Central and Eastern European Countries after and before the Accession

Volume 2
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Foreword

In spring this year the Jean Monnet Centre of Excellence of the Faculty of Law of ELTE University published the first volume of the conference book Central and Eastern European Countries after and before the Accession. That volume contained research papers prepared by the academic staff of our Centre within the framework of a Jean Monnet Programme of the European Commission. The aim of the papers was to stimulate legal debate on the application and implementation of EU law in Central and Eastern European countries in some selected areas of law, like private international law, free movement of persons, consumer protection and the application of EU law by national courts. As a follow-up of the publication of the research work, the papers were presented at a conference held in Budapest the 28–29 April 2011 still under the running Jean Monnet Programme. Representatives of law faculties of the region were invited to comment the papers and to contribute to the debate by expressing their own perception and views concerning the respective fields of law. This volume aims to supplement the first one by containing the contributions presented by the guest speakers at the April conference. It is important to note that not only current but also future and candidate Member States’ legal systems influenced by European law are represented. Among the contributors of this volume you can find academics and researchers from different law faculties and research institutions from Croatia, the Czech Republic, Estonia, Poland, Romania, Serbia, Slovakia and Slovenia.

Regionalism is one of the guiding principles the European Union is based on. It does not only mean that lower regulatory entities should maintain their power to legislate unless it is proved that higher level intervention should be more efficient and justified, but it should also mean that legal rules adopted at European level should be inserted into national legal systems in a way which allows to maintain and respect national and where applicable, regional specificities. The role legal scholars might play in this respect is that they exchange experience and information concerning their own legal system and as a result of this exchange of information they try to identify common interests, challenges and in certain cases possible solutions inspired by each others’ legal models.

I strongly believe that this second step towards an informal but active academic cooperation at Central and Eastern European level is just the beginning of a long road which must be paved in the coming years.

Budapest, August 2011.

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1. Introduction

1.1. The 1982 Act on Private International Law of Serbia and some of its features

It has been 29 years since the adoption of the Law on Resolution of Conflict of Laws with Regulations of Other Countries of Serbia (the “Act on PIL”). It was adopted as an act of the Socialist Federal Republic of Yugoslavia, and was the first (and only) codification from the establishment of the Kingdom of Serbs, Croats and Slovenes in 1918. Adopted in 1982, it entered into force January 1, 1983. Since 2006, it has been applied as an Act of Serbia.

During the drawing up of the Act on PIL, the drafters relied on contemporary comparative theory (scholarly ideas) and legislative acts. This could be shown through some examples. The law applicable to contractual obligations is the law chosen by the parties; in absence of choice the lex domicilii/law of the seat of the party that performs the characteristic obligation governs, if special circumstances do not justify the departure from the principle and the determination of the governing law according to the principle of the closest connection (Articles 19–20); the law applicable to torts is lex loci delicti – either the law of the place where the tort was committed, or the law of the place where the effect of the tort took place, whichever is more favourable to the injured person (Article 28); the personal law of legal persons is lex nationalis, which has to be determined through the application of the incorporation theory combined with the actual seat theory (Article 17). However, the provisions on the law applicable to

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2 Službeni list SFRJ No 43 of 23 July 1982, corrigenda in No 72/82, as amended in Službeni list SRJ No 46/96 and Službeni Glasnik RS No 46/2006
3 Article 28/1 reads: “Unless provided otherwise for individual cases, the law governing non-contractual liability for damages is the law of the place where the act was performed or the law of the place where the consequence occurred, depending on which of these two laws is more favorable to the injured person.”
4 Article 17 reads: “The nationality of a legal person shall be determined pursuant to the law of the State under whose law it was established. If a legal person has its real seat in another State than the one in which it was
contracts and to torts are too general, lacking details for some important questions (such as validity and form of choice of law, or the person entitled to choose the favorable law), and the determination of the lex nationalis of legal persons has given rise to different interpretations.

Protection of domestic nationals is the governing principle in questions of capacity (status), matrimonial and family relations. Provisions on applicable law, international jurisdiction and recognition and enforcement of foreign judgments are adjusted to the protection of domestic nationals through the application of domestic law before domestic courts, and control of merits of foreign judgments according to standards of domestic substantive law. This could be shown through the example of choice-of-law rules (Article 35) and rules on international jurisdiction of Serbian courts (Article 61 and 63) and the special rules for recognition of foreign judgments concerning the status of domestic nationals (Article 93).

Provisions on recognition and enforcement of foreign judgments could be characterized as liberal. Namely, these give an opportunity for judicial cooperation with other countries: rules of indirect jurisdiction are limited only to rules on exclusive jurisdiction of courts in Serbia (Article 89/1), and

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5 See Tibor Varadi, Berandet Bordaš, Gašo Knežević, Vladimir Pavić, Međunarodno privatno pravo (8th edn, Pravni fakultet univerziteta u Beogradu, Službeni glasnik 2007) 279; Маја Станивуковић, Мирко Живковић, Међународно приватно право, општи део (Службени лист СЦГ 2004) 129

6 Article 35 reads: “(1) The law governing divorce shall be the law of the State whose citizens both spouses are at the time of filing the divorce action. (2) If the spouses are citizens of different States at the time of filing of the divorce actions, the law governing the divorce shall be cumulatively the law of both States whose citizens they are. (3) If the marriage could not be divorced under the law determined in paragraph 2 above, the law governing divorce shall be the law of the Federal Republic of Yugoslavia if one of the spouses was domiciled in the Federal Republic of Yugoslavia at the time of filing of the divorce action. (4) If one of the spouses is a Yugoslav citizen having no domicile in the Federal republic of Yugoslavia, and the marriage could not be divorced under the law referred to in paragraph 2 above, the law governing divorce shall be the law of the Federal Republic of Yugoslavia.”

7 Article 61 reads: “1. The court of the Federal Republic of Yugoslavia shall have jurisdiction in disputes for establishing the existence or non-existence of marriage, annulment of marriage or divorce (marital disputes) even when the defendant is not domiciled in the Federal Republic of Yugoslavia: (1) if both spouses are Yugoslav citizens, irrespective of where they are domiciled; or (2) if the plaintiff is a Yugoslav citizen and is domiciled in the Federal Republic of Yugoslavia; or (3) if the spouses had their last domicile in the Federal Republic of Yugoslavia and the plaintiff was domiciled or resident in the Federal Republic of Yugoslavia at the time of filing of the action. 2. If the defending souse is a Yugoslav citizen and is domiciled in the Federal Republic of Yugoslavia, the court of the Federal Republic of Yugoslavia has exclusive jurisdiction.”

8 Article 63 reads: “In disputes for divorce the court of Federal Republic of Yugoslavia shall also have jurisdiction if the plaintiff is a Yugoslav citizen and the law of the State whose court would have jurisdiction does not provide for the institution of divorce of marriage.”

9 Article 93 reads: “If the law of the Federal Republic of Yugoslavia should have been applied pursuant to this Law on deciding upon the personal status of a Yugoslav citizen, a foreign judgment shall be recognized even if a foreign law was applied, if that judgment does not substantially depart from the law of the Federal Republic of Yugoslavia that applies to such a relation.”

10 Article 89/1: “A foreign judgment shall not be recognized if the court or other authority of the Federal Republic of Yugoslavia has exclusive jurisdiction in the respective matter.”
reciprocity is presumed (Article 92/1\textsuperscript{11}). In addition to this, there are significant exceptions to the rule (Articles 92/2\textsuperscript{12}, 94/1\textsuperscript{13}).

1.2. Reasons for drawing up a new Act on PIL

Since it has been in force for almost thirty years, the Act on PIL has shown its characteristics – strengths and weaknesses, gaps, adaptability to new social and economic developments. From the viewpoint of scholars, accessible case law does not give grounds for satisfaction, because there appears to be a significant gap between reality and law: the knowledge of private international law by practitioners is simply not satisfactory, and a solid act cannot substitute lacking knowledge. Not so long ago (in 2006) at an advisory meeting of judges the following question was asked: “It’s occurring more and more frequently that contracting parties make a choice of German or English law to be applied as governing law for their respective contract and they submit to the court the text of German Civil Code, for example, because the parties ask for the application of that law by the court. How should the court interpret this provision of the contract?”\textsuperscript{14}

Perhaps the gap between the theory of private international law and practice in the application of sources of private international law in Serbia is one of the very important reasons to amend the Act on private international law in force in Serbia. Another reason is certainly the need for modernization in accordance with developments in comparative law. Thirty years is a long period for changes and developments, even if no such imposing supranational legislative authority appears at the regional scene as the European Union – as it has happened since the entry into force of the Amsterdam Treaty on establishing the European Community in 1999. There is another reason for modifying the Act on PIL in force in Serbia: accession to the EU is the political goal in Serbia, hence harmonization with EU law is implied. Simultaneously voices are asking whether, and to what extent, to change existing private international law, when EU membership would bring rules of uniform private international law directly before Serbian courts.\textsuperscript{15}

Notwithstanding the above dilemma, the Serbian Ministry of Justice established in 2009 a working group with the task to draw up a draft of the new Act on PIL. As it seems today, the first draft text is expected to be completed by the end of the present year.

\textsuperscript{11} Article 92/1 reads: “A foreign judgment shall not be recognized if there is no reciprocity.”

\textsuperscript{12} Article 92/2–3: “2. The non-existence of reciprocity shall not be an impediment to the recognition of a foreign judgment rendered in a marital dispute, for establishing or contesting paternity or maternity, or if the recognition or enforcement of a judgment is applied for by a Yugoslav citizen. 3. The existence of reciprocity with regard to recognition of foreign judgments is presumed until the opposite is proved, and where there is doubt whether reciprocity exists, the federal authority for the administration of justice shall provide an explanation.”

\textsuperscript{13} Article 94/1 reads: “Judgments of foreign courts concerning the personal status of a citizen of the rendering State, shall be recognized in the Federal Republic of Yugoslavia without judicial examination pursuant to Articles 89, 91 and 92 of this Law.” The respective Articles concern international jurisdiction of Serbian courts, public policy exception and reciprocity.

\textsuperscript{14} Sudska praksa trgovinskih sudova [2006] Bilten No 3, 20

\textsuperscript{15} In an informal discussion with Mr. Jürgen Basedow, the co-director of the Max Planck Institute für auslandisches und internationales Privatrecht asked the question: “why now a new act, when …”
2. An example of harmonization: private international law of divorce in Serbia

2.1. Rules on international jurisdiction and choice-of-law rules for divorce and their interaction

Rules of jurisdiction\(^{16}\) and choice-of-law rules\(^ {17}\) in matrimonial matters of the Serbian Act on PIL in force are primarily formulated with the goal to allow divorce for Serbian nationals regardless of where they live and whether they are married to a foreigner or not. These rules also facilitate the application of Serbian divorce law under certain conditions to mixed marriages, or, even marriages of foreigners. International jurisdiction is determined by territorial and personal criteria, and applicable law is determined by the nationality of spouses, which is in line with the commitment of the legislator to subsume status and family relations of natural persons under their \textit{lex nationalis}.

Territorial connection to Serbia in the form of domicile is primarily substantial for the international jurisdiction of courts in Serbia for spouses who are foreign nationals:

(a) A foreign national spouse could be sued before courts of Serbia if she or he has a domicile in Serbia, with no regard to the nationality of the other spouse, because domicile is the ground for general jurisdiction of the Act on PIL (Article 46/1\(^ {18}\)). Applicable law is determined by Article 35\(^ {19}\) of the Act on PIL. Depending on the circumstances it could be one of the following law: (i) the law of the foreign state whose national is the defending spouse domiciled in Serbia, if the other spouse is also a national of the same foreign state (law of the state whose nationals are both spouses, Article 35/1); (ii) the law of the state whose national is the defending spouse together with the law of the state whose national is the other spouse, which means that Serbian court has to apply either the law of two foreign states, or the law of the foreign state in cumulatively with the law of Serbia, if the other spouse is a Serbian national who is not domiciled in Serbia (Article 35/2); (iii) the law of Serbia on the grounds of Article 35/3 of the Act on PIL, if the spouses are nationals of different foreign states, and the cumulative application of two foreign laws would make the divorce impossible before the courts of Serbia (Article 35/3); (iv) the law of Serbia on the grounds of Article 35/4 in case the foreign national spouse domiciled in Serbia is married to a spouse who is Serbian national, but has no domicile in Serbia.

(b) Last common domicile of spouses in Serbia, if at the time of filing the action the applicant is still domiciled in Serbia, or has her or his residence in Serbia is a ground of international jurisdiction of Serbian courts in those cases where both spouses are foreign nationals, or one of them is a national of Serbia (namely, the defending spouse) who is not domiciled in Serbia at the time of filing the divorce.

\(^{16}\) Act on PIL, Articles 46/1, 61, 62, 63
\(^{17}\) Act on PIL, Article 35
\(^{18}\) Article 46/1 reads: “The court of the Federal Republic of Yugoslavia shall have jurisdiction if the defendant is domiciled or has its seat in the Federal Republic of Yugoslavia.”
\(^{19}\) See note 6 above.
action, but her or his foreign spouse has domicile in Serbia (Article 61/1/3 of the Act on PIL). The governing law for divorce would be either the law of the state of common nationality of the spouses, cumulatively the laws of the two states (namely the law of two foreign states, or the law of the foreign state and the law of Serbia) whose nationals the spouses are, or if the cumulative application of the said laws of different states would disable divorce – the law of Serbia. It follows that all what is said supra under (a) applies mutatis mutandis.

(c) Last common domicile of spouses who are both foreign nationals is also a ground of international jurisdiction of Serbian courts, provided that the defendant consents to the jurisdiction of the court in Serbia, and that jurisdiction is allowed by the legislation of the state or states whose nationals the spouses are (Article 62 of the Act on PIL). The governing law under the Act on PIL would be the law of the foreign state whose nationals are both spouses, or cumulatively the lex nationalis of one of the spouses plus the lex nationalis of the other one (Article 35/1–35/2).

Nationality of Serbia is the personal criterion for grounds of jurisdiction of Serbian courts in matrimonial matters. It could be an independent ground, or it is used cumulatively with domicile in Serbia:

(a) If both spouses are nationals of Serbia, Serbian courts could establish jurisdiction even if neither of the spouses have domicile in Serbia (Article 61/1/1 of the Act on PIL). In a case like this, domestic courts apply Serbian law as governing law, which follows from the provision of Article 35/1 of the Act on PIL.

(b) If the applicant is a national of Serbia who also has his or her domicile in Serbia, she or he could file an action for divorce before Serbian courts against her or his foreign spouse, regardless of other point of contact with the territory of Serbia, such as common domicile or last common domicile in Serbia (Article 61/1/2). Applicable law should be determined by Article 35/2 of the Act on PIL. If the two governing laws would make impossible the dissolution of the marriage, the law of Serbia would govern the divorce of this mixed marriage on the basis of Article 35/3.

(c) If the defending spouse is a national of Serbia and she or he is also domiciled in Serbia, the courts of Serbia have exclusive jurisdiction (Article 61/2). Exclusive jurisdiction does not mean application of Serbian law, save in cases in which there would be grounds for application of Article 35/3 of the Act on PIL.

(d) Serbian nationality of the applicant confer jurisdiction to Serbian courts for divorce in cases where no grounds of jurisdiction would exist by Articles 46/1, 61 and 62 of the Act on PIL, if the law of the state whose courts would have jurisdiction does not provide for the institution of divorce of marriage (Article 63). This ground of special jurisdiction explicitly favors the divorce of domestic nationals, and it makes

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20 See note 7 above.
21 If both spouses are foreigners who had their last common domicile in Serbia, but at the time of filing the divorce action only the applicant spouse (who is a foreign national) has domicile in Serbia – international jurisdiction of Serbian courts is established by the provision of Article 61/1/3; if in the case of a mixed marriage between a foreigner and a Serbian national only the foreigner is domiciled in Serbia at the time of filing for divorce, courts in Serbia have international jurisdiction; and if the domestic national is the one who at the time of filing the divorce action still has domicile in Serbia, he would be able to bring the suit to a Serbian court on the basis of Article 61/1/2 and not Article 61/1/2.
22 Article 62 reads: “The court of the Federal Republic of Yugoslavia shall have jurisdiction in disputes referred to in Article 61 of this Law even when the spouses are foreign citizens who had their last common domicile in the Federal Republic of Yugoslavia or when the plaintiff is domiciled in the Federal Republic of Yugoslavia, provided that in those cases the defendant consents to the jurisdiction of the court of the Federal Republic of Yugoslavia and that the jurisdiction is allowed by the legislation of the State whose citizens the spouses are.”
23 See note 8 above.
possible the direct application of Serbian law (namely, the application of Article 35/4) without recourse to Article 35/2, because the impossibility of divorce before a foreign court is the precondition for the international jurisdiction of courts of the home state.

This analysis shows, that the most debatable provision of the Act on PIL on divorce – namely Article 35/2 – in conjunction with the provisions on international jurisdiction of courts in Serbia could lead in practice to the impossibility for foreign spouses to get a divorce in Serbia, only if at the time of filing for divorce none of them would have domicile in Serbia.24 The situation could be subsumed under the provisions of Article 62 of the Act on PIL: if spouses who are nationals of different foreign states had their last common domicile in Serbia and the defending spouse consents to the jurisdiction of the Serbian court, plus that jurisdiction is allowed by the laws of the states whose nationals the spouses are. Only in this case the cumulative application of their respective national laws could thwart the divorce of their marriage. Cumulative application of two governing laws for divorce is not a common solution in comparative context, because it makes more difficult to get a divorce, or sometimes divorce could even be impossible.25 Other connecting factors used in Article 35 of the Act on PIL do not diverge from those which are commonly used in comparative law. This is particularly true for the connecting factor of nationality, but also for the combination of nationality with other facts, which are used as subsidiary connecting factors, either to prevent fraus legis or to protect the public policy of the forum state.26

But, as a result of the choice-of-law rule embedded in Article 35 of the Act on PIL, a Serbian national before a national court will always be able to get a divorce from her or his foreign spouse, provided that the Serbian court has international jurisdiction.

Should anyone expect more from the national private international law of a country?

### 2.2. Rules on international jurisdiction and choice-of-law rules for divorce in the EU

Before I turn to the issue of the reform of private international law of divorce in Serbia, I will give a brief outline of the provisions of the two relevant sources of private international law in the EU, because these could be the challenge for the possible (and future) harmonization of Serbian law.

Compared to the above-mentioned grounds of jurisdiction of courts in Serbia, Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/200027 (the “Regulation 2201/2003”) links jurisdiction of courts of the Member States to territorial and personal criteria (Article 3 – General jurisdiction). The applicant spouse is entitled to choose between several alternative grounds of jurisdiction: (1) habitual residence of the spouses; or (2) last habitual residence of the spouses, insofar as one of them still resides there; or (3) habitual residence of the respondent; or (4) habitual residence of the either of the spouses in case of a joint application; (5)

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24 If the applicant has domicile in Serbia at the time of filing for divorce, grounds of international jurisdiction is stipulated in Article 61/1/3.
26 Bernadet Bordaš, Porodičnopravni odnosi u međunarodnom privatnom pravu (Forum Novi Sad 2000) 79
habitual residence of the applicant if he or she resided there for at least one year immediately before application was made; or (6) habitual residence of the applicant if he or she resided there for at least six months immediately before the application was made and he or she is the national of the Member State in question (in the case of UK and Ireland the link is domicile instead of nationality); (7) common nationality of both spouses.

Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation\(^\text{28}\) (the “Regulation 1259/2010) introduces limited choice of law by the parties. It means that spouses are entitled to choose one of the following law as the law governing their divorce (Article 5): (1) law of the state where the spouses are habitually resident at the time the agreement is concluded; or (2) law of the state where the spouses were last habitually resident, insofar as one of them still resides there at the time the agreement is concluded; or (3) law of the state of nationality of either spouse at the time the agreement is concluded; or (4) law of the forum.

If spouses fail to choose the applicable law, the Regulation sets subsidiary connecting factors for the determination of the governing law for divorce and legal separation (Article 8): (1) law of the state where the spouses are habitually resident at the time the court is seized; or, failing that (2) law of the state where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court is seized, insofar as one of the spouses still resides in that state at the time the court is seized; or, failing that (3) law of the state of which both spouses are nationals at the time the court is seized; or, failing that (4) law of the state where the court is seized.


As it has been shown, the connecting factor of nationality is very significant for divorce with international element in the private international law of Serbia. Domicile is the territorial link for general jurisdiction, but is also significant as a ground of special jurisdiction, particularly for the applicant. The provisions of the Act on the movement and residence of foreigners, which was in force until April 1, 2009, were very restrictive in authorizing foreigners to establish themselves and in acquiring domicile in Serbia. Hence, foreign nationals had not been too often sued before Serbian courts on the basis of Article 46/1 of the Act on PIL.\(^\text{29}\) The 2008 Act on foreigners,\(^\text{30}\) creates a legal framework for the entrance, temporary and permanent residence of foreigners in Serbia, and those provisions are harmonized with EU law, and the laws of Member States of EU, which are applicable to third country nationals.\(^\text{31}\) This Act sets conditions for residence of foreigners in Serbia for reasons of employment, establishment, study, family reunification, etc., which are all facts that would – in principle – result in growth of relations with international element. In this context the issue of appropriateness of habitual residence as a connecting factor for divorce in Serbia could be deliberated.


\(^{29}\) Zakon o kretanju i boravku stranaca, Službeni list SFRJ, No 56/80, 53/85, 30/89, 26/90, i 53/91, Službeni list SRJ, No 24/94, 28/96 i 68/02, Službeni list SCG, No 12/05 and Službeni glasnik RS, No 101/05 and 109/07

\(^{30}\) Act on foreigners, Službeni glasnik RS, No 97/2008, Article 92; the Act entered into force on November 4, 2008 and it is applied from April 1, 2009

For the needs of the present paper I shall only refer to the Swaddling judgment\textsuperscript{32} of the Court of Justice of the EC. In this judgment, the Court stated that the habitual residence of persons is in the State in which they “habitually reside and where the habitual centre of their interests is to be found. In that context, account should be taken in particular of the employed person’s family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances”\textsuperscript{,33} The Court also stated that habitual residence presupposes not only an intention to reside in a State, but also completion of an appreciable period of residence in that State.\textsuperscript{34} Whether a person has her or his habitual residence in a State, the existence of relevant territorial link and appropriate duration of the link should be established in each case, taking into account the particular circumstances.\textsuperscript{35}

When the Brussels Convention on Jurisdiction and Recognition and Enforcement of Judgments in Matrimonial Matters (the “Brussels II Convention”) was drawn up on the basis of Article K.3 of the Treaty on European Union\textsuperscript{36}, which served as a basis for drafting Regulation No 1347/2000 on Jurisdiction and Recognition and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility for Children of Both Spouses\textsuperscript{37} habitual residence was introduced for the first time as grounds of jurisdiction instead of domicile in the context of sources of law of the emerging private international law of the EU. As the author of the Explanatory report to the Brussels II Convention stated the “Forums of jurisdiction (i.e. inter alia the forum of habitual residence)\textsuperscript{38} adopted are designed to meet objective requirements, are in line with the interests of the parties, involve flexible rules to deal with mobility and are intended to meet individuals’ needs without sacrificing legal certainty.”\textsuperscript{39}

International conventions in which habitual residence is used as grounds of jurisdiction or as a connecting factor in choice-of-law rules avoid to give a definition of habitual residence\textsuperscript{40} in order to avoid “the rigidity associated with the alternative concepts of domicile and nationality”\textsuperscript{41}, so it is left

\begin{itemize}
  \item \textsuperscript{32} Case C-90/97 Robin Swaddling v. Adjudication Officer [1999] ECR I-1075
  \item \textsuperscript{33} Ibid para 29
  \item \textsuperscript{34} Ibid para 33
  \item \textsuperscript{36} Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters [1998] OJ C221
  \item \textsuperscript{37} Regulation No 1347/2000 on Jurisdiction and Recognition and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility for Children of Both Spouses [2000] OJ L160
  \item \textsuperscript{38} Remark of the author.
  \item \textsuperscript{39} Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, prepared by Dr Alegria Borrás, [1998] OJ C221, 37
  \item \textsuperscript{40} Some of the Hague conventions, adopted by the Hague Conference of Private International Law, use habitual residence as a connecting factor for more than fifty years, see the homepage of the Conference <www.hcch.net/index_en.php?act=conventions.listing>
  \item \textsuperscript{41} See Pippa Rogerson, “Habitual Residence: The New Domicile?” [2000] 49 ICLQ 86, 87
\end{itemize}
to judicial interpretation. However, there are definitions in some national laws on private international law.

3.1. Habitual residence as a connecting factor for divorce in Serbia

Since habitual residence links individuals by their place of residence, professional or other activities, family life, and generally speaking, by their day-by-day life to the territory of a state, irrespective of their nationality, it is a connection which expresses the center of their life and thus is eligible to become a fact on the basis of which the international jurisdiction of courts and the applicable law could be determined. In Serbia, there are no legal obstacles for the replacement of nationality and domicile with the connecting factor of habitual residence in all legal relations with international elements. The same is true for divorce. Bearing in mind that the Act on PIL adopt the principle of nationality for status and family issues, and that the same principle governs the same relations in many other countries of civil law legal tradition, common nationality of spouses could continue to be the connecting factor for international jurisdiction of domestic courts in cases of divorce of domestic nationals, regardless of their habitual residence. In this case common Serbian nationality of the spouses could also be the connecting factor for the determination of governing law before Serbian courts.

3.2. International jurisdiction

In line with the previous discussion, the provision on international jurisdiction of courts in Serbia for divorce with international element in the new legislation on private international law could be the following: The court of the Republic of Serbia shall have jurisdiction in matters relating to divorce: (1) if the spouses are habitually resident in Serbia at the time of filing for divorce – this ground of jurisdiction would be suitable for spouses who are both nationals of the same foreign state, as well as to those who are nationals of different foreign states, or in the case where one of the spouses is a foreigner and the other is a national of Serbia; (2) if the spouses had their last common habitual residence in Serbia and at the time of filing the action one of them still resides in Serbia – this provision fits for mixed marriages of two foreign nationals, or a foreigner and a national of Serbia, who at any time during the marriage had common habitual residence in Serbia, but after that time they have never established one in any country; despite of these facts the applicant (either a foreign or domestic national) who has her or his habitual residence in Serbia could file for divorce in Serbia regardless of the habitual residence of the defending spouse; (3) if the defending spouse has her or his habitual residence in Serbia at the time of filing the action – in cases where spouses did not have common habitual residence in Serbia, or if they have not

42 Ibid
43 For example, Switzerland’s Federal Code on Private International Law of 1987 in Article 20 gives the following definition: “For the purposes of this Code, a natural person: a. has his domicile in the State in which he resides with the intention to remain permanently; b. has his place of habitual residence in the State in which he lives for an extended period of time, even if this period is limited from the outset;" <http://www.umbricht.ch/pdf/SwissPIL.pdf> accessed 20 May 2011; the Belgian Law of 16 July 2004 Holding the Code of Private International Law (Loi du 16 juillet 2004 portant le Code de droit international privé, Moniteur Belge 27. 7. 2004, ed 1, 57344-57374) defines habitual residence in Article 4 paragraph 2: “For the purposes of the present statute, habitual residence means: 1. The place where a natural person has established his main residence, even in the absence of registration and independent of a residence or establishment permit; in order to determine this place, the circumstances of personal or professional nature that show durable connections with that place or indicate the will to create such connection are taken into account.” in Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 70, 2006. p. 358.
habitual residence at the time of filing the action in Serbia any longer, the court of Serbia could establish its international jurisdiction based on the fact of the habitual residence of the defending spouse regardless of the nationality of the spouses (this ground could be understood as a counterpart to the general international jurisdiction based on the domicile of the defending spouse); 44 (4) if either of the spouses has habitual residence in Serbia at the time of filing the application in the event of joint application for divorce by consent; (5) if the defending spouse is Serbian national and has her or his habitual residence in Serbia at the time of filing the divorce action – on this ground could file for divorce a Serbian national who returns form a foreign country to Serbia after the breakdown of the marriage; (6) if both spouses are Serbian nationals at the time of filing the action – as the only ground for jurisdiction of Serbian courts based exclusively on personal links with Serbia, regardless of the place where spouses live and whether they have a common habitual residence or not.

A provision like the proposed one would be compatible with Article 3 of the Regulation 2201/2003 which is in force in the Member States of the EU (except in Denmark), but it is not identical with it, what is not an ultimate goal even in the EU. 45 The proposed connecting factors for establishing international jurisdiction of courts in Serbia respect territorial and/or personal links with Serbia at the time of filing the divorce action, i.e. the actual close connection, although the connections vary in intensity. The common Serbian nationality is a concession to tradition and the valuation of a legal link, which is not necessarily also the closest link, but it expresses the view that domestic courts and domestic laws are, in theory, the best for domestic nationals. The proposed provision is very similar to the provisions of Article 61 of the Act on PIL. It does not include the provision on exclusive international jurisdiction, which should be dropped, first of all because of the effects of exclusive jurisdiction on recognition of foreign divorces in Serbia. If we bear in mind that in the europeanized private international law in matrimonial matters gives to habitual residence the status of primary connecting factor, and that acquiring habitual residence is not too difficult because it is not a legal concept, but rather a fact, it could easily lead to a situation where foreign divorces of Serbian nationals would remain without exequatur. Moreover, even the Act on PIL does not treat exclusive jurisdiction of domestic courts in divorce matters as a non-dispensable impediment for the exequatur of foreign divorces (Article 89/2 of the Act on PIL).

3.3. Applicable law

The new choice-of-law rule of the future Act on PIL in Serbia would have to include some new provisions as compared to the provisions of the present Article 35, but it should probably not abandon the principle of favor divortii. After the enactment of the new Family Law Code in 2005, Serbian law has kept liberal terms and causes for divorce: divorce by agreement of the spouses (written agreement on divorce, on

44 This ground could be dropped, depending on the formulation of the grounds of general jurisdiction of courts in Serbia.

45 Since the Treaty Establishing the European Community (Article 65) and the Treaty on the Functioning of the European Union speaks about "compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction" (Article 81/2/c) some authors stress that sources of law adopted in the EU need not necessarily introduce uniform rules for the Member States, but that compatibility could be achieved also by adopting other measures, see: Paul Beaumont, "International Family Law in Europe - the Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity" [2009] 73 Rabels Zeitschrift für ausländisches und internationales Privatrecht, 512.

46 Article 89/2 reads: “If the defendant applies for recognition of a foreign judgment that was rendered in a marital dispute or if the claimant applies for it, and the defendant does not object to it, the exclusive jurisdiction of the court of the Federal Republic of Yugoslavia shall not be an impediment for recognition of that judgment.”
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...exercise of parental rights and on division of marital property), and divorce based on serious and lasting disruption of marital relations (Article 40–41, Family Code). Hence, according to the Act on PIL in force, spouses closely connected to Serbia—either by territorial or personal ties (which also justify the jurisdiction of Serbian courts)—could divorce by the application of Serbian substantive law whenever the cumulative application of their national prevented their divorce. For the future, a new choice-of-law rule should be introduced for spouses who are nationals of different countries, because two different divorce laws for one and the same divorce make it more difficult by definition. However, it remains to be seen, in what way the application of lex fori could be introduced for achieving the goal of favor divortii.

Since the proposed rules on jurisdiction of Serbian courts favor habitual residence as a connecting factor, the same fact would definitely have to be stressed in the determination of the applicable law in cases where spouses have common habitual residence in the country. This connecting factor would suit also in cases where spouses had their last common habitual residence in Serbia, if one of them still live there. Such solutions would not only mean the application of Serbian law but also the respect for the principle of favor divortii. If the spouses lack common habitual residence at the time of filing the divorce action the connecting factor to follow could be common nationality. If common Serbian nationality of spouses makes sufficient ground for special jurisdiction, it makes sense only if those spouses could get a divorce by the application of Serbian law as lex nationalis. A solution like this could be reached in two ways: (1) in the scale of successive connecting factors common nationality of spouses should have precedence; and (2) introducing party autonomy of spouses in matters of divorce. However, choice of applicable law for divorce would widen the possibility for application the law of the home country, but it contribute to the affirmation of the principle of favor divortii. Finally, in cases where spouses who are not nationals of the same country, who do not have common habitual residence and who would not be able to agree on the law applicable to their divorce, the governing law should be lex fori.47

Hence, one possible proposal of choice-of-law rule for divorce in a new act on private international law in Serbia could be formulated as follows: Paragraph 1: Divorce shall be governed by: (a) the law of the state whose nationals both spouses are at the time of filing the divorce action; failing that (b) the law of the state of habitual residence of both spouses at the time of filing the divorce action; failing that (c) the law of the state of the last common habitual residence of the spouses, provided that at the time of filing the divorce action one of the spouses still resides in Serbia; failing that (d) the law of the state whose court is seized. Paragraph 2: If the marriage could not be divorced under the law determined in provisions a-b above, the law governing divorce shall be the law of Serbia, provided that at the time of filing the divorce action one of the spouses was a Serbian national, or had her or his habitual residence in Serbia. Paragraph 3: Spouses may agree to make a choice of applicable law for their divorce. Paragraph 4: The freedom to choose the law applicable to divorce is limited to one of the laws determined in paragraph 1 above, or to the law of the state whose national was one of the spouses at the time of choice.

4. Concluding remarks

The current state of play in the field of private international law in Serbia is marked by the intended reform on which work has started in 2009. The reform raises the issue of harmonization with the private international law of the EU, which has begun its development as soon as the entry into force of the Amsterdam Treaty Establishing the European Community. As the political goal of Serbia is accession to

47 This solution is adopted in the Act on Private International Law of Bulgaria (Article 82), in the Code of Private International Law of Belgium (Article 55) and in Regulation No 1259/2010
the EU, the reform under way is a good opportunity to compare existing and future private international law in Serbia with the law of the EU.

The assessment of compatibility of private international law of the EU and of Serbia on the example of divorce has been chosen for the topic of this paper for one reason. Despite the fact that Regulation 1259/2010 will be in force only in 14 Member States, it forms a whole together with Regulation 2201/2003 and makes the Europeanized private international law of divorce. These sources of law together regulate the three basic questions of private international law: the international jurisdiction of courts and tribunals, the applicable law and the recognition of foreign judgments.

The rules of EU law in terms of future private international law in Serbia give basis to consider the following: (a) whether habitual residence should be adopted as a ground of international jurisdiction of courts in Serbia and as one of the connecting factors for the determination of applicable law; (b) adaptation of existing rules on jurisdiction in matters of divorce to the rules of Regulation 2021/2003 by reason of their significant compatibility; (c) the introduction of choice of law for divorce as primary connecting factor, which would support the principle of favor divortii through the possibility of choice of lex fori; (d) determination of subsidiary connecting factors if spouses do not choose the applicable law; (e) retaining the principle of favor divortii and the application of lex fori in case of close connections with Serbia.

Although harmonization of private international law of Serbia with the law of EU is not a legal obligation at the moment, the sources of private international law of the EU can serve as a basis for reflection and consideration in the course of modernization of Serbian private international law.
1. Introduction

“It is, above all, the quality of the arbitral tribunal that makes or breaks the arbitration and it is one of the unique distinguishing factors of arbitration as opposed to national judicial proceedings.”

BLACKABY, N., PARTASIDES, C., REDFERN, A., HUNTER, M., Redfern and Hunter on International Arbitration, 2009

The arbitrator plays a dominant role in every arbitration, regardless of the fact, whether the arbitration has been labelled as a national procedure, purely “domestic” one in its very nature, or it has an international character, including usually more than one international element, separating it safely from its national sibling. Simultaneously, when considering the current status of arbitrator, it is of no significance, whether the arbitration has been organized as a traditional commercial arbitration, or the arbitration, tailored exclusively for the special area of commerce, such as banking, or trading with commodities.

Undoubtedly, as Lew et al noted, “The arbitrator is the sine qua non of the arbitral process.” Indeed, without any unnecessary exaggeration, the possession of legal skills, excellent practical experiences and professional qualities of arbitrator, as well as his integrity and strength of his personality might be as well compared (at least up to a certain extent) with the level of integrity and professionalism, usually desired in national, or even more urgently, in international judges. Powers and obligations of arbitrator against the parties are usually addressed in national arbitration laws.

Basic obligations of arbitrators, stipulated in national arbitration laws usually comprise deciding the parties’ dispute in an adjudicatory manner, which finally leads to rendering an enforceable arbitral award, as well as the proper conduct of arbitral procedure in accordance with the parties’ expectations,

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expressed in their arbitration agreement. Completion of the mandate of arbitrator follows, together with the duty to maintain the privacy and confidentiality\(^4\) (though not the ultimate confidentiality) of arbitration.\(^5\) On the other hand, it seems that the status of arbitrator\(^6\) and its proper regulation still has not found its way into national arbitration acts and as such, stands as perhaps quite an unusual issue for national legislators. As Born observed,\(^7\) “This is not because the arbitrator’s status is unimportant; it appears to be the case because the arbitrator’s status has been too important and delicate for national legislatures to have felt prepared to address it in any comprehensive fashion.”

Nonetheless, the status of arbitrator has been at least defined clearly in international legal writings. For instance, a comprehensive definition, written in summarily fashion, bridging both basic theories about the arbitrator’s status, has been provided by Blackaby\(^8\) et al.: “The powers of an arbitral tribunal are those conferred upon it by the parties themselves within the limits allowed by the applicable law, together with any additional powers that may be conferred by operation of law.” According to these authors, powers of arbitrator, derived from the law are much broader than arbitrator’s powers he was embraced with by the parties.\(^9\) Similarly, duties of arbitrator fall into a few separate categories in quite an intelligible manner, where duties imposed by law\(^10\) on arbitrator are more detailed, containing the duty to act with due care, the duty to act promptly, and finally the duty to act judicially.\(^11\)

Although not at all embracing generalization, nowadays it can be observed that there has been more than considerable amount of space in international legal writings occupied by discussing an overall role of predominantly international arbitrators. In particular, two issues deserve special mention. The number of theoretical comparative studies, focused on the practice, rights and powers of arbitrators, deciding disputes under national arbitration laws in the purely “domestic” national arbitration with no trace of international element cannot aspire on even distant nearing the masses of articles, published on the same topic in the international arbitration arena.

The second issue is, that perhaps no crescendo of criticism is needed at all, as the area of international commercial arbitration, due to a courtesy of its international character, has always been more capable of accumulation of quite intriguing, thought provoking issues, than its national counterpart. For instance,


\(^6\) A few theories have been developed with respect to the status of arbitrator in international legal writings. The contractual – currently prevailing theory gives the arbitrator the contractual status due to his relationship with the disputing parties, based on his contract with the parties. On contractual theory see more in Comparative International Commercial Arbitration, p.276–278. Unlike the contractual theory, the second theory perceives the arbitrator as a quasi-judge, with his rights and duties, deduced from his legal status, which is imposed on him by the applicable law, not by the contract with the parties, thus turning the arbitrator into the quasi-judicial figure.

\(^7\) See International Commercial Arbitration, p.1595.


\(^9\) These powers include common powers of arbitrators such as setting up the arbitration procedure, determining the applicable law, the seat and the language of arbitration in case the parties have not agreed on these issues. Moreover, they include common powers of arbitrators, concerning an evaluation of evidence, an evidence taking, granting interim injunctions, as well as powers of arbitrators they enjoy during oral proceedings.

\(^10\) For comparison see e.g. the legal regulation of basic arbitrators’ duties in Article 21 of the Swedish Arbitration Act 1999 See in detail in MADSEN, E., Commercial Arbitration in Sweden. Oxford University Press, 2006, p.150.

recent developments reveal many hot debates on the mixed position of one permutable version of arbitrator, being the flexible, but also vulnerable mediator-arbitrator.12 Similarly, disputes in confidentiality issues in arbitration (especially with respect to the arbitrators’ jurisdiction) turned out to be another widely analyzed subject in international legal writings,13 though less obviously visible than many pros and cons of the mediator/arbitrator figure.

Quite apart from these high-profiled topics, for instance, the arbitrator’s contract,14 together with delicate position of the chairman of arbitral tribunal, or the special power of arbitrators to introduce new legal issues ex officio,15 also occupy that category of related arbitration issues, which provides international legal writers with the interesting food for thought.16 However, it is beyond the scope of a single article, confined to the analysis of the overall role of arbitrators to discuss all abovementioned-intertwined issues. The object of the present article is therefore only to examine the duties and rights of arbitrators in two extracted member countries of the European Union on the base of their national arbitration laws, without droning unnecessarily on procedural aspects, regarding the arbitral tribunal, such as its composition, the method of arbitrators’ appointment etc.

In particular, those will be arbitrators’ duties and rights against the parties in arbitration, which are going to be identified and accentuated in relevant arbitration laws and practice in Slovakia17 and Hungary.18 Simultaneously, in order to “beef up” the whole topic, an undergoing short comparison will be provided with comparable rights and duties of international arbitrators, which are up to a certain point similar, but never identical. In addition, the following accounts of arbitrators’ powers and obligations in two countries will contain also short overviews of their national arbitration laws’ basic elements.

The thesis of this article is, that although there is no single model act (regardless of the unifying impact UNCITRAL Model Law19), gathering the most optimally worded rights and duties of national and international arbitrators, powers and obligations of national arbitrators are covered satisfactorily in national arbitration laws, with the sufficient level of sophistication and a necessary sense for detail. For the reasons already indicated, perhaps no broad fashioned renovation of the aforementioned national arbitration acts comes as inevitable, as these acts simply serve well.

The article falls into three sections with the first section, being the introduction. The second section in two parts firstly introduces the Slovak and the Hungarian arbitration law, and then describes the

13 See e.g. CROOKENDEN, S., Who Should Decide Arbitration Confidentiality Issues?, p.609. See also YOUNG, M., CHAPMAN, M., Confidentiality in International Arbitration: Does the exception prove the rule? Where now for the implied duty of confidentiality under English law? hereinafter referred to as the Confidentiality in International Arbitration: Does the exception prove the rule?, In: ASA Bulletin, 2009, Vol.27, No.1, pp. 26–47.
14 See e.g. International Commercial Arbitration, p.1605.
18 The Hungarian Act No. LXXI of 1994 on Arbitration.
rights and duties of arbitrators, as addressed in Slovak and Hungarian Arbitration Acts and perceived in the day-to-day arbitration practice in these countries. The main stress will be laid on arbitrators’ rights and duties they have against the parties in the ongoing arbitration procedure.

The final section will lay down a short comparison of the substantial elements of analyzed topic and draw some conclusions about similarities and differences among Slovak and Hungarian legal regulations of arbitrator’s powers in their entire complexity. Finally, the article will point shortly to some inevitable questions, touching the overall effectiveness of arbitrators’ conduct both in national as well as international commercial arbitration.

2. The Role of Arbitrator in Slovakia

2.1. Powers and Duties of Arbitrator – The Slovak Example

Within the frame of the Slovak legal order, rights and duties of arbitrators have been addressed in detail in the latest Slovak Act No.244/2002 on Arbitral Proceedings (hereinafter referred to as “the Act”). The Act, already shortly amended in 2005 and 2009 has turned out to be the exclusive and well working legal regulation of arbitration in Slovakia. However, it pays its tributes to the 1985 UNCITRAL Model Law perhaps in the “wholesale” way, with no try to retain some provisions, which could have been described as typically Slovak. Nonetheless, it has become the base of modern national arbitration and it is applicable to both domestic and international arbitral proceedings in case the arbitration has been seated within the Slovak territory, as well as to the ad-hoc and institutional arbitration.

Along the legislative road, nuts and bolts of all arbitrators’ powers and obligations in the Act have been addressed practically in twenty-three out of fifty-six provisions of the Act. Briefly put, rights and obligations of arbitrators in the Act fall into three categories. The first group of arbitrators’ powers and duties is addressed in Part III, regulating all necessary details of the arbitrator’s appointment. Furthermore, the second group was included in Part V. of the Act, dedicated to arbitral proceedings. Finally, the last group of arbitrator’s rights and duties may be identified in part VI. “Decision of Arbitral Tribunal”, which regulates rendering the arbitral award, its formal and substantive requirements, as well as a correction, interpretation and a controversial review of the arbitral award.

2.2. Arbitrators’ Powers and Duties in the Initial Phase of Arbitration

Basic criteria of eligibility for the potential arbitrator have been embedded in Section 6, Subsection 1 of the Act. Under this provision, only that impeccable individual may pass for the arbitrator, who has a full legal capacity and is “experienced enough to perform well the duties of an arbitrator”. Virtually, no closer details are included in the Act, which would clarify what exactly means, “experienced enough,” or, perhaps, a bit less than enough. The individual approached is under no obligation to accept the arbitrator’s

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21 The Slovak Act on Arbitral Proceedings 2002 in fact completely replaced a former heavily criticized and defective Slovak Act No.218/1996 on Arbitration Procedure. See more e.g. in PROCHAZKA, M., Review of an Arbitral Award by Other Arbitrators – Appeal to an Appellate Arbitral Tribunal under Czech and Slovak Law, p.343.
22 See more e.g. about the banking arbitration in Slovakia in CHOVANCOVÁ, K, Banking Arbitration in Europe – the Slovak and German Example, p.29–35.
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function. However, in case he does accept the nomination, he is bound to confirm it in written form (Section 8, Subsection 3).  

The same provision has also enacted the duty of confidentiality of arbitrator vis-a-vis disputing parties in order to promote and secure the confidentiality of arbitration, conducted under the Slovak law.

Therefore, according to Section 8, Subsection 4 of the Act, every arbitrator is obliged to maintain a strict confidentiality with respect to all information he has obtained throughout the whole arbitral proceedings, and after his mission has been completed. As should be clear from the following Section 9 "The Challenge of the Arbitrator", this section does not focus only on the challenging procedure and its consequences it has on the decision-making process. Equally, it has also adopted the basic regulation of arbitrator’s duty of impartiality, while unusually omitting the duty of independence at the same time.

The duty of disclosure, included in Section 9 Subsection 1, binds the arbitrator to disclose to the parties firstly the facts of exclusive nature, and secondly those facts, which could raise reasonable doubts with regard to the arbitrator’s impartiality. The arbitrator is bound to cope up with the duty of disclosure during the whole arbitral proceedings. Nevertheless, if the arbitrator has been challenged, the whole arbitral tribunal (including the challenged arbitrator) has every right to proceed with the case. However, this tribunal is not capable of rendering the arbitral award before the challenge has been finally decided (Section 9 Subsection 3).

With regard to carrying out the arbitrator’s function, it is important, that the arbitrator has the right to resign. Given that important steps must always be taken in arbitration without any delay, the resigned arbitrator stays obliged to perform and finish these acts. Moreover, the arbitrator is obliged to step back from his arbitrator’s position in case the special law, applicable to the arbitrator forbids him from keeping his position of arbitrator. On the other hand, as Section 10, Subsection 4 implies, in case the arbitrator is unable to carry out his function efficiently, he is not unconditionally obliged to resign from his function immediately upon the request of the parties. Not surprisingly, this issue of negative contest will be finally solved by the court or the specially appointed person.

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24 It is notable that the theory of arbitration connects with the moment, when the potential arbitrator has been jointly approached by the parties to the arbitration agreement the conclusion of the “arbitrator’s contract” between the potential arbitrator and the parties. See more in International Commercial Arbitration, p.1608.

25 The arbitrator may be freed from this obligation only by entitled parties, or by a special rule of the Slovak legal order (e.g. the Slovak Criminal Code, or the Code of Civil Procedure).

26 See more in International Commercial Arbitration, p.1619.

27 Actually, the concept of impartiality, as defined in Section 9, Subsection 1 comprises indirectly both an independence, and then also impartiality, stating “...doubts concerning the impartiality of the arbitrator, whether for his relationship towards the subject of the dispute or to the parties.” On maintaining the standards of independence and impartiality, see the latest landmark decision of the Swiss Federal Tribunal, rendered on October 29, 2010, rejecting multiple standards of independence and impartiality among arbitrators (case 4A 234/100). In this decision, the Swiss Federal Tribunal refused to set aside the award, rendered by the Court of Arbitration for Sport on the ground of alleged impartiality of one member of the arbitral tribunal (Prof. Ulrich Haas).

28 Section 10, Subsection 1, letter a/of the Act.

29 Section 10, Subsection 2 of the Act.

30 Under Section 10, Subsection 3, the disputing parties are entitled to revoke the arbitrator. It may be pointed out that the Slovak Act on Arbitral Proceedings uses unusual term “revocation” in the English version of the Act, instead of more frequently used “removal”.

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2.3. Arbitrators’ powers and duties in the proceedings

Virtually, the number of rights and duties of arbitrators, included in Part V “Arbitral Proceedings” is topping at thirty. Apparently, the first and most important obligation of arbitrators, stipulated in Part V of the Act, is the arbitrators’ duty to treat parties as equals, regardless of their standing in the arbitral procedure, to protect parties’ rights and provide them with an equal opportunity to present their cases.\(^{31}\) Obviously, the aforementioned Magna Carta of Arbitration is thus fully complied with in Section 17 of the Act.\(^{32}\) The first round of written submissions is up to the parties, but the arbitral tribunal may stop various amendments and modifications of the statement of claim and defense, if they consider these changes late and unreasonable.\(^{33}\) The competence-competence rule has been adopted in the Act in Section 21, enabling arbitrators to decide on their own jurisdiction also in disputes, concerning the existence (or the non-existence) and validity of the arbitration agreement.

Except for deciding on its own jurisdiction in the first instance, arbitrators are empowered to render interim measures, but with a bit of irony, this power might as well have been called “gutless.” First and foremost, the parties may exclude the right of arbitrators to render provisional measures by agreement. Furthermore, arbitrators may render interim measures only when being asked to do so by the parties and only with respect to the subject-matter of the dispute. Finally, the arbitral tribunal has no coercive power to enforce an execution of interim measures against third parties. On the other hand, it has been vested with the typical arbitrators’ rights in the proceedings such as determining the place of arbitration and the language of proceedings in case the parties have not agreed on these issues either in their arbitration agreement or later before the start of the arbitration procedure.\(^{34}\)

Hearings may be organized practically everywhere according to the arbitral tribunal’s order. The form of proceedings (the written only or both the written and oral proceedings) is determined mainly by the parties’ agreement with the arbitral tribunal deciding on the appropriate form of proceedings only in case the parties did not reach an agreement in this respect.\(^{35}\) While organizing and managing both the written and oral stage of arbitration procedure, including the evidence taking, as well as handling the experts,\(^{36}\) witnesses\(^{37}\) or the defaulting – saboteuring party,\(^{38}\) the arbitral tribunal is obliged to proceed in accordance with procedural rules, determined by the parties.

If parties agreed on no procedural rules, arbitrators would conduct the arbitration proceedings under their own discretion, always bearing in mind a quick and efficient statement of factual matrix, to which later the applicable substantive law will be applied.\(^{39}\) Powers of arbitrators during the evidentiary stage are restricted. The assessment, gravity and the probative value of evidence submitted by the parties will be considered by the arbitral tribunal in its own discretion, but only the evidence submitted by the

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\(^{31}\) Section 17 of the Act.


\(^{33}\) Section 18 of the Act.

\(^{34}\) Section 16 of the Act.

\(^{35}\) The arbitral tribunal will organize oral hearings also when being asked to do so by any participating party. See more in Section 26, Subsection 1 of the Act.

\(^{36}\) Section 28 of the Act (Appointed Expert). The arbitral tribunal may call upon an expert (or several experts) in case their expertise is necessary for the proper assessment of fact, on which the arbitrators’ decision will depend.

\(^{37}\) Section 27 of the Act (Evidence).

\(^{38}\) Section 30 of the Act (Default of the party).

\(^{39}\) Section 26, Subsection 2 of the Act (Oral Hearings and Written Proceedings).
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parties will be accepted. In contrast, arbitrators unfortunately have no power to compel parties to production of additional evidence, required and considered necessary by the tribunal.40

As should be clear from the wording of the Act, the arbitral tribunal may terminate the proceedings in three situations, still before deliberation process takes place.41 Facing the illogical “non-appearance” of the statement of claim, or if the statement of claim was not completed in available time period, arbitrators are entitled to terminate the proceedings (Section 30, Subsection 1 of the Act). Similarly, the arbitral tribunal will terminate the proceedings after it has concluded it has no jurisdiction. Finally, the arbitration will be terminated in case the advance payment on costs of proceedings has not been paid by the parties or by the claimant in accordance with the request of the arbitral tribunal.42

2.4. Arbitrators’ powers and duties in rendering the arbitral award

The actual number of rights and duties of arbitrators enacted in Part VI “Decision of Arbitral Tribunal” of the Act stops nearly below 30. Arbitrators decide the dispute according to the law, chosen by the parties,43 while taking into account applicable trade customs and acting in compliance with the principles of fair trade and boni mores. In case there was no agreement on the law, applicable to the substance of the dispute, arbitrators unfortunately may determine the applicable law only by using the *voie indirect* method,44 applying the Slovak conflict of laws rules, included in the Slovak Act on International and Procedural Law.45 In addition, they are always obliged to apply only the Slovak substantive law when deciding purely national disputes with no international element included.

In the course of deliberations, the presiding arbitrator has a casting vote, when no majority can be achieved.46 In any case, the majority is obliged to sign the award. Dissenting opinions are allowed and the chairman of the tribunal may decide procedural matters on his own in case he has been empowered to do so by his co-arbitrators. Arbitrators are obliged to render the award in merit, which will decide all requests submitted by the parties to the arbitral tribunal in the proceedings, including the decision on costs and the method of their payment.47

Arbitrators may correct the award on their own initiative or on the request of party within 30 days since the award has been rendered.48 In contrast to several sets of detailed rules and statues of international arbitral tribunals,49 the Slovak Arbitration Act has adopted only a very sketchy frame of the power of arbitrators to interpret the arbitral award. Consequently, Section 36 Subsection 2 involves only the right of any party to ask the arbitral tribunal to provide it with the interpretation of any part of already

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40 In case the arbitral tribunal is not able to secure and carry out the evidence needed, it may approach the relevant court with this task.
41 The arbitral tribunal will terminate the proceedings also upon request of the parties in case the disputing parties have settled the dispute during an ongoing arbitration procedure. Similarly, when being asked to do so by the parties, arbitrators will render the arbitral award on agreed terms on the base of the parties’ settlement (See Section 39 of the Act).
42 Section 18, Subsection 6 of the Act.
43 Section 31, Subsection 1 of the Act.
45 Act no.97/63 Coll. on International and Procedural Law, as amended later.
46 Section 32, Subsection 2 of the Act.
47 Section 34, Subsection 4 of the Act.
48 Section 36, Subsection 1 of the Act.
rendered arbitral award. This wording might indicate a theoretically unlimited discretion of parties to ask for interpretation of the award because of two reasons.

Firstly, no conditions have been stipulated in the Act, which should be fulfilled by the parties to enable them to approach the arbitral tribunal with their interpretation task for arbitrators, such as the dispute with respect to the content of the award, or the meaning of certain parts of the award etc. Furthermore, Slovak legislators did not specify, whether the arbitral tribunal has the right to refuse the request for interpretation, or whether it has at least some discretion with respect to this matter, or it is simply obliged always to comply with the parties’ request for interpretation.50 As a result, the regulation of interpretation the arbitral award obviously lacks the sense for detail, let alone the clarity or accuracy.

A more onerous provision of the Act, included in Part VI has addressed the revision of the award in three Subsections of Section 37.51 It is apparent that a frequent use (or any use at all) of this “splendid opportunity” in practice could efficiently undermine the proclaimed advantage of arbitration, which is obviously the finality of arbitral awards, and as such, would probably go against the grain of the institute of arbitration itself. It may be submitted that the revision procedure, included in both the Slovak and Czech Arbitration Act52 is a part of the rich legal heritage, rooted in the Civil Procedure of the Austro-Hungarian Empire. The very fact, that the Act allows in Section 37 for the second round of arbitration proceedings, in which the substantial content of the award will be scrutinized, does not help to promote Slovakia as the seat of international commercial arbitration with the governing procedural law being the Slovak Arbitration Act.

Perhaps no sensitive foreign contractual party would be interested in having its already rendered arbitral award amended – the arbitral award and its content are supposed to be final. Nothing more or less is expected by the disputing parties – this is the point of exercise. As Prochazka53 has noted, this instrument “would undoubtedly prolong arbitration proceedings and make them more expensive.” It is notable that the revision, adopted in Section 37 neither an appeal, nor the annulment could have ever been. Firstly, the institute of appeal may subsume the annulment procedure (which is impossible vice versa), but this is not the case here. Secondly, as the “second team” of arbitrators may only either confirm, or amend the arbitral award in the revision procedure under Section 37 of the Act, the annulment of the award is out of the question.54

Suffice it to say, this institute has been used in the arbitration practice only rarely. As Prochazka55 stoically concluded, “Czech and Slovak legislators are invited to either amend these provisions to enable a true appeal process for the parties, or to delete these provisions from the law altogether”. Thereupon, this implies with no shortage of sincerity that the Slovak legislators should shift quickly into top gear – or at least should move to reconsider the suitability of the revision procedure, as adopted in Section 37 of the Act.

50 Section 36, Subsection 2 of the Act.
51 The similar provision has been adopted also in Section 27 of the Czech Arbitration Act. See more in BĚLOHLÁVEK, A., Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů, . Praha: C.H.Beck 2004, p.54.
55 PROCHAZKA, M., Review of an Arbitral Award by Other Arbitrators – Appeal to an Appelate Arbitral Tribunal under Czech and Slovak Law, p.354.
3. The Role of Arbitrator in Hungary

According to the latest Hungarian reports, the 1994 Act No. LXXI on Arbitration⁵⁶ (hereinafter referred to as “the 1994 Act”) still fulfils its mission efficiently, as it “continues to reflect current arbitral practice in Hungary.”⁵⁷ Indeed, it is apparent that the Hungarian Arbitration Act, based on the UNCITRAL Model Law 1985, has functioned well without any amendments for more than sixteen years now, still representing a milestone in the Hungarian legal order.⁵⁸ When innovations were unavoidable, they led to the establishment of new permanent arbitration courts for the sport arbitration and the energy arbitration in Hungary, or they were inserted into the arbitration rules of the relevant arbitration institution.⁵⁹

The 1994 Act is applicable both to the domestic and international arbitration in its ad-hoc and institutional form.⁶⁰ In comparison with its much younger Slovak cousin, the 1994 Act did not gulp down the UNCITRAL Model Law in the wholesale way. As Horvath⁶¹ clearly observed, “The Arbitration Act is not a translation-like adaptation of the Model Law, although virtually all articles thereof are included in the Arbitration Act.” Actually, there are several differences with the UNCITRAL Model Law contained in the 1994 Act, such as an obligatory uneven number of arbitrators,⁶² arbitrators sworn to the full secrecy,⁶³ the casting vote of the chairman⁶⁴ of the arbitral tribunal etc.

Rights and obligations of arbitrators in the course of arbitration proceedings together with arbitrators’ qualification criteria and the whole appointment and challenge procedure have been thoroughly described and grouped in twenty-eight sections, comprised in no less than four chapters of the 1994 Act (hereinafter referred to as “the Act”). Firstly, Chapter II of the Act (Sections 11–23) has addressed the whole appointment process, the disclosure procedure as well as the challenge procedure. Jurisdiction of the arbitral tribunal, adopting the competence-competence rule, as well as the right of the arbitral tribunal to render interim injunctions are included in short Chapter III of the Act (Sections 24–26).

With composition of the arbitral tribunal deciphered in detail, the Hungarian legislators focused Chapter IV (Sections 27–37) on the Magna Carta of arbitration and the arbitration procedure. Following the procedural overture, Chapter V of the Act (Sections 38–45) regulates the rendition of arbitral award as the highest goal of every arbitrator,⁶⁵ and together with Chapter VI (sections 46–50), specifically tailored for the international commercial arbitration may be marked as the last two parts of the 1994 Act, covering arbitrators’ rights in quite an exhausting manner.

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⁵⁹ The Arbitration Court, attached to the Hungarian Chamber of Commerce has recently introduced an optional fast track arbitration.
⁶² Section 13 of the 1994 Act.
⁶³ Section 11 of the 1994 Act.
⁶⁴ Section 38, Subsection 1 of the Act.
⁶⁵ See more in HORVATH, G., The Duty of the Tribunal to Render an Enforceable Award, pp.135–158.
3.1. Arbitrators’ powers and duties in the initial phase of arbitration

Section 11 turned out to be the first provision in the Act, dedicated solely to the determination of the scope of arbitrators’ powers and duties in the arbitration procedure. In the first place, the Act does not request the legal profession as an obligatory eligibility criterion for arbitrators, nor the Hungarian nationality, or the membership in the Hungarian Bar. On the other hand, qualification criteria are defined in detail in arbitration rules of Hungarian arbitration institutions. Furthermore, unlike the comparable provisions in the Slovak Arbitration Act, the Hungarian legal regulation starts with addressing the independence and impartiality of arbitrators. Both criteria shall be cumulatively fulfilled and arbitrators are sworn to full secrecy in the course of proceedings, and after the arbitration have been finished.

Simultaneously, Section 11 states eloquently, that arbitrators cannot be mistaken for the parties’ representatives. Therefore, this criterion fully applies to all arbitrators, including the PAAs, allowing for no smart partisanship in favor of any disputing party. The very fact that the requirement of independence and impartiality is followed closely by the subsequent declaration of the status of arbitrators, being not the parties’ representative in no uncertain terms, may be considered rare when compared with arbitration acts in other European countries.

While it may be noted that the wording of Section 11 is a bit unusual, the following Section 12, stipulating in a negative way not who may, but who may not be an arbitrator (e.g. the person below 24, the person under the court’s curatorship etc.), can be considered unique. Actually, various requirements that have to be complied with in order to be eligible as an arbitrator under the Act must be deduced from Section 12 in an inverted logic. From the functional point of view, is should be noted that the eligibility criteria for arbitrators in the Hungarian legal regulations went for a reasoned criticism in the past, concerning the exclusion of Hungarian judges a prospective arbitrators.

Given that Article 6/2/ of the 1997 Act LXVII on the Status of Judges prohibit judges to act as arbitrators under the Hungarian legal order on the ground of possible conflict of interests, this regulation was criticized in the Hungarian arbitral practice as unfair, when compared with the status of Hungarian attorney, who may serve as arbitrators without any obstacles. Consequently, pointing out a vivid German practice of turning national judges into wise arbitrators, Horvath asked, “Why would an independent and impartial judge act differently if appointed as an arbitrator, especially as the same requirements are prescribed by the Arbitration Act?”

The disclosure obligation has been included in Section 17 Subsection 1 of the Act, according to which the prospective arbitrator (“proposed or appointed”) is obliged to disclose to the parties all circumstances, which might give rise to justifiable doubts with regard to his independence and impartiality. An arbitrator accepts an offer to act as the arbitrator by signing the written declaration for the parties and his signature is obligatory.

During the challenge procedure, it is notable that the arbitrator is neither obliged to leave his office when being challenged, nor to agree with the challenge. In order to proceed with the arbitration even after the challenge procedure has started, the Act has allowed the arbitral tribunal to advance the

67 See e.g. Article 4 of the Rules of Proceedings of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry (the “Budapest Rules”) effective as of January 1, 2008.
68 See Section 12, letters a/, b/, c/ and d/ of the Act.
70 Section 17, Subsection 2 of the Act
71 The liability of arbitrators has been addressed in the Hungarian legal order generally in the Act IV. of 1959 the Hungarian Civil Code in Art.339.
proceedings and to render the arbitral award, regardless of the ongoing challenge procedure. The competences – competence rule, as well as the separability of the arbitration clause from the main contract, have been fully maintained in the Act in Chapter III., Section 24, Subsection 1, being followed by clarifying the meaning of separability rule in Section 24, Subsection 2.

While deciding on the existence or validity of the main agreement of the arbitration agreement, arbitrators need not to recess, but may advance with proceedings and render the arbitral award in merit. The right of arbitrators to render interim injunctions has been adopted in a summarily fashion, stating broadly the arbitrators’ right to render interim measures of protection in the arbitrators’ own discretion, but only with respect to the subject of the dispute. However, the enforcement of interim measures rendered by the arbitral tribunal has not been addressed in the Act.

In any case, under Section 37 the party may turn also to the court with its request to grant interim measures in a case, decided by the arbitral tribunal. This right of the court is considered to be compatible with the ongoing arbitration (Section 37, Subsection 1 of the Act). Quite opposite in fact, the exercise of this right of the competent court may help the ongoing arbitration to proceed smoothly, as the court has the coercive power to ensure the enforcement of interim injunctions, which the arbitral tribunal has not been empowered with in the Act.

3.2. Arbitrators’ powers and duties during the proceedings

Chapter IV of the Act, which contains the regulation of the arbitration procedure, has adopted the Magna Carta of arbitration (the equality of parties, the right to be heard) in its first provision in Section 27. Under the frame of this section, the disputing parties must be treated as equals and have to be given an opportunity to present their case to the arbitral tribunal. As the Hungarian legislators have not borrowed from their colleagues in some other European countries, and did not qualify the required level of opportunity provided, it may be not instantly deduced from Section 27 of the Act, whether the parties should have a reasonable opportunity to present their case, or the full opportunity etc.

It is clear from the subsequent Section 28, that the only real limitation of the parties when planning procedural rules of arbitration is a strict maintenance of the fair trial, stipulated in Section 27. In fact, Section 28 allows the parties to tailor their own procedural rules in their own discretion, including also the procedural rules of the institutional arbitral tribunal. In turn, in no parties’ agreement has been reached on the subject of applicable procedural rules, the arbitral tribunal has practically free hands and may determine the procedural rules in its own discretion.

Equally, the same applies to determination of the language in international commercial arbitration in all cases in which the parties have not agreed on the language or languages of the proceedings (Section 48). Quite apart from the arbitrators’ right to determine the language in international proceedings, in national arbitrations the language of arbitration will be determined predominantly by the parties’ agreement, with the default language being the Hungarian language. Unlike in national arbitration, in international proceedings the arbitral tribunal has the right to determine the proper language of the proceedings in cases the parties were unable to agree on it. This means, that the Hungarian language is not the default language of proceedings in international arbitration.

72 Section 25, Subsection 2 of the Act.
73 Section 26, Subsection 1 of the Act.
74 Compare e.g. with Article 18 of the UNCITRAL Model Law 1985, Article 1694/1/of the Belgian Judicial Code, Article 33/1/a/of the English Arbitration Act 1996 etc.
76 Section 30, Subsection 1 of the Act.
77 Section 48, Subsection 1 of the Act.
Similarly, under Section 41, Subsection 1 of the Act, the arbitral tribunal may stipulate the *lex causae* in all cases where the parties have not agreed on the law applicable to the substance of the dispute in international arbitration proceedings. Moreover, arbitrators, deciding international disputes, may also decide as amiable compositeurs in all cases, in which they have been empowered to do so by the parties (Section 49, Subsection 3). When deciding in international arbitration proceedings, arbitrators are obliged to decide according to the parties’ contract and to consider relevant trade customs, applicable to the commercial contract and practice of the disputing parties.

Overall, arbitrators have a firm hand over the default determination of the place of arbitration and may determine the seat of arbitration, taking into account the circumstances of the case, when the parties have not agreed on the seat of arbitration. With regard to the exchange of submission and submitting of various supplements by the parties in the written phase of arbitration, the arbitral tribunal may exclude both the modification and the supplementation of the parties’ submissions because of the delay caused to the proceedings.

As a rule, oral hearings are held unless they were excluded by the parties (the same applies to the right of modification of submissions). Non appearance does not always cause the termination of the proceedings – the party’s absence at the hearing, or a failure of the defendant to send the statement of defence cannot stop the continuance of the proceedings (Section 35, Subsections 2, 3). However, in case of the missing statement of claim, arbitrators are obliged to terminate the proceedings (Section 35, Subsection 1).

Secondly, it may implied from the Act that an evaluation of the admissibility, gravity and the probative value is up to the arbitral tribunal, as the Act has not included any provision in this respect. Nor it has regulated in detail witnesses testimonies’ or their oath before the arbitral tribunal. In practice, Szasz and Horvath at least noted, that “The practice is, however, that the witness receive questions from the arbitral tribunal.” For these purposes, it is thus possible to conclude, that the arbitral tribunal has the right to question the witnesses, who are obliged to answer them orally in turn.

Unfortunately, the arbitral tribunal cannot impose a fine or to subpoena the witnesses and to compel third parties to testify – the Act simply has not entitled arbitrators with the necessary coercive power. Therefore, the possible assistance of the competent court with production of the necessary evidence upon request of the arbitral tribunal is definitely a useful tool. The Act has simultaneously stated the Central District Court of Pest as the relevant assisting court in Budapest (Section 37, Subsection 4).

As should be clear from Section 36 of the Act, unless the parties excluded the possibility to appoint experts, testimonies will be provided not only by witnesses, but also by experts, appointed by the arbitral tribunal in its own discretion. According to Section 36, Subsection 1, the arbitral tribunal may appoint one or several experts for the fact-finding purposes and order them to report on specific issues. In addition, upon the request of the party or in its own discretion, arbitrators may order the experts to

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78 According to Section 49, Subsection1, the arbitral tribunal may determine the *lex causae* directly, applying the *voie directe*, with no necessity to apply the relevant conflict of laws rules.

79 Section 50 of the Act.

80 Section 31, Subsection 1 of the Act.

81 Section 33, Subsection 3 of the Act.

82 Section 34, Subsection 1 of the Act.

83 The arbitral tribunal will terminate proceedings also upon the parties’ agreement, or when it comes to conclusion that the continuance has become unnecessary or impossible, or the claimant has withdrawn their claim and the respondent did not object to the withdrawal.

84 The National Report for Hungary, p.15

85 See more in the National Report for Hungary, p.15

86 Section 37, Subsection 3 of the Act.
participate in oral hearings, where they will be questioned by the parties. Arbitrators usually discuss
with the parties the subject matter of the required experts’ opinion.87

3.3. Arbitrators’ powers and duties in rendering the arbitral award

Two cardinal principles have been laid down by Hungarian legislators in Chapter V., which addresses
the rendition of arbitral award and the termination of proceedings. In the first place, the principle of
majority applies in the deliberating process, unless the parties decided on applying another method.88
Secondly, the position of the chairman of the tribunal is apparently strong, as he has been empowered
both with the casting vote as well as the right to decide on procedural issues, when being entitled to do
so by the parties (Section 38, Subsection 2 of the Act).

Arbitrators or the single arbitrator are obliged to render the award in written form, and naturally, the
signature of all who voted for the award as well as the reasoning are required. Similarly, the Act has laid
down also other formal requirements, which must be complied with in order to render a valid arbitral
award.89 In a way, similar to its Slovak counterpart, the Hungarian Act has equally allowed the arbitral
tribunal to correct and interpret the award,90 and, fortunately, there is no possibility to revise the arbitral
award, which is not the case in the Slovak arbitration law.

It may be thought that the requesting party’s obligation to notify the other party of its intent before
turning to the arbitral tribunal with the request for either interpretation or the correction of the award
is definitely an elegant and polite move. Arbitrators are allowed to correct the award and remove various
mistakes in computation and clericals flaws on their own initiative. In contrast, interpreting the award
will be possible only upon the parties’ request as well as rendering an additional award (Section 44 of the
Act).

When finishing a short essay on pros and cons of the Hungarian arbitration law, it may be submitted
(and not omitted) that arbitrators in international arbitration, which has been regulated in Chapter VI.
of the Act have been embraced with flexible powers and more space for maneuvering than arbitrators in
domestic arbitrations. In spite of omitting the broadest possible definition of international arbitration in
Section 46 of the Act,91 the arbitral tribunal needs not to waste a valuable time with nosing through
relevant conflict of laws rules. Actually, it may apply the voie directe instead, and simply to state the lex
causae directly in its own discretion, which makes the determination of the lex causae a speedy
procedure.

4. Conclusion

As I have mentioned elsewhere above, the number of articles, published on arbitrators’ rights and duties
in national arbitration is humbly lurking somewhere in the shadow of piles of the legal treatises, devoted
to an identical topic, but discussing arbitrators’ rights and duties in the international arena. Naturally,
I shall not try here to cover in detail all the hottest issues of nowadays’ international commercial
arbitration – there is at least a dozen of them. However, applying the privileged act of author’s own

87 National Report for Hungary, p.16.
88 Section 38, Subsection 1 of the Act.
89 See Section 41 of the Act.
90 Section 43 of the Act.
91 Compare with the UNCITRAL Model Law approach (Article 1/3/c), see more in LEW, J., MISTELIS L. A., KROLL,
S., Comparative International Commercial Arbitration, p.61.
contriving, an illustrative outline of two currently debated topics in international commercial arbitration certainly would do no harm, before finishing this article with the final evaluation of the Slovak and Hungarian legal regulation of arbitration, pointing once more to its efficiencies as well as deficiencies.

For these purposes, the introduction of the conundrum concerning the power of arbitrators to decide on confidentiality issues, followed by introducing the power of international arbitrators to introduce ex officio new issues in law should not be perceived supererogatory. The real issue when considering the arbitral tribunal’s right to decide on confidentiality matters, arising in the already started arbitration proceedings is not whether arbitrators do or do not possess enough power to decide, but the lack of some compact rules, which could be followed in these situations. Firstly, the very fact, that the arbitration is private does not mean an inherent involvement of ultimate confidentiality.

Indeed, the “confidentiality lullaby” ceased to work a long time ago in mid nineties after the verdict had been rendered by the Australian High Court in the **Esso BHP v Plowman** case in 1995. In this case, the court concluded that the confidentiality is not an essential element of arbitration. Even more, the presumption of confidentiality is excluded in all arbitrations, in which one disputing party is a state, or the state organization, as the public has every right to access information regarding an ongoing arbitration with the state, being the party. Nevertheless, the Australian High Court held that the obligation to disclose confidential information in public interest is on no account hydrocephalous – it does not apply to every relevant document, submitted in arbitration and overall, the principle of privacy and confidentiality in arbitration should be honored.

On the other hand, this distinction is of little help because of three reasons. Firstly, it is submitted that the scope of confidentiality obligation in arbitration has not been still unified. For instance, England still paves the way with an implied duty of confidentiality, laid down in the **Eastern Saga** case, which covers all documents, which were submitted, or even only appeared in arbitration. Other countries are in imprinting process of following the rule, adopted in **Esso BHP v Plowman**, confirming confidentiality only with regard to documents, submitted in arbitration upon the arbitral tribunal’s order. As Crookenden stated, “There is no clear consensus in national laws at to the obligations of parties to an arbitration to keep arbitration documentation confidential.”

Quite apart from this uncertainty, another obstacle is an absence of right of arbitrators to determine specific confidentiality rules in every case. Suffice it to say, that at least the disputing parties have the right to agree their own confidentiality rules. Further difficulties arise, when one considers whether the confidentiality issues, arising in the ongoing arbitration, should be finally solved by “the same panel” of arbitrators (which is the most time sparing and procedurally efficacious way), or the parties should have been entitled to approach the new arbitral tribunal with this task. And last but not least, it is also highly questionable, which body is the most competent to decide on confidentiality issues in arbitrations, where the problematic confidentiality issue concerns not only disputing parties, but also a third party to arbitration. Here the jurisdiction of the arbitral tribunal, deciding the dispute is more than volatile and the situation will simply call for the court’s involvement.

Not surprisingly, introducing new legal issues in arbitration by international arbitrators in their own discretion is perceived as a dilemma as well. Is this a right or an obligation of arbitrators in the ongoing arbitration to introduce ex officio new legal issues, when they are tightly woven to the merits of the

92 Esso Australia Resources Ltd and Others v. The Hon Sidney James Plowman (Minister for Energy and Minerals and others) 1995. 128 ALR 391. See also the decision of the Swedish Supreme Court in Bulgarian Foreign Trade Bank Ltd. v A.I. Trade Finance. YBCA, 2001, Vol. XXVI, p. 291 – 298
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case, but which are absolutely new and were not invoked by the parties? Certainly, the party autonomy rules over the whole proceedings, however arbitrators should have been provided with a certain possibility to introduce new issues, especially when these issues are pretty much tied together with the public policy issue of the relevant lex causae.

However, one should always bear in mind that international arbitrators do not stumble in the judges’ footsteps and *jura novit curia* does not apply to them to the fullest, as they may not go beyond the frame of their jurisdiction, agreed on by the parties in the arbitration agreement. As a result, as Dimolitsa concluded, arbitrators “*have the discretion to introduce new issues of law, i.e. issues that are indeed new and that appear material to the disposition of the case, but they must be cautious in so doing to respect fundamental principles of international arbitration.*”

Echoing the thesis of this article, when evaluating an effectiveness of the Hungarian and Slovak arbitration law, it may be concluded, that both Arbitration Acts serve their purposes. Short of the complete conclusion, it may be noted, that in both acts there has been left a certain legal space for improvement. In particular, the Hungarian Arbitration Act lacks a more specific determination of awards, which may be rendered by the arbitral tribunal – interim awards are not mentioned in the Hungarian Arbitration Act.

Nonetheless, it may be deduced from the Act that interim awards are regularly rendered, e.g. ordering interim measures, or confirming the jurisdiction of the arbitral tribunal. Similarly, a more detailed specification of conditions, in which the parties in already finished arbitration proceedings may approach the arbitral tribunal with their task to interpret substantial parts of the awards, would be perhaps welcome in the Hungarian Arbitration Act (this remark applies equally to the Slovak Arbitration Act).

Moving on to the Slovak Arbitration Act, undoubtedly the biggest pain has become the revision procedure. Equally, the fact that arbitrators have not been embraced with the voie directe cannot be perceived as a feature of the modern and flexible arbitration law, let alone the gutless power to order interim injunctions with no possibility to enforce them against the obliged party. Nonetheless, to put it mildly and wrap it up all nicely, there are simply perfect ideas that can be, and the real way it is, in its best possible shape, under circumstances. The story has ended, the curtain is down.

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96 The Equivocal power of Arbitrators to Introduce Ex Officio New Issues of Law, p.426.
98 See more in the National Report for Hungary, p.20
Marcin Czepelak*

Party Autonomy in European Private Law – the Attempt of Evaluation of Current Developments

1. Introduction

Although legal consequences of the membership in the European Union were widely discussed at the time of the accession of new Member States in 2004 and 2007, problems from the field of private law were scarcely at issue at this time. From the present perspective we can observe the dynamic development of European private law receiving growing coverage of legal writing. Plans set up by the European Commission show that this trend will be maintained or even increased in the future. This raises a question of the impact of the accession to the European Union on the systems of private law of the Central and East European Countries.

However, the attempt to consider the whole area of private law would probably equal to failure. Instead it might be illustrative to analyse how the European Union has affected one of the basic concepts of private law, i.e. the principle of party autonomy. It seems that there are at least three reasons to deal with this subject.

Firstly, party autonomy had already had long history before the European Union came to existence. Accordingly, it is worth asking: what has been changed in terms of party autonomy since the EU entered the kingdom of private law?

Secondly, party autonomy, although traditionally rooted in the law of obligations under the name of freedom of contract, has also gained some importance in other branches of law. Accordingly, it is worth asking: what is the role that party autonomy plays in the different fields of European private law?

Thirdly, the party autonomy it is probably that principle, which has been most profoundly moulded by European law. Accordingly, it is worth asking: has European law broadened or narrowed the scope of party autonomy?

In order to answer these questions I shall commence my analysis with a few words about this notion and two principal assumptions on which this principle can be based. It will be demonstrated, that only one of them is preferred by the European legislation. Then I shall briefly summarise the approach of current and proposed European instruments from the field of private law towards party autonomy. Eventually, I am going to make some observations on the interference between the development of European and national private law on the example of the brand new Polish Act on Private International Law.

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2. Principle and the Notion of Party Autonomy

First and foremost it is necessary to distinguish between the notion and the principle of party autonomy. Nowadays it goes without saying that Article 1134.1. of the French Civil Code which provides that agreements legally concluded take the place of law for those who made them (Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites) proclaims the principle of party autonomy, although the very notion of party autonomy cannot be found in this provision. The phrasing itself comes from Jean Domat (Les conventions étant formées, tout ce qui a été convenu tient lieu de loi à ceux qui les ont faites), which in turn was taken from Digesta, providing that: ‘Contracts receive legal sanction from the agreement of the parties’: ‘Contractus legem ex conventione accipiunt.’ (L. 1., § 6).

It follows that the idea of party autonomy had been already rooted in Roman law and the doctrine of natural law, before the notions of ‘party autonomy’ (Parteiautonomie), or ‘private autonomy’ (Privatautonomie, autonomie privée) and ‘autonomy of will’ (Autonomie des Willens, autonomie de volonté) were conceived by eminent German and thereafter French scholars in nineteenth century.

In a nutshell, party autonomy is understood as the competence of subjects of law to organise their legal relations by expressing their will, which thereby becomes crucial factor of attribution of legal effects to a person. Traditionally its various aspects are distinguished, like: freedom to dispose of one’s property, freedom to dispose of one’s succession by will, freedom of contract, or freedom to marry (and whom to marry), or not to marry and last but not least freedom of contract. In case of the latter we can distinguish further aspects, like freedom to choose a contractor, freedom of content of contract, etc.

That is more or less the current understanding of party autonomy as a principle of law. However, even in the framework of this common vision there are two opposite approaches, one taken by the common law and the other, taken by the civil law. The position of the former is that implying terms to the parties’ agreement would undermine freedom of contract. The position of the latter is that ius dispositivum does not qualify freedom of contract, as it is up to parties’ will to derogate from dispositive law. This approach is reflected by Article 56 of Polish Civil Code which provides: ‘A legal act gives rise not only the effects expressed therein but also to those which stem from law, principles of community life and established custom.’ Again, a common lawyer would consider a provision of this kind as an inroad into party autonomy.

3. Assumptions

These differences notwithstanding, it is on common ground that principle of party autonomy can be based on two assumptions.

4 Jean Domat, Les lois civiles dans leur ordre naturel (Nyon 1777), Part I, Book I, Titel I, Section II, at VII.
6 Bernhard Berger, Allgemeines Schuldrecht (Stämpfli Verlag 2008) 57.
7 For more detailed analysis see – Ernst A. Kramer, Obligationenrecht. Allgemeiner Teil (Helbing Lichtenhahn Verlag 2009) 63–64; Peter Münch, Sabina Kasper Lehne in Peter Böhringer, Roger Müller, Peter Münch, Alex Waltenspühl (eds), Prinzipien des Vertragrechts (Schultthess 2010) 1–2.
3.1. Party autonomy as the consequence of definite anthropological vision

The first assumption reflects a definite anthropological vision, which perceives a human as free and responsible being. It is not often that lawyers reflect on anthropological reasons for party autonomy, however the following passage might be a good example of the consideration of this kind: 'La consecration de l’acte juridique est l’expression du principe de l’autonomie privée. Chaque être humain est (en principe) libre et responsable; il peut donc valablement s’engager et la loi donne à cet engagement un effet juridique déterminé.' The similar reasoning as applied towards freedom of contract can be adopted to freedom of choice of the applicable law.

The view presented above reflects what might be called the traditional European perception of mankind. For the purpose of this analysis the source of this concept is irrelevant (i.e. whether the ability to discern freely results from the resemblance to God or it follows from something else). What matters is that a person can and should bear the consequences of his or her act because is reasonable and free, and vice versa – only there might be legal consequences of an act, where there are free and reasonable parties.

It follows that party autonomy is, in terms of private law, the sole adequate response to the constitution of man.

3.2. Party autonomy as the underlying principle of the free market economy

The second assumption reflects the idea of free competition and free market fundamental for modern economy based on 'a principle of reciprocity through which the opportunities of any person are likely to be greater than they would otherwise be'. From that perspective freedom of contract is a cornerstone of social coordination and cooperation within the system where ‘portions of the society’s resources are at command of private parties. Production and distribution of resources are determined by a multitude of private plans’. These assumptions were echoed in the following statement of Lord Bingham of Cornhill in *Starsin* case: ‘Commercial men must be given the utmost liberty of contracting. They must be left free to decide on the allocate commercial risks.’

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8 Pierre Tercier, *Le droit des obligations* (Schultess 2009) 53.
10 It is worth noting similar wording used by *Catéchisme de l’Église Catholique* (Paris 1992) at 1730–1731, which also considers man to be reasonable and therefore responsible for his own choices: ‘L’homme est resonable, (…) libre et maître de ses actes. La liberté est le pouvoir, enraciné dans la raison et la volonté, d’agir ou de ne pas agir, de fair ceci ou cela, de poser ainsi soi même des action délibérées. Par le libre arbitre chacun dispose de soi.’ It should not be very surprising, that in the European culture the attribution of moral and legal effects to the expression of man’s will presupposes that he is free, reasonable and therefore responsible for his own acts and omissions.
13 Homburg Houtimport B.V. v Agrosin Private Ltd (*The Starsin*), 2003 UKHL 12, at 57.
In the very same way freedom of choice of the law applicable to a contract, which is a counterpart of freedom of contract at the level of conflict of laws, is justified in terms of economic effectiveness. Accordingly, ‘the basic principle of party autonomy is efficient in the sense that it allows for a determination of the applicable law that increases the overall welfare of the parties. (...) the unquestionable advantage of party autonomy is that it allows for efficient solutions. Contracting parties may in fact make use of the institutional competition among legal systems of world and select the contract law which best suits their needs.

It follows from these considerations that both dimensions of party autonomy, i.e. internal and international, are considered to be a corollary of the free market economy.

4. The approach adopted by the European legislation

The former from these two assumptions concerning party autonomy can be called the ‘voluntarist vision’, the latter – the ‘market vision’. In his response to the Commission’s Green Paper on policy options for progress towards a European Contract Law for consumers and businesses Professor Simon Whittaker observed that:

‘The relationship between these different visions of freedom of contract is not straightforward either in the national laws of European Member States nor in EU law. So, rather than modern European laws fully reflecting one or other vision of the role of the law in relation to contracts (whether the general law or contract law properly so-called), these visions exist in tension within the laws, though to different extents in different substantive areas and in different national laws. So, while in some situations, these two visions of freedom of contract lead to the same approach to a particular legal issue (for example, as regards the general freedom whether or not to contract and with whom), in other situations they lead to very different approaches, different rules and different substantive results.’

I cannot entirely endorse this comment. On the contrary, I think that European law is market-oriented and this determines the European legislation’s attitude towards party autonomy. I would like to corroborate this observation by giving three following arguments.

4.1. Party autonomy as an element of freedom to conduct a business

Firstly, at the level of constitutional principles, it follows from Article 16 of the Charter of Fundamental Rights of the European Union that freedom of contract is understood as an element of freedom to conduct a business.

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conduct a business.\textsuperscript{18} As commented in the Explanation to the Charter\textsuperscript{19}, this provision is based on the Court of Justice case-law which has recognised freedom to exercise an economic or commercial activity and freedom of contract, which, as it is expressly admitted, results from Article 119 of the Treaty on the Functioning of the European Union, proclaiming in turn the principle of an open market economy with free competition. This fundamental value established by primary law of the European Union has been assumed and is repeatedly quoted by immense instruments of secondary law from the field of private law. As it was sharply noticed: ‘In arguing for harmonisation of contract laws, the requirements of the internal market are most frequently cited’\textsuperscript{20}.

4.2. The regulatory character of European private law

Secondly, at the level of the target assumed by the European legislation it is sufficiently clear that European law is not to serve the purposes of the market whatsoever, but to serve the purposes of the Common Market. It follows that the EU legislation form the field of private law pursues a defined regulatory objective, as ‘it is used to build and regulate internal market’\textsuperscript{21}. This concerns internal as well as international private law of the European Union, which seems to be fully aware of the impact of the conflict of laws on the overall functioning of the European economy. It is for this very reason that the Commission’s Green Paper on the Optional instrument repeatedly observes that ‘differences between national contract laws may entail additional transaction costs and legal uncertainty for businesses and lead to a lack of consumer confidence in the internal market.’ For the sake of this paper it is not necessary to discuss whether there is sufficient evidence to support this statement. However, it is enough to notice that the European approach to private law overwhelms division between conflict-of-law rules and substantive rules. Consequently, the European legislation will be working on unification and enhancement of the European conflict-of-law rules as long as it contemplates them to be adequate to serve the purposes of the Common Market in its current state. Nevertheless, from the very moment it considers them to be inoperative in this respect, it will try to find alternative solutions for them. Again, it is not necessary to assess in this paper whether it would be good, or not. Neither I am going to discuss chances for these projects to be successfully implemented. I am merely stating the current state of affairs. Accordingly, the fact remains, that the Commission’s Green Paper on the Optional Instrument has clearly shifted political focus away from the unification of private international law to the unification of substantive contract law and it has been done in the name of the Common Market. This underlying idea expressed in the language of politics reads as follows: ‘The Commission wants citizens to take full advantage of the internal market.

\textsuperscript{18} Article 16 Freedom to conduct a business

The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

\textsuperscript{19} ‘Explanation on Article 16 — Freedom to conduct a business

This Article is based on Court of Justice case-law which has recognised freedom to exercise an economic or commercial activity (see judgments of 14 May 1974, Case 4/73 Nold [1974] ECR 491, paragraph 14 of the grounds, and of 27 September 1979, Case 230–78 SpA Eridiana and others [1979] ECR 2749, paragraphs 20 and 31 of the grounds) and freedom of contract (see inter alia Sukkerfabriken Nykřbing judgment, Case 151/78 [1979] ECR 1, paragraph 19 of the grounds, and judgment of 5 October 1999, C-240/97 Spain v Commission [1999] ECR I-6571, paragraph 99 of the grounds) and Article 119(1) and (3) of the Treaty on the Functioning of the European Union, which recognises free competition. Of course, this right is to be exercised with respect for Union law and national legislation. It may be subject to the limitations provided for in Article 52(1) of the Charter.’


The Union must do more to ease cross-border transactions. It follows that the European legislation considers the whole spectrum of private law as no more and no less than an instrument of common economic policy.

Thirdly, the same remark applies to party autonomy. Accordingly, party autonomy is strengthened where it serves the purposes of the Common Market and it is weakened where it is perceived as a danger for it. Still, one has to bear in mind, that party autonomy performs various functions in different branches of private law. For example in private international law it enables parties to choose the applicable law, in contract law it guarantees them to establish and shape their legal relationship, in the law of successions it enables testator to dispose of his property after he passes away. None of these functions constitutes the primary concern of the European legislation. It is for this very reason that European law takes an overarching perspective that integrates conflict-of-law rules and substantive rules of private law for the purposes of the Common Market, bearing in mind that its territory is divided by 28 national systems of private law.

5. European instruments from the field of private law in the context of party autonomy

For the purpose of the forthcoming considerations I suggest to adopt the same overarching perspective to analyse current and proposed instruments of European law and to look at the whole spectrum of private law. Moreover, it will be very illustrative to take European private international law as a point of reference. It seems that there are two reasons for doing that.

Firstly, it is the conflict of laws, which by now constitutes the area of private law that is the most unified by the European regulations. The scope of European private international law is already important, as it covers (with some exceptions): contractual, extra-contractual and maintenance obligations, whilst current projects launched recently by the European Commission concern additionally: matrimonial property regimes, property consequences of partnerships, divorce and successions. At the same time European substantive law, perhaps with the exception of consumer law, covers only ‘the boundaries of traditional private law (von den Rändern her)’²², i.e. telecommunication, energy, transport, product safety, fair trading and private competition law.

Secondly, unlike European private international law, European substantive law constitutes only bunch of regulatory rules which are not, and cannot be designed to create an independent legal regime. From the simple fact that they aim at harmonisation of national systems, they are functioning only in the framework of those systems, which offer a default regime, i.e. a background legal environment for transactions, which parties are often free to adjust by means of an agreement. On the contrary, European conflict of law rules are designed to be self-sufficient, autonomous system, which gives the impression of slowly creeping codification²³. Consequently, whereas European private international law establishes the principle of party autonomy, European internal law takes for granted, that it is established by the national legal systems.


Accordingly, taking European private international law (including projects of the forthcoming regulations) as a starting point should in turn allow to draw some conclusions concerning also European substantive law.

As previously mentioned, party autonomy in conflict of laws manifests itself by the possibility to choose the applicable law. The European provisions establishing this possibility fall into three main categories.

5.1. Unilateral determination of the applicable law

The first category involves provisions vesting in a person the right to unilateral determination of the applicable law by choosing one from two possibilities given by the European legislation. There are two provisions of this kind.

First is Article 7 of the Rome II Regulation\(^{24}\) which confers on a person seeking compensation for environmental damage the possibility to choose between the law of the country where the damage occurred or the law of the country in which the event giving rise to the damage occurred\(^{25}\). The Preamble to the Rome II Regulation labels this competence ‘a choice of the applicable law’, although at the same time underlines, that it results not from party autonomy, but from ‘the principle of priority for corrective action at source and the principle that the polluter pays’, which ‘fully justifies the use of the principle of discriminating in favour of the person sustaining the damage’\(^{26}\). Thereby the European legislator establishes the principle of *ubiquitas* in the conflict of laws\(^{27}\), as it previously has been established by the European Court of Justice in the conflict of jurisdictions\(^{28}\).

The second example is a combination of Articles 16 and 17 of the Commission’s proposal for a regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession\(^{29}\). The title of Article 17 of this project reads: ‘freedom of choice’, exactly as in Article 3 of the Rome I Regulation\(^{30}\), but one who expects analogical solutions\(^{31}\) will be


\(^{25}\) Article 7

Environmental damage

The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.’

\(^{26}\) Recital 25.


\(^{31}\) Article 3 of the Rome I Regulation:

‘Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.’
disappointed, because as a matter of fact a testator can choose between the law of his nationality and the law of his domicile, under the proviso that they are different\textsuperscript{32}.

Although these two provisions offer a choice, it cannot be properly labelled as a choice resulting from the principle of party autonomy\textsuperscript{33}. In fact a person is to decide on what the European legislation could not or did not want to decide, i.e. a choice of a connecting factor. In case of torts it is the choice between the place of harmful event and the place of damage, in case of successions it is eternal conflict between \textit{lex patriae} and \textit{lex domicilii}. Accordingly, a legislative compromise has been agreed under the label of party autonomy.

\textbf{5.2. Limited choice of the applicable law}

Provisions of the second group allow parties to choose one from several laws determined by the European legislator by means of connecting factors. The rationale that underpins this solution is set forth by recital 15 of the Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation\textsuperscript{34} (hereafter the Rome III Regulation). It provides:

\begin{quote}
Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be that of the State in which the deceased had their habitual residence at the time of their death.
\end{quote}

\begin{quote}
A person may choose as the law to govern the succession as a whole the law of the State whose nationality they possess.
\end{quote}

\begin{quote}
The law applicable to the succession must be expressly determined and included in a declaration in the form of a disposition of property upon death.
\end{quote}

\begin{quote}
The existence and the validity in substantive terms of the consent to this determination shall be governed by the determined law.
\end{quote}

\begin{quote}
Modification or revocation by its author of such a determination of applicable law must meet the conditions for the modification or revocation of a disposition of property upon death.'
\end{quote}

\textsuperscript{32} ‘Chapter III  
Applicable law  
Article 16  
General rule


\textsuperscript{34} [2010] OJ L 343/11.
‘Increasing the mobility of citizens calls for more flexibility and greater legal certainty. In order to achieve that objective, this Regulation should enhance the parties’ autonomy in the areas of divorce and legal separation by giving them a limited possibility to choose the law applicable to their divorce or legal separation.’

Accordingly, Article 5 of this Regulation enables spouses to choose the law applicable to divorce or legal separation provided that it is either:

(a) the law of the State where the spouses are habitually resident at the time the agreement is concluded
(b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded;
(c) the law of the State of nationality of either spouse at the time the agreement is concluded
(d) the law of the forum.

A closer look at this provision reveals that it applies mainly the same points of attachment as established by Article 8 of the said Regulation. Simplifying a little bit, the sequence of the connecting factors preferred by the European legislator is: the current common habitual residence of spouses – the last common habitual residence – the common nationality of spouses – the law of the court seized. It follows that spouses are merely empowered to change that preferred sequence of connecting circumstances and to choose between several nationalities. Even though this possibility has undeniable practical importance.

Firstly, spouses can by means of the choice-of-law agreement fix their habitual residence in cases where it does not clearly follow from the circumstances of the case, because parties are equally connected with two (or even more) states. This will increase legal certainty in the field of conflict of laws.

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35 Article 8
Applicable law in the absence of a choice by the parties
In the absence of a choice pursuant to Article 5, divorce and legal separation shall be subject to the law of the State:
(a) where the spouses are habitually resident at the time the court is seized; or, failing that
(b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or, failing that
(c) of which both spouses are nationals at the time the court is seized; or, failing that
(d) where the court is seized.’

36 On the proviso, that it somehow still matters, which is the rationale for two further requirements: first, that is common for Article 5 and 8, i.e. continuance of the residence by one of spouses and second set forth by Article 8, that the period of residence did not end more than one year before the court was seized.
Secondly, spouses can take advantage of plethora of connecting factors which serve for grounds of jurisdiction as established by Article 3 of the Brussels IIa Regulation\(^\text{37}\) and by the choice of the *lex fori* determine as applicable the law of State which is the most convenient for them. This seems to be a far-reaching consequence of party autonomy and that is why the true meaning of Article 5 of the Rome III Regulation can be found only if this provision is read together with Article 3 of the Brussels IIa Regulation.

It follows that the underlying idea of Article 5 of Rome III is to use party autonomy as the vehicle for the application of the *lex fori*. Obviously, the reason was not to allow spouses to choose the law of their habitual residence, which would be applicable in the absence of choice (leaving out of consideration the problem of fixing this habitual residence, which has already been discussed above). The possibility to choose the law of the State of nationality of either spouse might be seen as factor increasing possibility of legislative compromise, however parties in such cases will most probably go to the courts of the State, which law has been agreed and therefore the law of nationality will equal to the law of forum.

Certainly, turning the spotlight on party autonomy may be regarded as steering a middle course between different approaches adopted by national systems of private international law\(^\text{38}\), even though the compromise has been reached only in the framework of ‘enhanced cooperation’ between Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal,


‘Article 3

General jurisdiction

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

   (a) in whose territory:

   — the spouses are habitually resident, or

   — the spouses were last habitually resident, insofar as one of them still resides there, or

   — the respondent is habitually resident, or

   — in the event of a joint application, either of the spouses is habitually resident, or

   — the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

   — the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her ’domicile’ there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the ’domicile’ of both spouses.

2. For the purpose of this Regulation, ’domicile’ shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.’

Romania and Slovenia. However, introducing party autonomy into conflict of laws in divorce seems to be above all this solution which encourages mobility of persons within the European Union. Indeed, the ‘advantage of this connecting factor from the perspective of the European integration process is that it offers and adequate solution for the multicultural character of European societies. The parties may choose the law of the host country, when they have adopted the life standards of this country; or the law of the country of origin, when they want to preserve their legal traditions, or they want to assure the recognition of the judgment in the country of origin in case they return.

Moreover, the introducing party autonomy in divorce cases shows some common features in international and internal family law. Notwithstanding the differences between approaches adopted in domestic laws of Member States, it seems that there is a growing tendency to respect mutual consent of spouses aiming at divorce or legal separation. Therefore it might be an additional incentive to accept parties’ choice as to the law applicable to divorce.

Other examples of provisions establishing limited choice of law are: Article 5.2. second subparagraph of the Rome I Regulation concerning the carriage of passengers and Article 16 of the Commission’s Proposal for a Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

In case of the latter, party autonomy in private international law results from admitting it in internal systems of family law, where in many countries spouses are empowered to choose one from several matrimonial property regimes, which they consider to be adequate to their personal needs and expectations. Accordingly it seems that the European legislation follows national codifications of private international law which it considers to be adequate solution for ‘increased mobility of persons within an area without internal frontiers’.

40 Beatriz Campuzano Díaz, ‘Uniform Conflict of Law Rules on Divorce and Legal Separation via Enhanced Cooperation’ in Beatriz Campuzano Díaz, Marcin Czepelak, Andrés Rodríguez Benot and Angèle Rodríguez Vázquez (eds), Latest Developments in EU Private International Law (Intersentia 2011) 23, 42.
43 COM(2011) 126 final. This provision reads as follows:

‘Article 16
Choice of applicable law

The spouses or future spouses may choose the law applicable to their matrimonial property regime, as long as it is one of the following laws:
(a) the law of the State of the habitual common residence of the spouses or future spouses, or
(b) the law of the State of habitual residence of one of the spouses at the time this choice is made, or
(c) the law of the State of which one of the spouses or future spouses is a national at the time this choice is made.’
44 Ruth Farrugia, ‘The future EU Regulation concerning matrimonial property regimes’ in Beatriz Campuzano Díaz, Marcin Czepelak, Andrés Rodríguez Benot and Angèle Rodríguez Vázquez (eds), Latest Developments in EU Private International Law (Intersentia 2011) 63, 74.
45 COM(2011) 126 final, at 1.2.
In case of carriage of passengers the European legislator decided to introduce another restriction to party autonomy, therefore limiting its scope in comparison with the Rome Convention\textsuperscript{46} which applied the general choice of law solution for contracts as established by Article 3 thereof\textsuperscript{47}. Surprisingly, at the end of the legislation procedure\textsuperscript{48} the Council proposed special rule on the law applicable to the contracts of carriage of passengers\textsuperscript{49}, which was eventually enacted\textsuperscript{50} as Article 5.2. of Rome I. The underlying idea of this provision seems to be the protection of passengers as weaker party. Were it so indeed, then that protection seems to be rather illusive\textsuperscript{51}. However once more it is noticeable that internal and international private law solutions are driven by the same policies, as it is in case of protection of weaker party.

5.3. Free choice of the applicable law

Eventually, there is the third group were the choice is unrestricted – at least as to the state, which law is to be applicable. That is the case of contractual and non-contractual obligations. Nevertheless even in these areas, there are many limitations to party autonomy. The Rome I and II Regulations make four common inroads into freedom of choice:

\begin{itemize}
  \item ‘Article 3
    Freedom of choice
    1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.
    2. (…)’
  \end{itemize}


\textsuperscript{50} Article 5.2. (second subparagraph) of the Rome I Regulation:

‘The parties may choose as the law applicable to a contract for the carriage of passengers in accordance with Article 3 only the law of the country where:
(a) the passenger has his habitual residence; or
(b) the carrier has his habitual residence; or
(c) the carrier has his place of central administration; or
(d) the place of departure is situated; or
(e) the place of destination is situated.’

a) the choice cannot effect rights of third parties\textsuperscript{52};  
b) in ‘domestic’ cases a choice cannot displace the mandatory provisions of the law which would be applicable in the absence of choice (Article 3.3. of Rome I and Article 14.2. of Rome II)\textsuperscript{53};  
c) in ‘community’ cases a choice of the law of a non-member state cannot displace the mandatory provisions of the EU law Article 3.4. of Rome I and Article 14.3. of Rome II)\textsuperscript{54};  
d) the choice cannot derogate from international mandatory rules of forum (Article 9 of Rome I and Article 16 of Rome II)\textsuperscript{55};

\textsuperscript{52} Article 14.1. subparagraph 2:  
‘The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.’

\textsuperscript{53} Article 3.3. of Rome I:  
‘Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.’

Article 14.2. of Rome II:  
‘Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.’

\textsuperscript{54} Article 3.4. of Rome I:  
‘Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties’ choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.’

Article 14.3. of Rome II:  
‘Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties’ choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.’

\textsuperscript{55} Article 9 of Rome I:  
‘Overriding mandatory provisions  
1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.  
2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.  
3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.’

Article 16 of Rome II:  
‘Overriding mandatory provisions  
Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.’
Furthermore, Article 6.2., 7.3., 8.1. of Rome I qualify the freedom of parties’ choice in consumer\textsuperscript{56}, insurance\textsuperscript{57} and employment contracts\textsuperscript{58} respectively. Also the provisions of Rome II establish additional criteria of the choice of law for non-contractual obligations. For example an anticipated choice can be made exclusively by parties pursuing commercial activity and only by means of ‘freely negotiated agreement’\textsuperscript{59}.

These restrictions notwithstanding, the European Union firmly adheres to the freedom of choice of the law applicable to contractual obligations. As noted in the \textit{Explanatory Report}, the rule established by

\textsuperscript{56} Article 6 of Rome I:

‘Consumer contracts
1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another professional shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:
(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
(b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.
2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.
3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.
4. (…)

\textsuperscript{57} Article 7.3. of Rome I:

‘In the case of an insurance contract other than a contract falling within paragraph 2, only the following laws may be chosen by the parties in accordance with Article 3:
(a) the law of any Member State where the risk is situated at the time of conclusion of the contract;
(b) the law of the country where the policy holder has his habitual residence;
(c) in the case of life assurance, the law of the Member State of which the policy holder is a national;
(d) for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State;
(e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder.
Where, in the cases set out in points (a), (b) or (e), the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom.

\textsuperscript{58} Article 8.1. of Rome I:

‘An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.’

\textsuperscript{59} Article 14.1. subparagraph 1:

‘Freedom of choice
1. The parties may agree to submit non-contractual obligations to the law of their choice:
(a) by an agreement entered into after the event giving rise to the damage occurred;
or
(b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.’
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Article 3 (1) of the Rome Convention ‘under which the contract is governed by the law chosen by the parties simply reaffirms a rule currently embodied in the private international law of all the Member States of the Community and of most other countries. Moreover, the European Union has broadened the scope of party autonomy to non-contractual obligations, which also can be seen as a conflict-of-law counterpart of accepting party autonomy in such cases in internal private law.

5.4. Interim conclusions

There are two important observations to be made on the mentioned provisions.

Firstly, in the field of family law and the law of successions, European private international law accepts party autonomy exactly there, where it is generally accepted by national systems of internal law. Furthermore, by this means the European legislation enhances mobility of the EU citizens for the benefit of the Common Market. This is the underlying goal of having law of domicile as applicable to succession or law of the forum as applicable to divorce or legal separation.

Secondly, in the field of obligations, limitations of the freedom of choice reflect general European policy on harmonisation of national laws in the area of consumer, insurance and employment contracts. This all boils down to the conclusion, that the scope of party autonomy in European private international law reflects party autonomy in internal private law, either in the substantive provisions already harmonised by European law, or only generally accepted in the European legal culture, in its current state.

6. The new Polish Act on Private International Law

Finally, I would like to reflect on how the European legislation has influenced national legal systems of Central and East European Countries in the context of party autonomy. In order to avoid generalisations I shall limit my observations to brand new Polish Act on Private International Law enacted on 4th February, which entered into force on 16 May 2011.

The idea of a new Act replacing one enacted in 1965 goes back to late nineties of last century. The underlying idea at the time was to adjust Polish law on international contracts to the standards set up by the Rome Convention of 1980. After Poland’s accession to the EU in 2004 there was no agreement on whether to continue legislative proceedings or not. Eventually, Polish legislation has commenced a kind of desperate race with the European Union to re-codify conflict of laws. Gradually, with every European regulation enacted there was less and less room for the national legislation and it was harder to ignore the ongoing progress of the unification of conflict-of-law rules at the European scale. Finally, the enactment of the new act was justified by the need to legislate on issues not unified by European law whilst on the other hand is was said to be necessary to adjust Polish law to the European standards. It is therefore not surprising that the outcome is far from being convincing.

Let’s now focus on new Act’s attitude to party autonomy.

The new Act establishes general rules concerning choice of the applicable law set forth by Article 4. As it ambitiously tends to repeat whatever ‘goes without saying’ and what has not been doubted by anybody, it proclaims that ‘It is possible to choose the applicable law, when it is allowed by this Act’ (Article 4.1.).

Additionally the new Act follows the European legislator in stipulating that ‘The choice must be expressed or clearly follow from the circumstances of the case, unless the provision, which allows such a choice, rules otherwise’ (Article 4.2.) and that ‘The choice made after the legal relationship had been established cannot prejudice the rights of third parties’ (Article 4.3.). Other two rules (Article 4.4. and Article 4.5.) concern the existence and material validity of the choice as well as it subsequent change or annulment.

In case of obligations the lacunas left by the Rome I and II Regulations have been filled. In the field of family law the new Polish Act on Private International Law has not accepted party autonomy in case of divorce and legal separation, however adopted similar solution to the choice of law for matrimonial property as set forth in the Commission’s Proposal. The same can be said about party autonomy in the international law of successions.

7. Final conclusions

Even a glimpse at the new Act on Private International Law shows that it follows similar approach to party autonomy as adopted by European instruments already enacted or recently proposed. The question is however, if Poland is ready to have solutions adequate to those accepted by other EU Member States, why not to have them all unified in the framework of the European Union? Unfortunately, recent national codifications or re-codifications of conflict-of-law rules are on a collision course with the idea of the overarching European unification of private international law, perhaps in the form of a European Code of Private International Law.

Furthermore, it seems that, in the context of party autonomy, the European and Polish legislation share the same view as to limits of party autonomy in different areas of private law. They both are willing

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64 Article 52 of the New Polish Act:
‘1. The spouses can submit their property relationships to law of the State of which one of them is a national or in which one of them has its domicile or habitual residence. The choice can be made also before the solemnization of marriage.
2. The marriage contract is to be governed by the law chosen by parties according to provision of paragraph 1. In the absence of such a choice the marriage contract is governed by the law applicable to personal and property relationships of spouses at the time this contract was concluded.
3. Whilst choosing the law applicable to property relationships of spouses or to the marriage contract it is enough to respect the form required in case of marriage contracts by the law of the State, which law has been chosen or in which the choice has been made.’

65 Article 64.1. of the New Polish Act:
‘The bequeather can in his will or any other disposition upon death can submit succession to the law of State of his nationality, or his domicile or habitual residence at the time this disposition is made or at the time of his death.’

66 Moreover, as it was aptly remarked in case of Hungarian law, it could happen that national legislation ‘created more problems and contradictions, than it had aimed to solve’ – László Burián, ‘The impact of the Rome I and Rome II Regulations on the national conflict rules of the Member States with special regard to central European countries’ in Réka Somssich, Tamás Szabados, Central and Eastern European Countries after and before the Accession, vol. 1, (Budapest 2011) 179, 185.

to grant parties possibility to choose applicable law, in cases where party autonomy is accepted by substantive law, whether European or national.

Nevertheless, there is important difference between European and national legislation. The latter is still not sensitive for the purposes of the Common Market. In my view it is this issue that will be crucial for further understanding and development of the principle of party autonomy in European private law.
1. Introduction

The regulation of Czech private international law (as national regulation) is embodied particularly in Act No. 97/1963 Coll., on international private law and procedure. A number of amendments made to this Act from time to time reflected, more or less appropriately, the requirements following from European law. Mention should be made in this respect of Act No. 125/2002 Coll. (contracts forming a payment system); Act No. 37/2004 Coll. (insurance contracts); Act No. 257/2004 Coll. (contracts in the area of business activities on capital markets, etc.); Act No. 361/2004 Coll. (provisions reflecting the procedure for recognition and declaration of enforceability under Brussels I; Act No. 377/2005 Coll. (governing law and related aspects concerning insolvency of financial institutions); Act No. 57/2006 Coll. (partial reflection of changes in powers in the area of business activities on financial markets); Act No. 70/2006 Coll. (reflecting the aspects of international sanctions); Act No. 233/2006 (some reflections of the European Enforcement Order); Act No. 296/2007 Coll. (insolvency and insolvency proceedings); Act No. 123/2008 Coll. (electronic payment order); Act No. 7/2009 Coll. (European Payment Order).

In connection with the preparation of the new Civil Code, the need emerged to adopt a new Act on private international law. The reason lies in the differing regulation of private substantive law. Although the amendment was not directly called for by EU law and although the existing regulation, dating back to 1963 and amended from time to time, does not cause any major problems in judicial practice and for entrepreneurs, we consider that the new draft Act on private international law provides, in a better and more systematic manner, also for those aspects that are directly or indirectly related to European law.

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3 The Act represents the basic source. Nevertheless, private international law is also regulated by a number of other legal rules, namely Sections 91 to 98 of Art. I and Sections 69 to 75 of Art. II of Act No. 191/1950 Coll., the Bills and Cheques Act, as amended by Act No. 29/2000 Coll. (conflict-of-law rules in the area of bills and exchange law). Conflict-of-law rules with respect to arbitration proceedings are specifically regulated in Sections 36 to 40 of Act No. 216/1994 Coll., on arbitration proceedings and enforcement of arbitration awards. Individual provisions on relationships to foreign countries can be found in the Commercial Code (Sections 21 to 26). Reference can also be made to the Family Act (Sections 5 and 7 (2)), the Insolvency Act (Sections 426 to 430) and the Labour Code (Section 48 (3)), Section 319.


5 http://obcanskyzakonik.justice.cz/cz/navrh-zakona.html
2. Draft Characteristic

The explanatory memorandum relating to the preparation and adoption of the new Act voices the commitment to modernise the Act on Private International Law and also reflects European law, while taking into account the experience of the Czech Republic and other EU countries regarding compatibility of national and European rules. Importantly enough, the amendment should also deal with aspects that are not directly required by EU law, but it is suitable and indeed desirable to address them (for example, procedural treatment of law, mandatory rules that are part of legis causae, etc.).

In accordance with the tradition of Czech private international law, the new draft stipulates both conflict-of-law rules and rules of procedural law. In contrast to the previous regulation, it includes aspects of international arbitration and international bankruptcies. It is also worth noting – and we shall discuss this aspect further in the text – the express regulation of procedural treatment of foreign law and the express regulation of the manner of application of mandatory (usually public-law) rules. Both aspects, similar to, for example, classification, have been left so far to jurisprudence and decision-making of courts. The new Act changes this.

The draft also uses a different ordination of institutes. In the 1963 Act, the conflict-of-law part and the procedural part were contained in separate sections. The new draft connects the special part of conflict-of-law rules with the jurisdiction of courts in respect of the relevant aspects and, where applicable, includes the aspects of recognition and enforcement. We personally do not believe that this change in concept was necessary. On the other hand, there is a merit to the justification that this will approximate the Act to its users.

Our paper aims to present the overall concept of the draft Act on Private International Law and to introduce certain solutions that came into being under the influence of European law or directly or indirectly reflect its requirements.

3. Background of the new regulation and basic structure of the draft

According to the express wording of Section 2, the Act applies within the limits of:

- the provisions of promulgated international treaties binding on the Czech Republic, and
- the provisions of European law.

This may seem superfluous. In Article 10, the Constitution of the Czech Republic gives priority to international treaties. This is also a generally accepted principle of European law, which is also confirmed by rulings of the European Court of Justice and most recently mentioned in declaration No. 17 attached to the Treaty of Lisbon,4 according to which, given its special nature, European law shall have primacy over the law of member States. It is not required that this primacy be mentioned in each individual law. The author of the draft substantiated this provision during the preparation of the Act:

a) by the extraordinary frequency of European and international regulations in the area of the European Area of Justice in civil matters and, consequently, appropriateness of pointing out the primacy in the draft;

b) the general view that private international law is not the common agenda of an average lawyer. Therefore, although it is otherwise superfluous, the provision concerned can be admitted into the text of the Act.

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4 Declarations attached to the final act of the intergovernmental conference which adopted the treaty of Lisbon signed on 13 December 2007.
The basic background of the new draft Act is as follows:

- emphasis on legal certainty of the parties to a legal relationship. This follows from the emphasis on predictability of conflict solutions, jurisdiction of courts and treatment of foreign judgments. This traditional value of continental law is shared by the Czech jurisprudence and the existing rules of law. In the new Act, it is reflected through rules that can be employed to determine the law to be applied, the place of jurisdiction and the rules of treatment of foreign judgments.

- achievement of “conflict-of-law justice” in resolving the case. This is achieved through a balanced choice among the available legislative rules so as to choose the one which is more closely related to the situation to be resolved than all other legal regulations. Substantive justice, i.e. taking account of the result of application in decision-making, is appropriate where it is necessary to protect weaker parties.

- application of foreign law in cases where there is an international element. Its assessment depends on the specific circumstances of the case. The Act does not specify the characteristics or any other definition of international element. Nevertheless, the explanatory memorandum refers to a characteristic which is accepted by the jurisprudence and which was formulated by the author of the draft Act: relevance in relation to the case at hand.

- while respecting the principle of equal position of foreigners in proceedings, to protect our own nationals and persons living in the country against possible abuse of a liberal procedure that could harm them. To create a space for response, in the area of conflict-of-law rules and procedure, to undesirable regulations or procedures of foreign courts (public policy exception, refusal to acknowledge and enforce foreign judgments, etc.)

- in the area of procedural law, by delimiting the jurisdiction of Czech courts, to confer on Czech citizens or persons domiciled in the Czech Republic the right to have proceedings held in matters to which they have an adequately intensive connection.

Conclusion: The basic concept of the draft new Act follows from continental traditions. It emphasises primarily legal certainty and predictability. On the other hand, it leaves certain space for considering specific circumstances of a given case.

4. Manifestations of the impact of European law on private international law

In legislative terms, the relationship to specific rules of European law is conceived in the draft new Act as follows (similar to the existing regulation):

a) By reference to the existence of EU Regulations where they currently exist.

b) By incorporating the conflict-of-law provisions of certain Directives.

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6 See Kučera, Z., Mezinárodní právo soukromé, Brno: Doplňek, 2004, p. 23
8 See Kučera, Z., Mezinárodní právo soukromé, Brno: Doplňek, 2004, p. 18
c) By adopting certain national provisions that are necessary particularly for procedural law so as to harmonise or simplify the processes of treatment of judgments delivered by a court of an EU Member State.

Re a) The impact of the EU Regulations that provide for the individual areas dealt with in the special part of the conflict-of-law rules is of fundamental importance for the existing regulation of private international law. These EU Regulations have universal effects (application not only to intra-EU and also to non-EU conflicts of laws; possible application of legal rules other than Member State’s law); they fully replace national laws and, in some cases, even international treaties\(^\text{10}\). All these reasons led the author of the draft to point out the existence of EU rules. This, in the author’s opinion, contributes to clarity and ease of orientation in the legal regulation. As an example, Section XI regulates conflict-of-law relationships both in contractual and non-contractual matters. The impact of the EU Regulations is reflected through express reference to the possibility of their existence and as an inspiration for the regulation of those aspects that are not covered by the Regulations. The draft Act attempts to use the same or at least similar solutions to conflicts of laws in relation to these aspects. It also regulates certain aspects that are not regulated in European rules of law. Here are some examples of the individual provisions:

I) General reference to the existence of European, directly applicable regulation – Section 84, “The provisions of this Title shall apply on the basis of the directly applicable legislation of the European Union regulating conflict-of-law rules for contractual relationships and non-contractual relationships, where the directly applicable European Union legislation shall apply.”

II) Section 87 follows from Section 84, reflecting aspects that are not directly regulated by a European rule – Section 87, Certain other contracts

“(1) Contracts that are not covered by a directly applicable rule of the European Union shall be governed by the law of the State to which the contract is most closely related, unless the parties have chosen the governing law. The choice must be expressly specified or must doubtlessly follow from the provisions of the contract or the circumstances of the case.

(2) Insurance contracts that are not covered by a directly applicable rule of the European Union shall be governed by the law of the State where the policyholder has his/her habitual residence. The parties may choose some other law.

(3) The parties may also choose law for other insurance contracts without limitation unless this is precluded by an applicable rule of the European Union.”

III) The aspects regulated in Section 101 are an example of a matter that remained unregulated due to disagreement: “Non-contractual relationships arising from violations of privacy and personal rights including defamation shall be governed, according to the choice of the affected person, by the law of the State in which the affected person has his/her habitual residence (registered office) or by the law of the State in which the tortfeasor has his/her habitual residence (registered office) or the law of the State in which the result of the violating conduct occurred if the violating person could foresee this. If the affected person fails to determine the governing law, the law to which the case is most closely related shall apply.”

**Conclusion:** In this respect, contractual rights are currently most elaborated. Given the unclear political situation and uncertainty about the time of adoption of the basic regulation – the Civil Code\(^\text{11}\), it is impossible to foresee the time of adoption of the new Act on private international law. Thus, it is

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\(^{10}\) See Art. 25 of Regulation No. 593/2008/EC on the law applicable to contractual obligations (Rome I) and Art. 28 of Regulation No. 864/2007/EC on the law applicable to non-contractual obligations (Rome II)

\(^{11}\) The Draft of the new Czech Civil Code was ratified by the Czech government on 18th May 2011 and is going to be pass along to the Parliament.
reasonable to expect further partial changes in the draft Act resulting from the adoption of additional EU Regulations concerning conflict-of-law rules.

Re b) A special problem lies in the treatment of Directives that, in order to meet their objectives, include requirements in the area of conflict-of-law rules or international procedural law. This codification should be aimed at concentrating all conflict-of-law rules into a single code, if possible. The author of the draft Act recommended that there be an annex to the Act with a list of Directives or that the transposition of Directives with certain requirements in the area of private and international law and procedure be concentrated in a separate law so that there is no need to amend the basic code as a response to each change. This proposal has not been further detailed and the last version of the draft contains neither any variant of the annex nor any mention of a special law. Only individual provisions contain certain requirements following from “directive law”, where necessary. For example, Section 83 reflects the requirements of Directives No. 98/26/EC, No. 2002/47/EC, 2004/25/EC.

Re c) The existing regulation and the new draft both reflect the existing EU Regulations in the area of procedural law, particularly Brussels I\(^\text{12}\). The draft contains certain provisions that the author considers important for simplification of the applicant’s position. This applies particularly to the possibility of applying for enforcement itself in an application for recognition and declaration of enforceability. This is regulated in Title IV. As an example, the following provisions are embodied in Section 19 of the draft:

(1) Together with an application for declaring enforceability (exequatur\(^\text{13}\)), an application may be lodged for ordering enforcement of a judgment or distraint under some other legal regulation. In that case, the court shall rule on both applications through a single judgment by means of separate operative parts that must be substantiated. The judgment must be substantiated even if it pertains to only one of the applications.

(2) If the court proceeded pursuant to paragraph 1 above and if a directly applicable rule of the European Communities or an international treaty stipulates a time for appealing against the judgment on recognition or declaration of enforceability of foreign judgments which is longer than the time stipulated by some other legal regulation for lodging an appeal against a judgment ordering enforcement of a judgment or distraint, the longer time shall also apply to the lodging of the appeal against the judgment ordering enforcement of the decision or distraint.

(3) If the appellate court examines the reasons for which it is possible not to recognise a foreign judgment and, on the basis of the relevant regulations of the European Communities or an international treaty, the court of first instance could not examine these reasons, then, if these reasons suggest non-recognition of the foreign judgment, the court of appeal shall change the judgment of the court of first instance in that it refuses the application.

(4) The judgment cannot come into legal force in respect of the operative part ordering enforcement of the judgment or distraint earlier than in respect of the operative part whereby the judgment is declared unenforceable.

Conclusion: Given the possible amendment to the basic Regulation, i.e. Brussels I\(^\text{14}\), it is a question to what extent this provision will be superfluous or to what extent it will require additional reworking.

\(^{12}\) Regulation No. 44/2001/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I)

\(^{13}\) Authors notice

5. Some other related issues

We consider it appropriate to mention some other issues that are regulated in the Act, either on the basis of their regulation in European legislation or, in contrast, due to the fact that they are not yet regulated in European legislation. The Czech legislator found it important to address them. Both issues have in common that they are concerned with treatment of foreign law – on the one hand, procedural treatment of foreign law in general and, on the other hand, treatment of public law.

**Procedural treatment of foreign law.** The relevant aspects involve a question of whether or not:
- foreign law is applied *ex officio* or at instigation of a party;
- foreign law is treated as law or as a fact;
- from another point of view, the preceding question is related to the question whether or not the judge him/herself must ascertain the content of foreign law;
- it is possible to lodge an appeal against wrong interpretation and application of foreign law, and
- how foreign law is treated in appellate instances.

In the Czech Republic, there has traditionally been a consensus that foreign law is to be applied *ex officio* where the relationship meets the conditions for applying foreign law – the impact of Section 1 of the Act on Private International Law. The jurisprudence traditionally shared this view and it is also expressly stipulated in the new draft in the first sentence of Section 23: "Unless the provisions of this Act imply otherwise, foreign law to be applied under the provisions of this Act shall also be applied without proposition (ex officio) in the manner in which it is applied in the territory where the law is applicable".

The second issue – foreign law as a fact or as law – is resolved in that foreign law tends to be perceived as law. The doctrine and the express stipulation in Section 23 (2) of the draft resolve this issue clearly: "Unless hereafter stipulated otherwise, foreign law to be applied under the provisions of this Act shall be ascertained automatically without proposition (ex officio). The court, or some other public authority, shall take every reasonable step to ascertain it. ........".

This question can also be formulated as to whether, in case of incorrect ascertaining or incorrect application of foreign law, the same remedies can be used as those in case of breach of national rules of law. In this respect, Kučera infers that this situation is the same as that when national rules are breached. It is thus possible to invoke the grounds of an error of law pursuant to Section 241a (2) (b) of the Code of Civil Procedure. However, this is a rather theoretical consideration. There has not been a single case of this kind in the decision-making practice and there is no opposing view in literature.

The new draft also regulates the matter of treatment of foreign law where primarily public law is concerned. The regulation of this aspect also used to be left to jurisprudence. Specifically, the following rules can be mentioned:

- **Section 3 Overriding mandatory rules**. “The provisions of the present Act do not prevent application of the provisions of the Czech laws that must always be applied, within the scope of the

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13 For more details, see Rozehnalová, N., Závazky ze smluv a jejich právní režim (se zvláštním zřetelem na evropskou kolizní úpravu). [Contractual Obligations and their Legal Regime (with special emphasis on European conflict-of-law-rules)]. Brno: Masaryk University, 2010. p. 242–251


15 An application for appellate review may be lodged only on the following grounds:
   a) the proceedings have a defect that could result in an incorrect decision on the merits of the case,
   b) the decision is based on an error of law.”

16 *Lex fori* overriding mandatory rules
subject thereof, whatever the law governing the rights and obligations affected by the effects of the application of the relevant rules."

- **Section 23, the second sentence**19: “Effect shall be given only to those rules that would apply to decision-making in rem in the territory where the law is applicable, whatever the systematic classification or public-law nature, unless the rules are at variance with the overriding mandatory rules of the Czech law”.

- **Section 25, Overriding mandatory rules of other foreign law**20: “The provisions of third-country law that shall not be given effect pursuant to the provisions of this Act, but are to be applied under the law of the foreign State whatever the law governing the rights and obligations in which the effects of application of the provisions are manifested, may be applied at the request of a party, if the rights and obligations in which the effects of the application of the rules are manifested have a sufficiently important connection with the relevant foreign country and if the application of the provisions is fair, having regard to the nature and purpose of the rules or the consequences of application or non-application of the rules particularly for the parties. The party seeking to rely on such regulations must demonstrate validity and content thereof.”

**Classification.** This institute of PIL has not yet been explicitly regulated by the Czech law. The Draft changes it by the provision that: “Legal classification of a legal affair or question in order to selection of the applicable conflict law provision to determine the law applicable is conducted according to the Czech law (lex fori).” While the Czech Republic is a member state of the EU the explicit reference to the Czech law might be problematic in some cases. When applying EU legal provisions the authorities of member states are obliged to interpret the EU legal provisions autonomously, i.e. according to the objectives and scheme of the rule which is interpreted and to the general principles which stem from the corpus of the national legal systems21. Even though it is a rule concerning interpretation it is difficult sometimes to separate the effects of interpretation and legal classification. EU legal rules create new legal institutes and the borders among classification, interpretation and creation of new institutes might seem brumous in some cases. EU member states authorities have to be aware of it and the clear instruction of usage of Czech law might be confusing or even misleading for the Czech authorities.

### 6. Conclusion

Private international law has become a branch that allows various comparisons; for example, with reference to the plurality of sources of law, mutual comparison can be made of three basic pillars (sources) of law (European legislation, international treaties and national rules of law). A comparison reflecting the shift from national to regional regulation could also be used and the same is true of several others. The Czech draft Act on Private International Law has not yet been finalised. There are currently two reasons for this: one lies in the possible shifts in the content of the basic regulation, i.e. the Civil Code, from which the draft follows in spite of the necessary European basis, European classification and European terminology building. The other reason lies in the upcoming development of the European Area of Justice where additional Regulations with an influence on this area can be expected in the future.

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19 *Lex causae* overriding mandatory rules
20 Third state overriding mandatory rules
21 ECJ Case 29/76 LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol
The Impact of European Family Law on National Legal Systems

1. Notion of European Family Law

“European Family Law” is a notion embracing quite different approaches to what exactly a family is supposed to be. “Family” can be and has been regarded as the unique union between husband and wife, whose legal formalization is marriage, protected by the European Convention on Human Rights (the “ECHR”). "Family" is also the union between a man and a woman living together in a marriage-like setting, protected by the ECHR. “Family” may also be any other lifestyle characterized by “family life” in the sense of Art 8 ECHR. The understanding of the term in the Europe of the 47 Member States of the Council of Europe is undoubtedly not homogeneous, nor is it uniform within the European Union.

Throughout Europe, marriage is a formalized union between husband and wife. Married couples can adopt children; they also have access to medically assisted procreation. Their relationship is protected and actively supported by national legislators as well as on the European level. In some countries, same-sex couples also have access to “marriage” and may even, to a varying degree, adopt children (step-child adoption or joint adoption). In all European countries, some rights are conferred upon persons living together. Their family life is also protected. In the past two decades, many States have introduced legally recognized forms of “family” by introducing “registered partnerships”. This notion stands for many different forms of “family”. These forms vary from status-like contracts (e.g. Pacte civil de solidarité [PACS] in France) to unions highlighting economic rights (e.g. in Luxembourg, Belgium), or to marriage-like partnerships (e.g. in the Scandinavian countries, Great Britain, Germany, Austria, Switzerland and others).2

Among the 27 EU-Member States, 14 have introduced registered partnerships so far: Austria, Belgium, the Czech Republic, Denmark, Germany, Finland, France, Hungary, Ireland, Luxembourg, the Netherlands, Slovenia, Sweden and the United Kingdom. Sweden (as well as Norway and Iceland) introduced same-sex marriage and abolished registered partnership. Denmark, Finland and Luxembourg will most probably follow them. The Netherlands (2001), Belgium (2003), Spain (2005) and Portugal (2010) have introduced same-sex marriage in addition to the already existing forms of partnerships.

With regard to children, the first revolution since the seventies has certainly been the equal treatment of legitimate and illegitimate children. This development is not yet fully completed, but there seems to

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* Bea Verschraegen*


be a European consensus that they should not be discriminated against. A further development has been the development of rights and duties of a step-parent towards the children of his/her partner. Here, national rules still differ considerably. In some countries, the step-parent may have some parental custodial rights and duties and even the obligation to pay support as long as the relationship goes on. Adoption is another important issue. National rules vary considerably with regard to step-child adoption, adoption by couples living together and by same-sex partners. Finally, access to medically assisted procreation has given way to blur the traditional concept of a family united by marriage and blood relationship much more than the concept of adoption ever did.

We end up by encountering a great variety of relationships in which individuals have family life according to Art 8 ECHR. In some countries, their sex is of no importance; the blood ties are – in most of the countries – not decisive, and relationships may change their composition over time. This means that children may meet different adults with whom they live together and to whom – in one way or the other – they owe respect and obedience.

Depending on how one chooses to evaluate these developments, the notion of “family” in the European context may present itself as a “bouquet of flowers” or a “decline of society”. Legislators emphasizing the positive side of these changes address them by introducing different legal patterns of “family unions”, while those upholding the “traditional family” try to prevent what most probably cannot be stopped: a radical change of society.

From a legal point of view, the following developments paved the way to fundamental changes of marriage and family law: the decriminalization of behavior touching upon “private and family life”, the prohibition of discrimination on grounds including sexual orientation, and the recognition of rights, duties and relationships beyond marriage.

This can be observed on the level of the Council of Europe – more precisely in the case law of the European Court of Human Rights (the “ECtHR”) – as well as on the level of the EU, its legislation and case law.

2. The Impact of the ECtHR

2.1. Relevant Articles

Art 12 ECHR establishes the right of heterosexual couples to marriage. As things stand today, the ECHR does not guarantee the right of same-sex couples to marry, nor does it guarantee the right to adopt children. The right to private and family life according to Art 8 ECHR is not limited to married couples, but may also cover singles with children and same-sex parents or couples living together. Art 14 ECHR prohibits any discrimination on the grounds of i.a. sexual orientation.

3 Denmark: adoption without restrictions since 2010; Norway: idem since 2009; Iceland: idem since 2006; Sweden: idem since 2003; Finland: step-child adoption since 2009.

4 This paper does not deal with the UN-Convention on the Rights of the Child, see i.a. B. Verschraegen, Die Kinderrechtekonvention (Manz 1996); neither will it focus on other conventions elaborated by the Council of Europe or with the Hague Conventions.
2.2. Case Law

It is typical for the ECtHR to underline that the ECHR is a living instrument and must be interpreted in an evolutive-dynamic way in the light of present-day conditions.5 The ECHR is an instrument which is designed to maintain and promote the ideas and values of a democratic society,6 whereby a spirit of pluralism, tolerance and broadmindedness shall govern such interpretation.7

Transsexuals differ from homosexuals in that they have changed their sex after having gone through severe treatment and surgery. The latter do not change their sex; quite to the contrary, they stress the importance of their existing sex. Yet, the case law on transsexuals has an impact on the legal approaches to the family life of homosexuals. Among the cases dealing with transsexuals, the Goodwin-case is probably the most important one.8 In Goodwin, the ECtHR held that while Art 12 ECHR referred expressly to the right of a man and a woman to marry, it was not persuaded that at the date of the decision these terms restricted the determination of gender to purely biological criteria. There had been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. Therefore, a test of congruent biological factors at birth could no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. Furthermore, it was artificial to assert that post-operative transsexuals had not been deprived of the right to marry, only because according to the law, they remained able to marry a person of their former opposite sex. Goodwin lived as a woman and would only wish to marry a man. However, she had no possibility to do so. Therefore, the very essence of her right to marry had been infringed.

Transsexuals change their sex; they do not change their gender. They claim that their birth sex and their gender do not coincide. Thus, a sex-change is necessary to align their biological sex with their (genuine) gender. However, their chromosomes remain unchanged by the operation. Homosexuals, on the other hand, are not in any way troubled by their biological sex; quite the opposite. It is due to their sexual orientation that they wish to live in a same-sex relationship. Up until today, the ECtHR (at least indirectly) holds that it is not artificial to assert that homosexuals are not deprived of the right to marry, as, according to the law, they remain able to marry a person of another sex. In view of these arguments and with regard to the changed picture in the European landscape, it seems questionable whether this viewpoint is convincing, if one follows the arguments in the case law hitherto.9

Different cases have dealt with the prohibition of discrimination. There is no doubt that refusing custody to a homosexual in favor of the heterosexual mother purely on the grounds of his/her sexual orientation is discriminatory. The ECtHR has held so in Salguero da Silva Mouta/Portugal, a case decided in 1999.10 The Fretté-decision of 2002,11 in which adoption by a homosexual was denied on the grounds...
of his/her sexual orientation was overruled by the *E.B./France*-decision in 2009.\textsuperscript{12} Up until today, the ECtHR denied the right to marry to same-sex couples, most recently in *Schalk & Kopf* (2010), because the couple had an alternative coming close to marriage anyway.\textsuperscript{13}

3. The Impact of the EU

3.1. Legal Framework

With the *Treaty of Amsterdam*,\textsuperscript{14} the Community entered a phase of political integration.\textsuperscript{15} The European citizen has been placed in the centre of the European construction. Moreover, as the *Garcia Avello-case*\textsuperscript{16} illustrates, the European Court of Justice (the “ECJ”) has detached the concept of European citizenship from its economic imperative. Harmonization of international family law is a very sensitive subject, politically as well as legally. Reasons are that it verges on the domestic public policy-exception and that family law is by nature rooted in national legal cultures. Member States are very zealous about their competences and conceptions on family and on family law. By unifying international family law the EU is aiming for a *twofold objective*: (greater) legal certainty and simplification for the union citizen.\textsuperscript{17}

a) Charter of Fundamental Rights of the EU

The *Charter of Fundamental Rights of the EU*,\textsuperscript{18} which forms an integral part of the Treaty on the Functioning of the EU (the “TFEU”),\textsuperscript{19} provides in Art 7 with regard to “Respect for private and family life” that “(E)veryone has the right to respect for his or her private and family life, home and communications”; in Art 9 with regard to the “Right to marry and right to found a family” that “(T)he right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights” and in Art 21 which deals with “Non-discrimination” that

1. Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.”


\textsuperscript{13} *Schalk & Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010).


\textsuperscript{16} Case C-148/02 *Garcia Avello v Belgium* [2003] ECR I-11613.


In the Explanations\(^{20}\) on Art 7 of the Charter it is expressly stated that the rights guaranteed in Art 7 correspond to those guaranteed by Art 8 ECHR. In accordance with Art 52(3) of the Charter, the meaning and scope of this right are the same as those of the corresponding Article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Art 8 ECHR.

In the Explanations on Art 9 of the Charter it is said that “this Article is based on Art 12 ECHR. The wording of the Article has been modernized to cover cases in which national legislation recognizes arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides.”

In the Explanations on Art 21 of the Charter it is held that “(P)aragraph 1 draws on Art 13 EC-Treaty, replaced by Art 19 TFEU, Art 14 ECHR and Art 11 of the Convention on Human Rights and Biomedicine as regards genetic heritage. In so far as this corresponds to Art 14 ECHR, it applies in compliance with it. There is no contradiction or incompatibility between paragraph 1 and Art 19 TFEU which has a different scope and purpose: Art 19 confers power on the Union to adopt legislative acts, including harmonization of the Member States’ laws and regulations, to combat certain forms of discrimination, listed exhaustively in that Article. Such legislation may cover action of Member State authorities (as well as relations between private individuals) in any area within the limits of the Union's powers. In contrast, the provision in Art 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law. Paragraph 1 therefore does not alter the extent of powers granted under Art 19 nor the interpretation given to that Article. Paragraph 2 corresponds to the first paragraph of Art 18 TFEU and must be applied in compliance with that Article.”

Obviously, the EU does neither define marriage nor family; it rather refers to the “acquis” of the Council of Europe. The ECtHR argues that the Member States have a margin of appreciation, in some cases larger than in others. This margin of appreciation is virtually nonexistent when it comes to equal treatment of children, whereas it is wide with regard to marriage. To a growing extent, the prohibition of discrimination comes into play. Sexual orientation, for example, shall not be a legitimate reason to refuse the adoption of a child by a (single) homosexual.

b) The Brussels Regulations

The Brussels I Regulation on jurisdiction, recognition and enforcement of judgments in civil and commercial matters (Brussels I)\(^{21}\) covers “maintenance” in Art 5 para 2.\(^{22}\) The Brussels II Regulation on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental


\(^{22}\) The provision reads: “A person domiciled in a Member State may, in another Member State, be sued: (2) in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.”
responsibility for children of both spouses (Brussels II)\textsuperscript{23} – although an instrument for cross-border procedure like Brussels I – directly dealt with issues of family law. Brussels II was soon replaced by Brussels IIa,\textsuperscript{24} and in order to ensure equality for all children, the new Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding. Therefore, this was an important step towards unification of specific notions of family law.

c) The Maintenance Regulation

The next important step is undoubtedly the Maintenance Regulation.\textsuperscript{25} In order to take account of the various ways of resolving maintenance obligation issues in the Member States, this Regulation applies both to court decisions and to decisions given by administrative authorities, provided that the latter offer guarantees with regard to, in particular, their impartiality and the right of all parties to be heard. This Regulation also ensures the recognition and enforcement of court settlements and authentic instruments without affecting the right of either party to such a settlement or instrument to challenge the settlement or instrument before the courts of the Member State of origin. The fact that a defendant is habitually resident of a Third State no longer leads to the non-application of Community rules on jurisdiction, and there should no longer be any referral to national law. This Regulation therefore determines the cases in which a court in a Member State may exercise subsidiary jurisdiction. The rules on conflict of laws\textsuperscript{26} determine only the law applicable to maintenance obligations, but not the law applicable regarding the establishment of family relationships on which the maintenance obligations are based.\textsuperscript{27} The establishment of family relationships continues to be covered by the national law of the Member States, including their rules of private international law. The only object of the recognition of a Member State of a decision relating to maintenance obligations is to allow the recovery of the maintenance claim determined in the decision. It does not imply the recognition by that Member State of the family relationship, parentage, marriage or affinity underlying the maintenance obligations which gave rise to the decision. The Regulation does not define the notion of “spouse”. At the end of the day, it will be up to the ECJ to interpret this term.

The Maintenance Regulation applies since 18 June 2011, “subject to the 2007 Hague Protocol being applicable in the Community by that date” (Art 76 para 3). The “Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations” (the “2007 Hague Protocol”) has not yet entered into


\textsuperscript{26} Art 15 (Determination of the applicable law) reads: “The law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (hereinafter referred to as the 2007 Hague Protocol) in the Member States bound by that instrument.”

\textsuperscript{27} Art 22 (No effect on the existence of family relationships) reads: “The recognition and enforcement of a decision on maintenance under this Regulation shall not in any way imply the recognition of the family relationship, parentage, marriage or affinity underlying the maintenance obligation which gave rise to the decision.”
force,28 but it was ratified by the European Community. The European Community declared29 “that it will apply the rules of the Protocol provisionally from 18 June 2011,” the date of application of the Maintenance Regulation, and “that it will apply the rules of the Protocol also to maintenance claimed in one of its Member States relating to a period prior to the entry into force or the provisional application of the Protocol in the Community in situations where,” under the Maintenance Regulation, “proceedings are instituted, court settlements are approved or concluded and authentic instruments are established as from 18 June 2011, the date of application of the said Regulation.”30

d) The Divorce Regulation
The ("Rome III") Regulation of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation31 will apply from 21 June 2012 in the 14 Member States which now participate in the enhanced cooperation (Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia).32 It will embrace proceedings instituted and agreements of the kind referred to in Art 5 (choice of the applicable law by the spouses), concluded as from 21 June 2012. Effect shall also be given to an agreement on the choice of the applicable law concluded before that date, provided that the agreement complies with Art 6 and 7 (rules governing material and formal validity of the agreement).33 The Regulation shall be without prejudice to agreements on the choice of law concluded in accordance with the law of a participating Member State whose court is seized before 21 June 2012.34 As becomes clear, the Regulation does not unify the different concepts of divorce, because of possible cultural constraints. In addition, preliminary questions such as legal capacity and the validity of marriage, the effects of divorce or legal separation of property, name, parental responsibility, maintenance obligations or any other ancillary measures will be determined by the conflict rules that are applicable in the participating Member State concerned.

The Regulation provides for a limited right to choose the applicable law. According to Art 5 para 1, the spouses may choose:

- the law of the State where they are habitually resident at the time the agreement is concluded; or
- the law of the State where they were last habitually resident at that material time; or


29 In accordance with Art 24 of the Protocol, “that it exercises competence over all the matters governed by the Protocol. Its Member States shall be bound by the Protocol by virtue of its conclusion by the European Community.” This does not include Denmark by virtue of Art 1, 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, and the UK by virtue of Arts 1, 2 of the Protocol on the position of the UK and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community.


32 Art 21 para 2 of Reg No 1259/2010.

33 Art 18 para 1 of Reg No 1259/2010.

34 Art 18 para 2 of Reg No 1259/2010.
the law of the State of nationality of either spouse at the time the agreement was concluded; or
the law of the forum.

According to Art 8, the applicable law in the absence of such choice (the "proper law") will be the law of the State
(a) where the spouses are habitually resident at the time the court is seized; failing that
(b) where the spouses were last habitually resident, provided that period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; failing that
(c) of which both spouses are nationals at the time the court is seized; failing that
(d) where the court is seized.

The Regulation does not define the notions of "spouses" and "marriage". It may be assumed that same-sex spouses and marriages fall within the scope of application of Rome III, whereas other forms of unions, such as registered partnerships or cohabitation, do not.

e) The Proposals on Matrimonial Property and on Property Consequences

The Green Paper on Conflict of Laws in Matters concerning Matrimonial Property Regimes\(^35\) defines "matrimonial property regime", "registered partnership" and "non-marital cohabitation" as follows:

*Matrimonial property regime*: Matrimonial property rights of the spouses. Matrimonial property regimes are the sets of legal rules relating to the spouses' financial relationships resulting from their marriage, both with each other and with third parties, in particular their creditors.

*Registered partnership*: Partnership of two people who live as a couple and have registered their union with a public authority established by the law of their Member State of residence. For the purposes of the Green Paper, this category will also include relationships within unmarried couples bound by a "registered contract" along the lines of the French "PACS".

*Non-marital cohabitation* (living together): Situation in which two people live together on a stable and continuous basis without this relationship being registered with an authority.

The Green Paper explains that "(T)o ensure that all property aspects of family law are examined, the Green Paper addresses issues touching both on matrimonial property regimes and on the property consequences of other forms of union. In all the Member States, more and more couples are formed without a marriage bond. To reflect this new social reality, the Mutual Recognition Programme states that the question of the property consequences of the separation of unmarried couples must also be addressed. The area of justice must meet the citizen's practical needs."\(^36\)

The aim of the Green Paper is to unify Private International Law rules in matters governing matrimonial property regimes. However, the notion of "marriage" is unclear as to the question of whether it also embraces same-sex marriages. The Green Paper adopts a broad concept of "registered partnerships", because it also includes the French PACS, which is contractual by nature; it does not differentiate further between the different models of "registered partnerships". The legal landscape in


Europe is far from being homogenous;\(^{37}\) the same is true for de facto unions and, of course, for property law. The last word has definitely not been spoken yet in this context. It has been suggested that it may be wiser to provide for an optional model for a marriage and/or cohabitation agreement to be chosen by the couple as the applicable law to their property relations.\(^{38}\)

The EU, however, has picked a different option. In the Communication from the Commission "Bringing legal clarity to property rights for international couples",\(^{39}\) the Commission expresses its wish to overcome the obstacles that still impede the full exercise of Union citizenship rights, in particular the right to free movement. One of these obstacles is the uncertainty surrounding property rights of international couples in cross-border situations. The Commission promised in the Action Plan Implementing the Stockholm Programme that it approved on 20 April 2010\(^{40}\) to propose initiatives. More precisely,

- a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes;\(^{41}\)
- a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.\(^{42}\)

As becomes clear, the first proposal addresses property regimes in marriage. With a view to Art 21 of the Charter of Fundamental rights of the EU, the proposal is deliberately gender neutral and may, therefore, apply to heterosexual as well as same-sex marriages.\(^{43}\) The same is true for the second proposal which deals with the property consequences of registered partnerships, most of them available to same-sex partners, some of them also to partners of different sex.\(^{44}\) Therefore, a "registered partnership" is defined in Art 2 lit b of the Proposal as a "regime governing the shared life of two people which is provided for in law and is registered by an official authority".

The proposals are offered "as a package, to underline the Commission's determination to facilitate the daily lives of international couples regardless of whether they have entered into a marriage or a registered partnership".\(^{45}\) Neither Proposal touches upon the substantive law on matrimonial property regimes and

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\(^{39}\) Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Bringing legal clarity to property rights for international couples' COM (2011) 125 final, p 3.


\(^{43}\) See COM (2011) 125 final, p 6

\(^{44}\) See COM (2011) 127 final, ch 1, Art. 2, lit b (p 17).

the property consequences of registered partnerships of the Member States, because this lies within the national competence of the Member States.

With regard to questions of jurisdiction "consistency is sought with the existing or proposed European rules on jurisdiction in other Union legislative instruments." When it comes to the choice of law, however, the proposals differentiate between marriage on the one hand and registered partnership on the other. This is due to "the specific features of each institution." Married spouses are given a limited choice between the law of their common habitual residence and that of their country of nationality (Art 16 of the Proposal-Marital Regimes). In the absence of a choice, the applicable law will be determined according to the objective attachment (Art 17 of the Proposal-Marital Regimes). Registered partners can only choose the law of the country where their partnership was registered (Art 15 of the Proposal-Registered Partnerships). This solution seems sound since the national features of registered partnerships vary greatly. The provisions on recognition and enforcement are similar to those of the Draft Regulation on Successions. This means that decisions made in one Member State will be recognized before the courts of the Member State where enforcement is sought on the basis of exequatur.

f) The Proposal for a Regulation on PIL aspects of Succession and Wills
The "Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession" follows the traditional pattern. There is a lack of harmonization of law in the substantive field, but not in the field of procedure and conflict rules.

The Commission explains:
"The proposal provides for the application of a single criterion for determining both the jurisdiction of the authorities and the law applicable to a cross-border succession: the deceased's habitual place of residence. People living abroad will, however, be able to opt to have the law of their country of nationality apply to the entirety of their succession. All assets making up a succession will thus be governed by one and the same law, thereby reducing the risk that different Member States will issue contradictory decisions. Likewise, a single authority that of the country of habitual residence will be competent for settling the succession; it will, however, be able to refer the matter to the competent authority of the country of nationality where the latter is better placed to hear the case. Lastly, there will be full mutual recognition of decisions and authentic acts in succession matters. A European Certificate of Succession will also be created to enable a person to prove their capacity as heir or their powers as administrator or executor of a succession without further formalities. This will represent a considerable improvement on the present situation where people sometimes have great difficulty exercising their rights. The result will be faster, cheaper procedures."

48 This rule applies to all forms of registered partnerships, in whatever State they are registered, not merely to partnerships registered in a Member State; so-called “universal application” (Art 16 of COM (2011) 127 final).
g) The Proposal on Equal Treatment
The "Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation"52 aims at eliminating discrimination on grounds of i.a. sexual orientation in the fields of social protection, social advantages, education and goods and services, including housing.53 Its material scope of application is embodied in Art 3 of the Proposal, according to which the proposed Directive is "without prejudice to" i.a. "national laws on marital or family status and reproductive rights". This reflects, of course, the controversial opinions on same-sex marriage, the adoption by such couples and their access to reproductive rights.54

h) The Directive on Free Movement and Residence
The "Directive 2004/38 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States"55 gives the right to non-community family members of an EU-citizen to move and reside freely within the EU, independently of whether those family members have resided in the EU before. This right does not depend on the place and the time of marriage. The notion "family member" is defined in Art 2 para 2 and includes:

(a) the spouse;
(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
(c) the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b);
(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);"

i) The Directive on Family Reunification
The Directive 2003/86 on the right to family reunification does not go any further with regard to nationals of third countries. The ECJ considers the Directive to be in conformity with Union law. Art 4 defines the notion of family members as follows:

According to Art 4 para 1, family members are members of the nuclear family, which means the sponsor’s spouse as well as minor children of the sponsor or spouse. Irrespective of the exceptions

59 Art 4 para 1: “(a) the sponsor’s spouse; (b) the minor children of the sponsor and of his/her spouse, including children adopted in accordance with a decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State or must be recognized in accordance with international obligations; (c) the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. Member States may authorize the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement; (d) the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her. Member States may authorize the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement. The minor children referred to in this Article must be below the age of majority set by the law of the Member State concerned and must not be married. By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorizing entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.”
Art 4 para 2: “(a) first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin; (b) the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health.”
Art 4 para 3: “the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2), the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons. Member States may decide that registered partners are to be treated equally as spouses with respect to family reunification.”
Art 4 para 4: “In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorize the family reunification of a further spouse. By way of derogation from paragraph 1(c), Member States may limit the family reunification of minor children of a further spouse and the sponsor.”
Art 4 para 5: “In order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her.”
Art 4 para 6: “By way of derogation, Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorize the entry and residence of such children on grounds other than family reunification.”
60 A “sponsor” is a third country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her (Art 2 lit c).
provided by the Directive, Member States have no margin of appreciation with regard to family reunification of the nuclear family.61

In case of a polygamous marriage the reunification of only one spouse is permitted. Member States may fix a minimum age for both sponsor and spouse. Apart from the fact that Islamic countries tend to advise men not to marry more than one woman for economic reasons, there remains some ambiguity in this Directive. The entry of spouses (a husband and one of his spouses) does imply the recognition of this “segment” of the marriage, while at the same time excluding, and thus discriminating, the other spouses whom the respective husband has lawfully married abroad. This is also true for the children of his other spouses who are refused entry, even though they are regarded as legitimate children.

Minor children are individuals under the nationally set age of majority who are not married. But States that have already provided for specific legislation on the date of implementation of the Directive may require that children over the age of 12, arriving independently of the rest of their family, have to meet national integration conditions.

According to Art 4 para 2, Member States may define as family members – in addition to the nuclear family members – dependent parents and unmarried adult children of the sponsor or his/her spouse as well as an unmarried partner (duly attested long-term relationship or registered partnership) of the sponsor. Member States are required to authorize the entry and residence of the parents of a recognized minor refugee without the conditions of dependency and lack of proper family support.

Finally, according to Art 4 para 2 and 3, Member States can, but must not authorize the entry and residence of “other family members.”62

j) Green Paper on the Effects of Civil Status Records

The Green Paper “Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records”63 explores the possibilities of reducing the many obstacles to the right of free movement of citizens and the right to be treated like a national in the Member State of residence, specifically the problems related to the requirement to present public records in order to provide the proof needed to benefit from a right or to comply with an obligation. These obstacles to the rights mentioned are not limited to the actual documents as such, but also concern their effects. Two proposals which are based on the Stockholm programme64 are envisaged for 2013. They will deal with “free movement of documents by eliminating legislation formalities between Member States” and with “recognition of the effects of certain civil status records”. Indeed, in this context, the EU can rely primarily on the work achieved by the “International Commission of Civil Status” (CIEC)65. The organization has elaborated a series of Conventions dealing with civil status records.66

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3.2. Case Law of the ECJ

The ECJ has repeatedly dealt with the notions of “marriage” and “family” in the context of anti-discrimination as well as regarding the right to free movement of persons. In this context, it is correct to say that if a EU-Member State provides for specific rights (and duties) to national same-sex couples, those rights must be extended to other EU-nationals, too. This does, however, not apply to nationals of third countries, i.e. non EU-Member States.67

The Grant-case68 dates back to 1998. The applicant argued that depriving same-sex couples from benefits which were granted to married husbands and wives constituted discrimination on grounds of sexual orientation, which the ECJ denied in this case. The ECJ argued that there was no consent among the Member States as to whether stable same-sex relationships were to be regarded as heterosexual marriages or other stable relationships of persons of different sex. In the D & Sweden/Council-case from 2001, the ECJ denied to accord a household allowance, granted by the EU Staff Regulations to “married officials”, to a same-sex couple. In the Eyüp-case,69 however, a heterosexual couple married, got divorced and remarried. The question was whether the period during which the couple simply lived together without any formal status could be regarded as “family life”. This was confirmed by the ECJ. The ECJ should reach an identical solution in cases of same-sex marriage.

The ECJ has also dealt with the right to move and reside freely in connection with Private International Law relating to surnames. Garcia Avello70 and Grunkin-Paul71 are both remarkable decisions. The right to free movement was detached from economic considerations. In the Garcia Avello-case, the ECJ held that the children with dual Belgian and Spanish nationality have the right to be registered with the surname of both parents, following the Spanish tradition. Their effective nationality, however, was definitely Belgian. Grunkin-Paul, a German national as his parents, was born and grew up in Denmark. He was registered under the composed surname of his parents according to Danish law. German officials refused to register this name, because German law did not allow such composed surname. The effect of this would have been that the child would be required to bear different surnames in different Member States. Thus, the ECJ held that even if the case concerns matters that fall within the competence of the Member States, they must comply with EU law – e.g. prohibition of discrimination, free movement of Union citizens – unless the case is a purely internal one with no link to Community law. This was definitely not the case here. Therefore, the right to move and reside freely precludes Member States in cross-border cases to apply their own national law instead of the applicable law of another State simply because it is different. In a very recent case – Ilonka Sayn-Wittgenstein/Landeshauptmann von Wien72 – the ECJ held that Member States are not precluded from refusing all the elements of the surname (here: title of nobility, prohibited under Austrian constitutional law) of a national of that State as determined by the law of another Member State in which the national resides (here: an Austrian national residing in Germany; title acquired through adoption) in spite of Art 21 TFEU (free movement of persons), provided that such refusal is justified on public policy grounds. This is the case if such measures are “necessary for the protection of the interests which they are intended to secure and are proportionate to

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68 Case C-249/96 Grant v SW Trains [1998] ECR I-621.
71 Case C-353/06 Grunkin-Paul v Standesamt Niebüll [2008] ECR I-7639.
the legitimate aim pursued.” Austria abolished nobility by law of 3 April 191973 with constitutional status74 in order to implement the principle of equal treatment. The refusal of the title of nobility (“the noble elements of a name”, such as “Fürstin” and “von”) by the Austrian authorities thus lies within their margin of appreciation and is not disproportionate in order to attain the objective of protecting the principle of equal treatment.

The Metock and Others/Minister for Justice, Equality and Law Reform-case75 concerned free movement of third country-citizens which are family members of a Union citizen. The ECJ “reconsidered” its previous case law76 and held that the right to freely move and reside of such family members is not conditional on their having previously resided in a Member State. Indeed, this concept was later expressly provided for in the Directive 2004/38.77 A non-community spouse of a Union citizen accompanying him/her “can benefit from the Directive, irrespective of when and where their marriage took place and of how that spouse entered the host Member State.”78 In the Tadao Maruko-case,79 the ECJ decided on the basis of Directive 2000/7880 that not only married couples, but also same-sex partners have the right to receive the survivors’ benefits under a compulsory occupational pension’s scheme. Thus, it is safe to assume that cases like Grant/SW Trains (1998) and D & Sweden/Council (2001) would be decided differently today.81 And indeed, the recently decided case Römer/Freie und Hansestadt Hamburg, which deals with retirement pensions that are higher for married couples than for registered partners, seems to point in this direction.82 The ECJ held that a different (more advantageous) basis for calculating pensions for married couples discriminates against same-sex couples living in registered life partnerships on the grounds of sexual orientation.

4. The Endeavours of Private Initiatives

In 2001, the “Commission on European Family Law” (CEFL) was established on the private initiative of family academics. The main objective of this group is the creation of “Principles of European Family Law

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73 Gesetz über die Aufhebung des Adels, der weltlichen Ritter- und Damenorden und gewisser Titel und Würden (“Law on the abolition of the nobility, the secular orders of knighthood and of ladies, and certain titles and ranks”), StGB 1919/211, 1920/1.
74 Art 149 para 1 of the Austrian Federal Constitutional Law.
79 This is, of course, also due to the new legal sources applying to these cases, see Dir 2000/78/EC and Council Regulation 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities [2004] OJ L124/1.
that are thought to be the most suitable for the harmonization of family law in Europe". One of the aims of this commission is the "search for the common core for the solution of several legal problems on the basis of comparing the different solutions provided by the family laws of the various European jurisdictions." The CEFL has so far formulated model "Principles of European Family Law" on "Divorce and Maintenance between former Spouses"; "Parental Responsibilities"; and "Property Relations between Spouses".

5. Conclusion

It can be observed that to a growing extent, States and European institutions have changed the notion of "family" and "marriage". Nine European States have introduced same-sex marriage, and many others have enacted laws formalizing same-sex partnerships. Some of these laws allow adoption, others do not. Many States have amended their national law in order to confer some rights to same-sex couples. Very few States did nothing at all. Statistical data also shows that divorce rates are enormous; hence, marriage is – in practice – certainly not a life-long commitment any more. More and more people choose to simply live together without legal commitment, and more and more homosexual people tend to out their sexual orientation even in countries that are hesitant to introduce specific rules.

There surely is societal and political pressure. The legal concept of "family" and "marriage" has become highly controversial. Whether such "pluralism" is desirable or necessary in a modern society is a separate question. Opponents of a changed understanding of "family" claim that society will be destabilized when traditional concepts of "family" and "marriage" are blurred; proponents point out that the concerned same-sex couples wish to have a legally formalized stable relationship, and hence would contribute to the stabilization of society.

The changing patterns of family life also influence the perception of children. Parents choose new partners who already may have children, as well. Children are facing challenges in these patchwork families, for they have to find some way to build up a parent-like relationship with the respective new partner of their custodial parent. This is reality. It may very well be that the hostility of legislators towards these changed patterns of family and family life which manifests by not legally recognizing them could have negative drawbacks on the children themselves. They grow up in an environment which is wanted and enacted by private individuals, but not legalized by law; hence, they must feel extremely uncomfortable. Yet, not everything designed by factual situations must be supported by law. At the end of the day, what is in the best interest of the child depends on the situation at stake. Lawyers also rely on the opinions of psychologists and psychoanalysts, who have controversial views, as well.

As for the Europe of the Council of Europe, counting 47 Member States, it is probably a matter of time before some degree of unification is achieved. Art 1 para 1 of the Statute of the Council of Europe states that "The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress." The ECHR is the most important human rights instrument and lies


at the core of all discussions on “family” and “marriage”. The more States provide for legal patterns dealing with family forms which differ from traditional marriage and family, the less likely it is that the current margin of appreciation accorded to the Member States in this matter will be upheld.

The EU has a different approach: The fundamental freedoms, such as free movement of persons and services, along with the prohibition of discrimination, allow a pragmatic approach to family matters. All States are equal, and no national should be discriminated against in another EU-Member State. The attempt of the EU to harmonize the law in family matters has led to very contradictory reactions. Opponents advance the cultural constraints argument by saying that family law is simply unsuitable for deliberate harmonization due to the strong cultural and historical constraints that lead to a lack of shared values and objectives, whereas the (moderate) proponents reject the cultural constraints argument by claiming that the general similarity at the level of ideologies and morals between all countries in Europe is overwhelming, and that legal cultures in Europe do not possess a unique national character, although there are some differences in family culture and ideology that cannot be disregarded altogether.

The analysis of the various legal acts and proposals of the EU demonstrate that the EU turns out to be a very wise actor: No amendments of substantive law are envisaged, but, instead, the introduction of harmonized rules on Private International Law and the mutual obligation to recognize and enforce is pushed forward; this is also done on the level of “enhanced cooperation”. These developments will and must influence the European Family Law and the Family Law in Europe.

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Grega Strban*

Social Security of EU Migrants – an Interplay between the Union and National Laws

1. Introductory remarks

Social security is first and foremost regulated by national law, which takes into account various historically conditioned and rather distinctive structural and cultural elements and policy preferences in every State. This is the reason why social security systems have not developed in a more uniform way.¹

According to the principle of territoriality, States usually limit their responsibility for providing social security to the territory on which they have sovereignty. National social security systems may apply only when social risk occurs in the State concerned, or the person has worked or resided in the State for a certain period of time, or the benefit may be paid only as long as the person remains on the territory of the concerned State.² Hence, the link is made between the territory of a certain State and the group of persons, contributions, risks or benefits governed by the legislation of this State. However, national social security systems may come into conflict with each other when people start to move from one State to another.

It could be argued that national law itself may regulate cross-border aspects to a certain extent.³ The restrictions of territoriality or nationality might be mastered with national substantive norms (e.g. making no distinction on the grounds of nationality) or collision norms (national rules of conflict). They may regulate situations of national law producing effects in other States, e.g. unrestricted export of benefits, and taking into account legal norms, events or benefits from other States, e.g. by restricting the applicability of national law (like reducing the benefits) in case of entitlements from other States.

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³ For instance, the ILO Social Security (Minimum Standards) Convention (No. 102) from the year 1952 foresees in its Article 69 that a benefit to which a person protected would otherwise be entitled may be suspended as long as the person concerned is absent from the territory of the Member State.
⁴ For instance with exporting pension benefits to another State, with which there is no bilateral, multilateral or supranational coordination mechanism in place. G. Strban, The existing bi-and multilateral social security instruments binding EU States and non-EU States, in: D. Pieters, P. Schoukens (Eds.), The Social Security Co-Ordination Between the EU and Non-EU Countries, Intersentia, Antwerpen, Oxford (Social Europe Series, vol. 20) 2009, p. 86.
In addition to the legislature, the judiciary might play an important role in applying not only international, but also solely national norms. Unilateral measures by the States are encouraged also by certain international legal instruments. However, at the end the realisation of effective solutions requires coordination (linking together of) national social security systems on the grounds of international (bilateral or multilateral) and supranational legal instruments.

**Bilateral agreements** remain the most common international social security coordination instruments between the States outside of the European Union (the “EU”) and between EU Member States and Non-EU States. They are tailored to the legal and social situations of the two contracting States, and reflect migration patterns (depending on geography, language and culture) and more or less restrictive immigration policies. This is clearly an advantage of bilateral agreements, which can at the same time present their serious drawback.

Sometimes, when issues concerning more than two states (i.e. multilateral issues) arise, they cannot be effectively dealt with in a bilateral way. Also various third country clauses in bilateral agreements send a clear signal for the need of multilateral approach.

**Multilateral social security coordination instruments** can be agreed upon between several States directly or within international organisations. However, the simpler they are (e.g. dealing only with non-discrimination principle) the more States are willing to be bound by them and more ratifications they have. The same applies vice versa. The more complex they are the fewer States are ready to ratify

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5 For instance, Paragraph 4 of Article 12 of the (initial and revised) European Social Charter encourages the Contracting States to take steps, by the conclusion of appropriate bilateral and multilateral agreements, or by other means, in order to coordinate social security systems. The European Committee of Social Rights made it clear that other means may include unilateral measures. Council of Europe, Social protection in the European Social Charter, Council of Europe Publishing, Strasbourg, 1999, p. 49.


7 According to which sometimes bilateral agreements with third countries should also be taken into account, relevant periods (of insurance or residence) completed in third countries (with which separate bilateral agreement is in place), have to be calculated, or nationals of a contracting State enjoy the same provisions of exportability of benefits (to third countries) as nationals of the State in question. G. Strban, The existing bi-and multilateral social security instruments binding EU States and non-EU States, in: D. Pieters, P. Schoukens (Eds.), The Social Security Co-Ordination Between the EU and Non-EU Countries, Intersentia, Antwerpen, Oxford (Social Europe Series, vol. 20) 2009, p. 89 ff.

8 For instance, the new Convenio Multilateral Iberoamericano de Seguridad Social, agreed in Santiago de Chile in November 2007, which came into force at the beginning of May 2011 is accessible at www.oiss.org (May, 2011).

9 For instance Interim Agreements of the Council of Europe were ratified by 21 States and the European Convention on Social and Medical Assistance by 18 States. G. Strban, The existing bi- and multilateral social security instruments binding EU States and non-EU States, in: D. Pieters, P. Schoukens (Eds.), The Social Security Co-Ordination Between the EU and Non-EU Countries, Intersentia, Antwerpen, Oxford (Social Europe Series, vol. 20) 2009, p. 104 ff.
them.\textsuperscript{10} It may also happen that when multilateral social security coordination instruments are actually applied by the national courts in a concrete case, the States no longer wish to be bound by them.\textsuperscript{11}

Among the \textit{EU Member States} the above mentioned solutions could hardly ensure the desired result. EU is a specific international organisation (with supranational powers). One of the major objectives of the EU, which should enable the functioning of the internal market, is the promotion of the free movement of EU citizens and of professionally active persons in particular. Without an effective, uniform social security coordination mechanism, such free movement could be seriously hampered.\textsuperscript{12}

2. Coordination of social security systems with a Regulation

2.1. The beginnings

The Treaty of Paris establishing the European Coal and Steel Community (ECSC) provided for the free movement of workers.\textsuperscript{13} In 1953 the preparation of a European Convention on social security for migrant workers in the coal and steel industries has been initiated. The objective was to replace the bilateral agreements concluded between the Member States. In 1955 it was acknowledged that the common market should include the entire economies of the Member States, not just the coal and steel industries. The European Convention on social security for migrant workers was already signed in December 1957, just a couple of weeks before the Rome Treaty establishing the European Economic Community (EEC) entered into force (beginning of January 1958).

Because free movement of labour was considered essential for the operation of the common market, several provision ensuring the free movement of workers were included in the EEC Treaty.\textsuperscript{14} The authors were fully aware of the disparities between social security systems (of that time and persisting also today) and they had to ensure that they would not present an obstacle to the free movement of workers.\textsuperscript{15}

Although the provisions of the Treaties of Paris and Rome were almost identical, there was an important distinction between them regarding the available legal instruments. The Treaty of Paris envisaged a multilateral convention in accordance with the traditional international law. Coordination

\textsuperscript{10} For instance the ILO \textit{Maintenance of Social Security Rights Convention, 1982} (No. 157) is a comprehensive social security coordination instrument, as it covers all nine traditional branches of social security and all coordination principles. However, it has been ratified by a rather peculiar group of not more than four States, i.e. Spain, Sweden, Philippines and Kyrgyzstan.

\textsuperscript{11} For instance, the Netherlands is the only State which has denounced the ILO \textit{Equality of Treatment (Social Security) Convention} (no. 118). It has done so in 2004, because a national court has recognised its direct applicability. Hence, awarding direct effect to an instrument can also have adverse effects, as States no longer want to be bound by it. F. \textit{Pennings}, An Overview of Interpretation issues of International Social Security Standards, in \textit{Pennings, F. (Ed.), International Social Security Standards}, Intersentia, Antwerp-Oxford, 2007, p. 19.


\textsuperscript{13} C.f. Article 69 of the Treaty establishing the ECSC, which was signed on 18 April 1951 in Paris, entered into force on 23 July 1952 (and expired on 23 July 2002).

\textsuperscript{14} C.f. Articles 48–51 EEC Treaty, corresponding to Articles 45–48 of the Treaty of the Functioning of the EU (the “TFEU”), OJ C 83/01, 3.3.2010.

of social security was thus left to the contracting States themselves. According to the Treaty of Rome the path was opened for the Council to adopt measures of Community (today Union) law.

It was decided to make the coordination rules operational as soon as possible to avoid time consuming procedure of ratification by the Member States. This determined the fate of the European Convention. The rules were passed in a form of a Regulation. In fact, it was the third ever adopted Regulation in the EU16 and the first real, legal instrument.17 The Regulation 4/58/EEC was the implementing Regulation, mainly containing rules of behaviour of the institution responsible for social security coordination.18

Choosing a Regulation over the traditional Convention has important implications. It gives the possibility to the Court of Justice of the European Union (the “ECJ”) to interpret the secondary legislation and establish its conformity with the Treaties, or in fact apply the Treaties directly to the situations under the material scope of the EU law.

One might argue that it is rather impossible to link (coordinate) social security systems with a Regulation. The latter is a unifying measure, which is generally applicable, binding in its entirety and directly applicable in all Member States.19 The attribute of direct applicability is linked to the doctrine of supremacy. In principle it is not open to Member states to interfere with the direct application of the Regulation in the national legal order.20 However, social security systems are not unified, at least not substantive social security law. Rather the part of formal social security law, governing the application of the substantive law in transnational situations is unified in all Member States.

Hence, Member States are still competent to determine the scope of insured persons, kinds and levels of benefits, obligations of the beneficiaries and procedures to enforce social security rights. At the same time it could be argued that coordination Regulations nevertheless influence the substance of social security. For instance, States ensuring protection to all residents have to broaden the personal scope of their social security system also to migrant workers (even if they reside in another Member State).21 Hence, it could be argued, that the more diverse social security systems of the growing number of Member States have become, the more complex is their coordination.22

2.2. Characteristics of further developments

It soon became apparent that the new Regulations contained number of faults and omissions. The Commission started to revise, extend and simplify the Regulation 3/58/EEC already in 1963, just five years after its introduction.23 In addition, the nature of migrations was changing with more diversified migration, and some States with distinctive social security systems joined the Union.

Therefore, new regulations, the famous Regulation 1408/71/EEC and its implementing Regulation 574/72/EEC were introduced. With many modifications, some to codify, some to oppose the judgments

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17 With due respect to regulations Nos 1 and 2, which dealt respectively with the use of languages and the form of the laissez passer to be delivered to the Members of the European Parliament. Y. Jorens, Overall concluding remarks, in: Y. Jorens (Ed.), 50 years of Social Security Coordination, Past-Present-Future, European Union, 2010, p. 237.
19 Article 288 TFEU.
21 The leading principle for determining the legislation applicable for economically active persons moving within the Union is lex loci laboris (Article 11 Regulation 883/2004/EC).
22 The same goes also vice versa. The more similar the national social security systems are, less complicated their coordination is.
of the ECJ, they have become the most complex piece of Union legislation. They have beyond any doubt developed to the most important social security coordination instruments in Europe. They were being constantly developed, especially by the ECJ, and by the legislator.\textsuperscript{24} It could even be argued that the EU social security coordination law has become the most comprehensive instrument of linking national social security systems on the Planet.

In 1998 the process of modernisation and simplification of social security coordination law began with the publication of the proposal for a new coordination Regulation by the European Commission.\textsuperscript{25} It resulted in the new regulations, coordinating social security systems of the Member States. Interestingly enough, the Regulation 883/2004/ES was passed only a couple of days before the largest enlargement of the EU so far. The 15 Member States agreed on the wording of the Regulation on the 29\textsuperscript{th} of April 2004.\textsuperscript{26} The 10 States joined the EU on the first of May 2004 and the unanimity of 25 (and later 27) Member States would be required.

The implementing Regulation was passed only in 2009, as Regulation 987/2009/EC,\textsuperscript{27} due to the required unanimity of 27 Member States. The application of the Regulation 883/2004/EC has been enabled only since May 2010. This Regulation has been modified even before entering into force.\textsuperscript{28}

After coming to force of the Lisbon Treaty in December 2009\textsuperscript{29} the unanimity requirement has been mitigated, but not completely abolished. The European Parliament and the Council may adopt measures in the field of social security which are necessary to provide freedom of movement for (mainly economically active) persons in accordance with the ordinary legislative procedure. According to this procedure the votes of qualified majority in the Council as a rule suffice for the legislative act to be passed.\textsuperscript{30}

However, a so called “alarm procedure” or “brake procedure” has been installed in the Treaty of the functioning of the EU (the “TFEU”). In case a Commission proposal would affect important aspects of its social security system (including its scope, cost or financial structure) or would affect the financial balance of that system, the Member State may refer the matter to the European Council. In this case, the ordinary legislative procedure is suspended and the European Council may accept or reject the proposal.\textsuperscript{31}

But the European Council as a rule adopts its decisions unanimously (except where the Treaties provide otherwise). Hence, the Member State referring the matter to the European Council may still block the adoption of the proposal in the European Council. The right of Member States to a veto has not been completely abolished, it has been modified.

In addition, for the economically non-active persons, a second legal basis, i.e. Article 352 TFEU remains necessary, according to which unanimity is always required. All this is an expression of reluctance of the Member States to transfer the competence in the social security field to the EU and to limit the influence of the EU law to national social security systems.


\textsuperscript{26} OJ L 200, 7 June 2004.

\textsuperscript{27} OJ L 284, 30 October 2009.


\textsuperscript{29} OJ C 306, 17 December 2007.

\textsuperscript{30} Articles. 48 and 294 of the TFEU.

3. Equality of treatment of EU nationals

The principle of equal treatment of EU nationals is one of the pillars of the EU law. This principle is mentioned also in the social security coordination Regulations. Persons covered by these Regulations have to enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals of that State.

3.1. Personal scope of the social security coordination Regulations

Covered are no longer only workers. The scope of the Regulations has been historically extended ratione personae. Self employed persons were included in 1981. The reason was lack of explicit legislative power. This deficit was in a way remedied in 2009 with the TFEU. Self employed persons were squeezed into Article 48, now covering “employed and self-employed migrant workers”. Such provision is indeed a bit odd, since self-employed persons are usually distinguished from workers, and the goal of this article is to provide freedom of movement for workers.

Civil servants, covered by special schemes were included in the personal scope of social security coordination law only in 1998, and students in 1999. The latter are no longer mentioned in the Regulation 883/2004/EC. They might be considered as non-active persons. Such classification might not always be the most appropriate one, since also doctoral candidates or even postdoctoral researchers, who are productive members of the society, might in some countries hold the status of a student.

Regulation 883/2004/EC extends its personal scope to all EU citizens (economically active or not), covered by social security system in a Member State and moving within the Union. It slightly departs from the economic origin (although non-actives persons are future or past active persons, like students or pensioners, and social assistance recipients are excluded) and strengthens the concept of EU citizenship.

32 Articles 18, 20 ff. TFEU.
31 Article 4 Regulation 883/2004/EC.
34 The first social security coordination regulations covered only “wage earners or assimilated workers” who were nationals of a Member State. The term worker was not defined by the Regulation in order to determine its personal scope. This had to be done by the ECJ. The Court emphasised that this term was to be given a Union meaning. It opted for an extensive interpretation to include to (EU) nationals who were or had been subject to a social security scheme of a Member State applicable to workers. E.g. judgment in the case C-75/63 Unger [1964] ECR 177. Due to limited scope of social security coordination regulations for the content of this meaning in a concrete case, reference is made to national legislation. This case law was reflected in the definition of employed person in the Regulation 1408/71/EEC.
36 Further development of the concept of self-employed persons by the Court, e.g. in case C-300/84 Van Roosmalen [1986] ECR 3097.
38 The new Regulation 883/2004/EC refrains from defining employed and self-employed person, but it defines a civil servant. Article 1 (d) Regulation 883/2004/EC defines ‘civil servant’ as a person considered to be such or treated as such by the Member State to which the administration employing him or her is subject.
3.2. Reinforcement of the equal treatment principle

The Regulation 883/2004/EC reinforces the equal treatment principle in two ways. Firstly, all facts, events, benefits and income should be assimilated, regardless in which Member State they have occurred.\(^{40}\) For instance, the Member State providing a pension should take into account also child raising periods or military service, if they are taken into account when establishing a pension period under its legislation, regardless in which Member State they have been completed.

The lack of a general clause of the assimilation of facts and events in the former Regulation 1408/71/EEC has been tackled by the ECJ. It argued that situations in which Member States do not give effect to events simply because they took place in another Member State is to be considered contrary to the general principle of equal treatment.\(^{41}\)

The question might arise, whether the assimilation of facts and events is always to the benefit of the person concerned. Hence, would it be admissible and desirable for the assimilation of facts to lead also to loss or reduction of the benefits?

An argument, for the assertion that assimilation always has to be only in favour of the beneficiary, is the purpose of the coordination Regulations. They should enable and promote free movement of persons and contribute towards improving their standard of living.\(^{42}\)

On the other hand, would it be contrary to this goal, when someone would (partially) lose national benefits in case a foreign fact or situation would be taken into account? Could the principle of assimilation of facts lead to negative consequences for migrant workers, or would the Petroni principle\(^{43}\) (according to which someone cannot be deprived of national acquired rights) oppose this kind of assimilation of facts?

There are strong arguments to allow application of the principle of assimilation of facts in a manner which allows the restriction of migrants’ rights. In this case the outcome could not be in favour of the moving person. Already the decision of the ECJ in the case Kenny might be an example of that, where imprisonment in another Member State was leading to a suspension of benefits in the competent State in the same manner as would the imprisonment in this State.\(^{44}\)

Not applying the assimilation of facts, might lead to far reaching consequences. For instance, for obtaining a means-tested benefit linked to a traditional social security risk, such as old age or unemployment (a so-called special non-contributory benefit), a Member State takes income into account. Not applying this principle might lead to a situation where the person would obtain a means-tested benefit, even if he or she would also receive an income from abroad.\(^{46}\)

To the same extent, the fact that, for example, a person has an insurance status in another Member State may be used to deny a pro-rata pension in the competent State, where it is a national condition that

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\(^{40}\) Article 5 of the Regulation 883/2004/EC.

\(^{41}\) Case C-290/00 Duchon [2002] ECR I-3567.

\(^{42}\) Recital 1 of the Regulation 883/2004/EC.

\(^{43}\) Described also as a principle of favourability, named after the case C-24/75 Petroni [1975] ECR I-1149.

\(^{44}\) The ECJ argued that articles 7 and 48 of the (EEC) Treaty and article 3(1) of Regulation No 1408/71/EEC do not prohibit the treatment by the institutions of Member States of corresponding facts occurring in another Member State as equivalent to facts which, if they occur in the national territory, constitute a ground for the loss or suspension of the right to cash benefits. National authorities should apply this rule without direct or indirect discrimination on the grounds of nationality. Case C-1/78 Kenny [1978] ECR 1489.

\(^{45}\) C.F. Article 70 Regulation 883/2004/EC.

a pensioner has to retire and may as a rule have no insurance status. An interesting case in this respect was recently decided by the Slovenian social courts. The first instance court held that the assimilation of facts (insurance in Austria) could lead to the denial of a pro-rata pension in Slovenia. The higher Labour and Social Court overturned this decision, arguing essentially that the coordination rules should have positive outcome for a migrant and not vice versa. The Slovenian Supreme Court agreed with the first instance social court (citing also decisions of the ECJ, among others in the cases Duchon and Kenny) and denied the right to a pro-rata old-age pension to a person still insured in Austria.47

Otherwise, the decision might be opposing the solidarity principle, a cornerstone of every social security system? In addition, the principle of assimilation of facts or events should not lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period.48 Hence, it could also lead to the reduction or loss of social security entitlements of the migrant.

Secondly, the prior condition of residence is no longer required. Persons covered by the Regulation 883/2004/EC are able to invoke the right to equal treatment in social security law, even if they reside outside the EU. However, there should still be a cross-border movement within the EU for Regulation to become applicable.

### 3.3. Third country nationals

Although the condition of residence has been abolished, the nationality requirement has been maintained. Although the personal scope of the Regulation 1408/71/EEC has been extended to third country nationals,49 they are (again) not covered by the Regulation 883/2004/EC. Again, special rules (agreed on the chapter on Policies on border checks, asylum and immigration)50 were required and passed in a so called “bridging” Regulation 1231/2010,51 which extends the scope of the coordination regulations to third country nationals.

It could be argued, that the EU law does influence the social security of moving persons to a varying extent. For instance, the new social security coordination Regulation became applicable in the first of May 2010. It has been extended to third country nationals only with the first of January 2011 (until then the former Regulation 1408/71/EEC remained applicable to third country nationals).52

Even more problematic in this regard may be the asymmetric application of measures that are taken on the grounds of the TFEU chapter on Policies on border checks, asylum and immigration. Some Member States have the right to opt out of this regime, whereas others have to indicate explicitly that

48 Recital 12 of the Regulation 883/2004/EC.
50 Article 79 TFEU provides that the Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings. To this aim it adopts measures also in the field of the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States.
52 Article 90 of the Regulation 883/2004/EC.
they want to be bound by the measure by opting in. For the Regulation 859/2003/EC the Denmark opted out and the Ireland and UK opted in. The legal consequence being that Denmark was under no legal obligation to ensure equal treatment to third country nationals in social security matters.

For the new Regulation 1231/2010/EU Denmark again opted out, and Ireland again opted in. However, the situation has changed for the UK, since it now opted out. The result is that in the UK the former Regulation 1408/71/EEC (as extended by the Regulation 859/2003/EC) remains applicable53 in the relations between the Member State (other than Denmark) and the UK.

In addition, special agreements with the EEA States (Iceland, Norway and Liechtenstein) and Switzerland have not yet been concluded. For nationals of these States the Regulation 1408/71/EEC remains in force.

Application of various legal instruments in similar or even identical legal situations might contravene the principle of legal certainty and predictability of behaviour. It certainly does not make the coordination of social security systems within Europe easier and more transparent.

3.4. Reverse discrimination

3.4.1. The definition of reverse discrimination and its unequal effect

Persons who find themselves in a cross-border situation may invoke the EU law. Reverse discrimination occurs when an EU citizen finds him- or herself in a "purely internal situation" of a certain Member State and as a result cannot rely on the EU law to obtain a certain benefit but only on the national law of the Member State concerned. Citizens of a Member State, whose situation is limited only to this Member State, can invoke only the national law of this State. In the same circumstances, the latter might turn out to be less favourable than the EU law.54

For instance, according to the Regulation 883/2004/EC with regard to sickness benefits in kind (medical treatment) ‘member of the family’ means any person defined or recognised as a member of the family or designated as a member of the household by the legislation of the Member State in which he or she resides.55

This means that the definition of a member of the family who might be entitled to health care will be governed by the law of the State of his or her residence, and not by the legislation of the State paying for the benefits (State where the person is insured) nor the legislation under which benefits are provided.

For instance, Slovenia would be the competent State, if a German national would be employed there. His family members could still reside in Germany. The scope of family members would be defined according to the German and not Slovenian legislation. In Germany same sex partners may be mandatory health insured as family members, whereas they have no such right in Slovenia. When the same sex partner would stay in Slovenia, Slovenian health insurance would have to cover the costs of health care for him or her, although there is no obligation to cover identical costs for same sex partners, whose situation is limited only to Slovenia.

Another example might be the (long-term) care insurance, introduced in the Flemish community in Belgium. According to the EU social security coordination regulations it has to cover not only residents

53 By virtue of Regulation 859/2003/EC and Article 90(1)(a) of Regulation 883/2004/EC.
55 C.f. Art 1 (i) 1 (ii) with regard to benefits in kind pursuant to Title III, Chapter 1 on sickness, maternity and equivalent paternity benefits in the Regulation 883/2004/EC.
of Flanders, but also employed and self-employed persons, who have made use of free movement of persons in the Union, even if they reside in another Member State.

The question sent to the ECJ was, whether migrant employed and self-employed persons, who have made use of the EU law on free movement of workers (and moved to Belgium) and who work in Flanders, but reside in the other part (Wallonia) of the same country (Belgium), should also have access to the Flemish care insurance.\(^{56}\) The ECJ held the view that this was indeed the case.\(^{57}\) With this decision, the Court seems to have made an opening to a change. As a rule, until this decision, it abstained from the system outcome comparison, i.e. which social security system is good and which is better for the migrant worker. It is clear that national (or even regional) social security systems are distinct, i.e. more and less developed. It might be argued, that a box of Pandora might be opened by the ECJ, if in any case, regardless of the agreed legal norms, the best solution for the migrant has to be found.\(^{58}\)

The ECJ underlined on various occasions that the free movement constitutes the principal objective of the coordination Regulations and thereby conditions the framework of their interpretation (using the teleological method of interpretation). The main principle is that migrating persons should not be in a worse position in comparison to those who have never moved (the already mentioned Petroni principle). This position even legitimises situations in which migrant workers are in a better legal position than workers who have never moved.\(^{59}\)

### 3.4.2. Possible solutions?

Such reverse discrimination has negative implications on the legal position of persons whose case is limited to pure internal situations, and may lead to unjust situations. The question is what could be the solution? Could it really be argued that reverse discrimination is in complete accordance with the EU law and with national law of the Member States?

This could be doubted, at least after the decision of the ECJ in the case Zambrano, a Colombian citizen, who has moved to Belgium, where two of his three children were born.\(^{60}\) The Court argued that Article 20 TFEU (establishing the EU citizenship) confers the status of citizen of the Union on every


\(^{57}\) However, another question in this case was, whether EU law could force the regional authorities to grant the persons working on their territory but residing in another part of the same State (in this case Belgium) without ever having made use of the EU right to freedom of movement, the same rights as to economically active person, who have made use of this right. Here the ECJ stated that EU law clearly cannot be applied to such purely internal situations. It is not possible, to raise against that conclusion the principle of citizenship of the Union set out in Article 17 EC (now Article 20 TFEU), which includes, in particular, according to Article 18 EC (now Article 21 TFEU), the right of every citizen of the Union to move and reside freely within the territory of the Member States. The Court has on several occasions held that citizenship of the Union is not intended to extend the material scope of the Treaty to internal situations which have no link with EU law. According to the ECJ’s decision, the Belgian court decided that the Belgian nationals in a purely internal situation who work in the Dutch-speaking region (of Flanders) or in that of the bilingual region of Brussels–Capital but who live in the French- or German-speaking region are not unfairly discriminated because this is a consequence of the internal conferral of power between the regions in Belgium. H. Verschueren, Reverse Discrimination: An Unsolvable Problem, in: P. Minderhoud, N. Trimikliniotis, (Eds.), Rethinking the free movement of workers: the European challenges ahead, Wolf Legal Publishers, Nijmegen, 2009, p. 105.


\(^{59}\) Ibidem, p. 1.

\(^{60}\) Case C-34/09 [2011] Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEm), not yet reported.
person holding the nationality of a Member State. Moreover, the citizenship of the Union is intended to be the fundamental status of nationals of the Member States.

Mr. Zambrano’s second and third children possessed Belgian nationality in accordance with the Belgian law. Hence, they undeniably enjoyed the status of EU citizens. In such circumstances, national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union would be against Article 20 TFEU. The Court argued that a refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, had such an effect.

The Court has assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

It could be argued that the argument of the Union citizenship could be applied also to combat undesired results of the reverse discrimination. In the Zambrano case there was no movement within the Union (the only known movement was from Colombia to Belgium). Hence, the Court in a “purely internal situation” (with no link to another Member States) applied the Union citizenship argument, together with the non-discrimination and the rights of a child and social security arguments steaming from the Charter of fundamental rights of the EU. It applied not only Articles 12 EC, 17 EC and 18 EC (now 18, 20, 21 TFEU), but also Articles 21, 24 and 34 of the Charter of Fundamental Rights of the EU.

However, the reverse discrimination could run also against the national, especially constitutional law prohibiting discrimination on the grounds of various personal circumstances. The question emerges, whether internal law of the Member State tolerates a less favourable legal status for individuals compared with the one they would enjoy under the EU law? From this angle, less favourable treatment of purely internal cases in relation to the intra-Union cases could be perceived as unlawful.

4. Determining the legislation that governs the social security position of a moving person

One of the most important and most discussed chapters of social security coordination regulations is the one on applicable legislation. It contains conflict rules in cross-border social security matters. They influence the social security of persons moving within the Union, since their position depends very much on the applicable national social security system (it has already been established that they may vary considerably).

By applying solely the national social security rules, one might end up with no social security coverage due to the so called negative conflict of laws. For instance, if a person would work in the country covering

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61 Points 40–46 of the Zambrano judgement, ibidem.
only residents (for instance Denmark) but would reside in a country covering only workers (for instance Germany), he or she would not be covered at all. The same might apply *vice versa*, for instance if the person would reside in a State covering residents and work in the State with social insurance, covering all workers, he or she might be covered twice. A so called positive conflict of laws could occur.

This is the reason why a complete and uniform system of conflict rules has to ensure that persons moving within the Union should be subject to social security system of only one Member State. This rule has an exclusive and overriding effect. The first one means that in principle only one single legislation is applicable for collecting the social security contributions and for granting the benefits.65 Hence, the possibility of other Member States’ social security schemes being simultaneously applicable is excluded.

The overriding or binding effect means that the designated social security system has to be applied, despite any other conditions of that legislation. It has to be applied, even if the national legislation as such would not include the EU migrant in its social security system.66

The general rule is that the applicable legislation is the one of the Member State where the person moving within the Union performs economic activities, i.e. the *lex loci laboris* principle. Special rules are provided for secondment (posting) of workers and (self-posting) of self-employed persons, persons active in two or more Member States at the same time, persons active in international transportation, mariners, persons working as workers and self-employed at the same time, civil servants with other activities, diplomatic and consular personnel, and professionally non-active persons.67

All these rules are agreed among the Member States and enshrined in the coordination Regulations. However, the ECJ may also in this case directly apply the more general provisions of the Treaties, like freedom of movement, free movement of goods and services, and EU citizenship. A good example is the case *Bosmann*.68 Until this case the ECJ upheld the principle of exclusive application of the designated Member State.

However, it seems that in the case of *Bosmann*, the Court departed from this position. Mrs. Bosmann, a Belgian national was resident in Germany. She was bringing up her two children on her own. They also reside Germany where they were students. Hence, Germany, as the competent State granted Mrs. Bosmann child benefits. Later on she took up employment in the Netherlands. According to the general principle of *lex loci laboris*, the Netherlands became the competent State and the Germany refused to pay child benefits any longer. However, Mrs. Bosmann was disadvantaged by this provision of the coordination regulations, since she could not be entitled to the corresponding child benefits in the Netherlands in view of the fact that its legislation does not provide for them to be granted for children aged over 18 (which was the case with Mrs. Bosmann children).

The ECJ, influenced also by the concept of the EU citizenship, argued that while Germany (a non-competent State) was not compelled to provide child benefits to residents, the coordination Regulations do not preclude that German authorities provide such benefits when they are subject to the condition of residence on its territory.

Some argue, that the decision in the *Bosmann* case contravenes the binding effect of the coordination Regulations, and that basic principles of social security coordination could be under strain. Others take

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65 In the Recital 15 of the Regulation 883/2001 we can read that “it is necessary to subject persons moving within the Community to the social security scheme of only one single Member State in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom.”


67 Ibidem, p. 73.

68 Case C-352/06 Bosmann [2008] ECR I-3827.
a more pragmatic view. The principle of unity of applicable legislation has to ensure that complexities arising out of simultaneous application of several social security systems do not have adverse impact on the fundamental right of the free movement of EU nationals. This view might raise the problem of the criterion of complexity, i.e. which situation is complex and which not, and who is to decide on that.69

It could be argued that it becomes more and more obvious that the Court in certain cases perceives the social security coordination Regulations as too technical and inflexible, and rather relied on more general principles of the EU law. Of course, this is the case only when general principles are leading to the more favourable situation for the person moving within the Union.

5. Protection of rights in the course of acquisition

The objective of the EU social security coordination law is to protect the rights that are in the course of being acquired. Although not mentioning the principle as such, but rather a technique of aggregation or totalisation of all relevant periods, this commitment is enshrined already in the Article 48 TFEU.70

The coordination Regulations provide for the aggregation of periods of insurance, employment or residence under the legislation of various Member States. The new Regulation 883/2004/EC does not stipulate separately, in each chapter, the rule of aggregation of periods, as this was the case with the former Regulation 1408/71/EEC. It rather brings these provisions to the forefront and transforms them into one general provision to be applied horizontally.71 One of the aims of the new Regulation, simplification of the coordination rules, has at list in this respect been achieved.

An example of the aggregation of all relevant periods might be the following. A worker wants to claim a pension after working for 14 years in Hungary, 14 years in Slovenia, 4 years in Germany and 4 years in Italy. Even if he or she was economically active for as much as 36 years, such worker could not satisfy the entitlement conditions for an old-age pension in none of these States. Minimum entitlement conditions in Hungary and Slovenia seem to be 15 years of insurance, and in Germany and Italy (after 1996) minimum 5 years of insurance period.72

In order to avoid the negative implication of various qualifying periods, the Regulations provide for the aggregations of all these periods. Hence, if the administration of every Member State involved would add all the insurance periods together, the worker could be entitled to an old-age pension in every of the four mentioned States. However, this does not mean that he or she would be entitled to four pensions, each calculated on the grounds of 36 years of insurance.

For those social security schemes concerning long term cash benefits (like pensions) the aggregation rule is combined with the principle of apportionment or pro rata temporis calculation. This implies that each of the Member States, in which the worker was active, will have to calculate the so called theoretical amount for the entire period of insurance completed in all Member States. In the above mentioned case, the four Member States, i.e. Hungary, Slovenia, Germany and Italy, would have to calculate the amount of an old-age pension for 36 years of insurance according to their own national legislation.

70 In the Article 48 we can read that the Union should “… adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries…”
71 Article 6 of the Regulation 883/2004/EC.
The second step is that each of the Member States involved calculates the pro-rata temporis benefit. This means a portion of the theoretical amount that equals to the period spent in insurance in the concerned Member State will actually have to be paid. For instance, Hungary and Slovenia would have to pay 14/36 of their theoretical amount, and Germany and Italy 4/36 of their theoretical amount. The application of the pro rata calculation might result in quite complex situations especially when the EU and national anticumulation rules, i.e. rules that prevent overlapping of benefits for the same period, are taken into account.73

Because the application of the EU social security coordination rules cannot result in a worse situation for the beneficiary, compared to the situation of a person who has never moved, the administrations have to make another calculation. It is the calculation which takes into account only national rules, if the conditions for granting a pension are met. For instance, if in the above mentioned case, a worker would be insured in Hungary or Slovenia for at least 15 years, the conditions under national legislation might be met. Then, the so called independent benefit74 would have to be calculated, in parallel to the pro rata benefit. At the end, the person is entitled to the highest of both amounts in each Member State.

This is co called principle of favourability, also called the Petroni principle, according to the ECJ judgment in the case Petroni.75 It seems that in more and more areas of social security coordination the Court applies the principle of favourability. The decision will usually be to the benefit of the moving person, even if it would be outside of the agreed coordination rules.

The aggregation of relevant period takes place also with so called special non-contributory benefits, i.e. benefits that show features of the social assistance, but are still related to a traditional social security risk, such as old-age, unemployment or invalidity.76 The examples could be the Hungarian non-contributory old age allowance, or Slovenian state pension.

Among others, the conditions for the latter are permanent residence in Slovenia at the time of application and for at least 30 years between the ages of 15 and 65.77 Slovenian administration takes into account permanent residence in every Member State in order to determine eligibility. If this condition is fulfilled the permanent residence in Slovenia in the time of granting the state pension still has to be satisfied. Hence, if the person resided anywhere in the EU for at least 30 years in his or her active period, he or she might be entitled to the Slovenian state pension after merely five years of residence in Slovenia (after which a permanent residence could be established).

6. Protection of acquired rights

Protection of the acquired rights principle is one of the most important coordination principles, which guarantees the export of benefits. Exportability of benefits is enshrined already in the TFEU78 and presents an important element in providing free movement of (economically active) persons within the

74 Article 52 Regulation 883/2004/EC.
76 Article 70 Regulation 883/2004/EC.
77 Article 59 Pension and Invalidity Insurance Act, OJ RS 106/99, with later amendments.
78 In Article 48 TFEU we can read that the Union should “… adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants: … (b) payment of benefits to persons resident in the territories of Member States.”
Union. Without paying the benefits to other Member States, a person, who moved from one Member State to another one, would lose his or her vested rights, which would seriously hinder mobility.

**6.1. Export of cash benefits**

Article 10 of the Regulation 1408/71/EEC waived residency requirements mostly for long term cash benefits (mainly pensions). Article 7 of the Regulation 883/2004/EC has strengthened the exportability principle by generally stipulating that all cash benefits should be exported.79

**6.2. No unrestricted export**

However, derogations from the exportability rule are still possible. There is no unrestricted export of benefits which are linked to the social and economic situation of the Member State providing the (special non-contributory) benefits, or when a certain obligation is imposed on the moving person. For instance, unemployment benefits are not exported without limitations, because a person has to be available to the employment services.80 The same applies to medical benefits, i.e. the right to health care, where a person has to act in accordance with the orders of the physician.

**6.3. Limited export of medical benefits**

The issue of export of medical benefits has become increasingly interesting, especially due to the ECJ judgments and the recently passed Directive 2011/24 on the application of patients’ rights in cross-border healthcare.81

**6.3.1. Social security coordination Regulations**

There are clear coordination rules on applying medical benefits outside of the Member State of insurance, which were agreed among the Member States. In general, we could distinguish between three situations. In the first one a person resides outside of the Member State where he or she has health insurance. Entitlement to medical benefits is opened in the Member State of residence, according to the rules applicable there, on the account of the health insurance carrier in the Member State of insurance.

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79 Article 7 Regulation 883/2004/EC stipulates that “Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.”

80 As a rule unemployed person has to register and remain available to the employment service of the competent Member State for at least four weeks, before departure to another Member State. He of she has to register as a person seeking work with the employment services of the Member State to which he moved and adhere to the control procedure organized there. The Member State which the unemployed person has left will continue to pay unemployment benefits only for a period of three months, with possible extension to another three months. If the person does not return to the competent Member State within this period of six months, he or she will loose the right to unemployment benefits. More in F. Penning, European Social Security Law, 5th edition, Intersentia, Antwerp, 2010, p. 225 ff and C. Sánchez-Rodas Navarro (Ed.), Migrants and Social Security, The (EC) Regulations 883/2004 and 987/2009, Ediciones Laborum, Sevilla, 2010, p. 113 ff.

Second situation is, when a person temporarily stays in another Member State for non-medical reasons, e.g. as a tourist, and his health condition necessitates medical care. The person will be entitled to medical benefits in the Member State of stay, on the account of the Member State of insurance, but with certain limitations. Only the necessary treatment will be provided. The questions might be what necessary treatment is, how it is distinguished from urgent medical treatment and who decides what is necessary.

The social security coordination Regulations specify that necessary medical care concerns benefits in kind which become necessary on medical grounds during the stay, taking into account the nature of the benefits and the expected length of stay. They should prevent an insured person from being forced to return, before the end of the planned duration of stay to the competent state to obtain the necessary treatment. The scope of the necessary treatment is hence determined individually in each concrete case. In addition, the Administrative Commission for the Coordination of Social Security Systems establishes a list of medical benefits related to necessary medical care which for practical reasons require a prior agreement between the moving person and the health care provider. The continuity of the treatment of a person during a stay in another Member State has to be guaranteed.

Since 2004 the right to necessary medical treatment may be invoked by the European Health Insurance Card (the "EHIC"). On its basis a health care provider can certify the patient's health coverage in the social security system of another Member State. The EHIC is of course not similar to a credit card, issued by a bank, although in some cases it was attempted to be used as such. In Slovenia there are well known cases of planned delivery of pregnant women in Austria, for which the costs have been tried to be settled by the EHIC.

The third situation deals with the planned medical treatment in another Member State. In this case the insured person has to obtain a prior authorisation from the competent institution in the Member State of insurance, before going for a treatment to another Member State. This authorization must be issued, if the treatment is among the benefits provided in the person's own health care system, but cannot be provided there within a time limit which is medically justifiable, taking into account his or her current state of health and the probable course of the illness. In this case a person is entitled to benefits in kind in another Member State (according to the rules applied there).

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84 Ibidem Article 2 now clearly stipulates that “Benefits in kind, including those in conjunction with chronic or existing illnesses or in conjunction with childbirth, are not covered by these provisions when the objective of the stay in another Member State is to receive these treatments.”
6.3.2. Parallel coordination system of the ECJ

However, interestingly enough, the ECJ has developed a parallel coordination system for medical benefits. It has not only interpreted the coordination regulations, but has tested the authorization procedure against the Treaty provisions on the free movement of goods and services.

It all started with the judgments in the leading cases Kohll and Decker. Both, Mr. Kohl and Mr. Decker were insured in Luxembourg. The first one took his minor daughter to a treatment from an orthodontist in Trier, Germany, and the second one purchased a pair of spectacles with corrective lenses from an optician established in Arlon, Belgium, on a prescription from an ophthalmologist established in Luxembourg.

They have not asked for a prior authorization and their request for the reimbursement of costs from their insurance carrier in Luxembourg (in accordance with its tariffs) was denied. The ECJ argued that while EU law does not detract from the powers of the Member States to organise their social security systems, they must nevertheless comply with the Union law when exercising those powers.

It has established that the coordination Regulations do not violate the Treaty provisions and are in line with the EU law, but they only suggest one possible way of reimbursing medical treatment obtained in another Member State. The ECJ circumvented the coordination Regulations and relied directly on the Treaty provisions. It argued that requiring prior authorization before refunding the costs of medical treatment or the costs of medicinal goods obtained in another Member State is an unjustifiable restriction of the free movement of goods and services in the internal market.

In many judgments that have followed these two cases, the ECJ refined its position. In general, it always found that medical services are services in the internal market, for which freedom of providing (and receiving) serviced applies. Prior authorisation is an obstacle to such freedom, even if it is in line with the coordination Regulations. The essential question then is whether such an obstacle could be objectively justified?

It might be justified, if it is essential for public health and even survivor of the population, if financial balance of the social security system would otherwise be undermined and the objective of maintaining a balanced medical and hospital service open to all could not be reached. Hence, prior authorization might be justified with hospital treatment, because hospitals need planning and any wastage of financial, technical and human resources should be avoided. However, prior authorisation could not be justified for ambulant, i.e. outpatient treatment.

These judgments make a shift in the organisation of the health care system, from the provision of benefits in kind (where the insurance carrier concludes contracts with health care providers) to the system of reimbursement of costs, at the level of the Member State of insurance. This is even the case, when these costs would be higher then the actually incurred costs.

The Member States could argue that although the judgments are binding erga omnes, their system is so distinct that is would not be appropriate to apply it. For instance, in Slovenia the first social court decision on the reimbursement of costs was adopted at the end of 2009.

6.3.3. The Directive 2011/24/EU

Judgments of the ECJ have to a certain extent been ignored not only by the Member States in national, but also in the EU setting. For instance the EU legislature has not taken into account the case law on cross-border patients’ rights when passing the new social security coordination regulations.

Instead the EU legislature opted for a specific legal instrument and codified the judgements the Directive 2011/24/EU on the application of patients’ rights in cross-border healthcare. It might be concrete enough to be directly applicable in all Member States, if not properly implemented by the national legislators.

The Directive regulates a very sensitive issue for the Member States. This is one of the reasons why it was adopted after several years of negotiations, and why it contains as many as 64 (!) recitals in its preamble.

According to the Directive the Member State of affiliation (i.e. insurance) will have to ensure that the costs incurred by an insured person who receives cross-border healthcare are reimbursed, if the healthcare in question is among the benefits to which the insured person is entitled under its system.

There are some limitations to this general rule. Under certain conditions a system of prior authorisation for reimbursement of costs of cross-border healthcare may be introduced. However, it is an exception to the rule and has to be interpreted restrictively. It should be restricted to what is necessary and proportionate to the objective to be achieved, and may not constitute a means of arbitrary discrimination or an unjustified obstacle to the free movement of patients.

The question remains what is risky and what not, and who is to judge the health care systems of other Member States.

Although granting prior authorization according to the Regulation 883/2004/EC should have priority, the patient could choose to ask for prior authorization in accordance with the Directive (which is an exception to the rule of free movement of patients).

The Directive raises certain concerns. For instance, is it really in the interest of the Member States and their social security systems to have an open market of medical benefits? Will everyone actually have equal access to all medical benefits in all Member States, or will that be the more informed, more mobile and wealthier persons? In addition, the patient will have to comply with the same standards in the Member State of treatment, including possible waiting list. But mobile patient will have the opportunity to receive treatment from a private physician (and be reimbursed), which will not always be the case for patients who have not moved. Could the personal physician be chosen in another Member State (the administrative requirements could remain, but should not be discriminatory)?

7. Social advantages outside the scope of the social security coordination law

There is a variety of social benefits, which fall outside of the EU social security coordination law. For instance, social assistance or benefits for war victims are excluded from the scope of Regulation 883/2004/
The question might be, whether the EU law has any influence on the legal position of migrants, requiring social assistance in the host Member State. Social assistance is usually restricted to the territory and permanent residents of social and economic environment of the country providing assistance.

Since the EU has evolved from the predominately economic community, a distinction between economically active persons (especially workers) and others has been preserved until today.

### 7.1. Social advantages of economically active migrants

Article 45 TFEU and especially the Regulation 1612/68/EEC apply to migrant workers. This Regulation ensures freedom of movement of workers with prohibiting *de iure* or *de facto* discrimination of migrant workers with national workers. It ensures the social inclusion of workers, EU citizens in the host Member State. The concept of worker has a specific Community meaning and must, according to the ECJ, not be interpreted narrowly. Hence, any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a worker. The essential feature of an employment relationship is, according to the case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. The Regulation applies also to unemployed workers, but not to the job seekers.

The Regulation 1612/68/EEC ensures to the EU migrant workers the “same social and tax advantages as national workers.” At first, it was not clear whether the notion of social advantages was restricted to advantages directly connected with the status of worker or whether it has a broader meaning. The ECJ has chosen a rather broad interpretation of the notion social advantages, i.e. including all social advantages, whether or not attached to the contract of employment. In fact, every public benefit to the individual working in the Member State and intended to improve his or her economic and social position should be perceived as social advantage. Regulation applies to all social advantages outside of the EU social security coordination law, because the coordination Regulation 883/2004/EC has priority, and should not be affected by the Regulation 1612/68/EEC.

For instance workers, who despite their salary have no sufficient means for surviving of their family, are entitled to social assistance in the host Member State without any additional conditions, such as certain period of residence. Such condition would not be admissible, since it does not apply to national...
workers in the host Member State. The ECJ argued that this would be a clear discrimination on the grounds of nationality of a worker, which would contravene the EU law.104

7.2. Social advantages of economically non-active migrants

The Regulation 1612/68/EEC has been amended with the Directive 38/2004/EC.105 With the latter the right to free movement has been extended to all (also non-active) EU citizens.106 Nevertheless, the non-active EU citizens do not enjoy an unrestricted access to social assistance in the host Member State (e.g. from the first day of their arrival).

The TFEU ensures the free movement to all EU citizens, but subject to the limitations and conditions laid down in the primary and secondary legislation.107 Therefore, three consecutive periods have to be distinguished, i.e.

- residence for up to three months without any formalities, whereby the host Member State is under no obligation to ensure the right to social assistance, and the migrant might loose the right to residence, if he or she would become an unreasonable burden on the social assistance scheme of the host Member State,108

- residence between three months and five years, whereby non-active EU citizens should dispose of sufficient means for them and their family not to become a burden to the social assistance, otherwise they might loose the right to residence,

- after five years of uninterrupted residence the EU citizen might acquire the right to permanent residence109 and should enjoy the same access to all social benefits as nationals of the host Member State.110

Although the Directive 38/2004 regulates the rights of all Union citizens, it does not overcome the superior legal position of the economically active migrants. Workers and self-employed persons already in the first three months enjoy the equal access to social assistance and the condition of sufficient means is not set in the further period of their residence in the host Member State.

On the other hand non-active EU citizens have to show a certain degree of integration in the society of the host Member State. A condition of at least certain period of residence, e.g. five years of uninterrupted residence, seems to be reasonable and accepted also by the ECJ, to establish a genuine link with the host society.111

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104 In case C-249/83 Hoeckx [1985] ECR 973 the ECJ established that a condition of at least five years of residence in Belgium for an EU migrant worker (which does not apply to national worker) is against the EU law.
106 In recital (1) of the Directive 38/2004 we can read that “citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States…”
107 Article 21 TFEU.
8. Concluding thoughts

The Member States of the European Union (the “EU”) for quite some time perceived national social security systems as their domaine réservé. They were willing to transfer to the Union the mere competence to coordinate the distinctive social security systems.

However, social security is not an island outside the EU law (anymore). The Court of Justice of the EU (the “ECJ”) has for half of a decade consistently interpreted the social security coordination regulations in a dynamic and constructive way. It has not only interpret the secondary legislation, but has also applied more general principles of the primary law in parallel to the secondary legislation. In this way it has been broadening the scope of options and hence flexibility for the moving person.

Hence, the real driving force behind the development of social security legal rules is the ECJ. The Union legislature has on many occasions reacted (in a positive or negative way) to the decisions of the ECJ. The latter are taken ad hoc, in relation to a concrete case and disregarding the overall (social) policy of the Union. Such approach might probably not present the very best solution. It offers less legal certainty then a clear and straightforward social policy as enshrined in social security legislation.

What might be deducted from the decisions of the ECJ is that the Court will strive to find a positive solution for the social security of an EU migrant, by applying the so called binary approach. If there will be no possibility to apply the secondary legislation, usually the provisions of the Treaties will be applied directly. It has been done so, for instance in granting cross-border patients’ rights, determining the applicable legislation, calculating of pensions.

Potentially powerful concept, further developed by the ECJ, is the Union citizenship. On one hand, the Court is removing the obstacles in the Member State of origin, and enabling the free movement. On the other hand by applying the principle of equal treatment in the host Member State, it removes the obstacles related to the citizenship of the host country. Maybe Civis Europeus Sum does not yet mean as much as Civis Romanus sum used to mean. But it is and increasingly important concept, also when establishing access to social benefits. It seems that even intra Union movement is not required anymore (in certain cases).

Such individualised view of, among the Member States negotiated rules of social security coordination, might be a good solution for a migrant in question. However, it is weakening the principle of legal certainty and reducing the predictability of legal consequences of migrating EU citizen in general.

The relations in society are constantly changing. The rule of law principle demands from the legislature to follow these changes with its normative action, and we are witnessing social security reforms in virtually all Member States. However, the EU social security (coordination) law is not only following these changes, but is (at least partially) also causing them.
Emöd Veress*

The Legality of Expulsion of Roma as Union Citizens under the Conditions Imposed by the Directive 2004/38/EC1

1. Introduction

Some recent cases of “voluntary return”, especially of persons belonging to the Roma Minority and being Romanian and Bulgarian Citizens, raise complex issues regarding the application of legal provisions of the Directive 2004/38/EC (hereinafter: the Directive) on the expulsion of a person, citizen of the European Union from a host Member State. The provisions of the Directive under which circumstances can serve as legal base for an expulsion measure? How can the rules laid down by the Directive be used as a tool of protection against expulsion (declared as such a measure or disguised in any form, such as the mentioned “voluntary return”?).

2. Social context of the Roma in Eastern Europe

At a conference, having as a topic free movement of workers, the panel where I made a presentation was called Workers from the “New Europe”, referring to Romania and Bulgaria. To start with the term “New Europe”. This area is also a “very old Europe”, but with a deflection in normal historical development: 45 years of so called communism. Communism expressed a state owned and state planned economy instead a market driven one. In fact this conducted to economic collapse, and the fall of communist regimes was not the effect of strength of the democracy, but the effect of the strength of the market. The communist dictatorships were not sustainable economically. This is the ultimate reason why communism collapsed. In this context were started a transition to market economy, privatization, often marked with fraud, and in case of almost all of these transition countries, the transformation of former secret services network into a network of business, politics and even judiciary.

In case of Romania and Bulgaria, the accession date was 2007, in the context of the (until now) last wave of accession to the EU. The transition period roughly ended, the economy started an acceptable level of growth from year 2000 and perceptible in living conditions also. But the social structure of these states, due the historical past, differs fundamentally from the social structure of a state with uninterrupted evolution. The transition period corresponded also to the primitive accumulation of capital. And the

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result is a normal size upper class, but the very foundation of the modern society, the middle class is very weak. And there is the lower class (from the perspective of the levels of incomes), higher in percentage comparing to western societies, which forms the mass of Romanian citizens. And at the lowest social level, taking into consideration income, unemployment, illiteracy, economic disadvantage, there is the second largest ethnic minority in Romania: the Roma or “Gypsy” minority (according the official data, about half a million people declared itself gypsy, this means 2,5% of the population, but the realistic number is at least double of the official ones). The United Nations data estimate that even the number of 2 millions is exceeded, 9% of the population of Romania belongs to the Roma minority (UNDP), and the Roma in this case could be the largest minority in Romania. Therefore even the size of Roma community is subject to debate. Just a little percentage is really integrated and many of Roma minority members are living in the outer side of rural settlements, isolated, in poor conditions or having their own improvised settlements. And a part of Roma is living a true nomad life, migrating inside (and now, outside) the country. The majority attitude towards Roma is generally negative, this ethnic group is marginalized, not by any official policy, but by their economic situation, by low level of integration, by discrimination in the labour market despite the very modern anti-discrimination legislation. The situation of Roma is was similar even under the Communist rule, the principle of equality of work was not a functional and effective tool for Roma integration. In some Central or Eastern European states and some cases, there are signs of a rise of an exclusive nationalism towards the Roma.

This marginalization is just strengthened for example by the French or Danish actions of expulsion, ie “voluntary return”. According to the European Roma Rights Center, there are generally believed to be between 10,000 and 20,000 migrant Roma living in France, a significant number of whom are from Romania and Bulgaria. Some of them are migrating for work, some of they are migrating to receive social benefits, some of them are migrating to beg.

Otherwise the Roma issue is not only the special problem of Romania or Bulgaria, but also a general one in other EU member states also, taking into account the transnational character of this European minority.

3. “Illegal residence”?

The use of the term “illegal residence”, in the context of the Directive is not really appropriate, the right of EU citizenship somehow excludes this kind of brutal approach.\(^2\) A right of residence, even in the case when the conditions laid down by the Articles 6 and 7 of the Directive are not met, can be based directly on the TFEU. This is a similar situation than in the Chen judgment, where the ECJ ruled that a young minor who is a national of a Member State, if is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State.\(^3\)

First of all, we have to admit that “illegal residence” cases, when EU citizens no longer fulfill the conditions of Articles 6 and 7 of the Directive, can occur relatively easily.

For example:

* one person is exercising its right of residence for up to three months (as stated in art. 6 of the Directive, without any conditions or any formalities other than the requirement to hold a valid

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\(^3\) ECJ Case C-200/02 Chen.
identity card or passport), but after the expiration of the period in concern remains on the territory of that Member State, without fulfilling any of the conditions necessary for the right of residence for more than three months;

* one person does not have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and does not have comprehensive sickness insurance cover in the host Member State;

* one person it is enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training, but the person in concern voluntarily interrupts these studies and does not leave the territory of the host Member State etc.

This “illegal residence”, more precisely the non-fulfillment of the residence conditions, is enough for expulsion? The previous regulation on expulsion, Directive 64/221, especially the “substantive provisions of the 1964 Directive, supplemented by extensive jurisprudence of the Court of Justice, specified that it applied even where a person was not legally resident.” The present regulation provides “greater protection.”

4. Expulsion conditionality

A complex analysis and interpretation of the Directive is needed. And from a such interpretation, I have identified at least nine independent conditions of any – direct or indirect, declared or disguised – expulsion measure. This conditionality must be reflected fully in the transposing national legislation of the Directive.

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4 According to the recital 16 from the Preamble of the Directive, "as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.”


1. There must be a reason of expulsion, based on public policy, public security or public health. The non-fulfillment of the conditions of the residence rights can be included only in the category of public policy. The Directive doesn’t give a definition of public policy and public security. Anyway, the possibility of definitions is open for the transposing national legislation.

2. In all cases, these grounds (public policy, public security or public health) shall not be invoked to serve economic ends.

3. Measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted. The term of personal conduct was explained by the ECJ, in Case 41/74 Van Duyn. The Court stated that past association with an organisation does not count as a personal conduct, although present association does. In a different case, 30/77 R v Bouchereau the ECJ stated that the existence of a criminal conviction could only be taken into account to exclude a person on the grounds of public policy or public security, if the conviction indicated a propensity to act in the same way in the future.

4. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality.

5. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin. In the legal literature it was remarked that the Directive “does not give any indication regarding the content and nature of the social and cultural integration test”, and this will lead to divergent national practices and possible discrimination.

6. The Directives contains mandatory limitation of expulsion possibilities (enhanced level of protection), which has to be respected by the national legislation. The host Member State may not

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7 Article 29 from the Directive is the regulation on the regime of expulsion under the public health condition. The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State. Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory. Where there are serious indications that it is necessary, Member States may, within three months of the date of arrival, require persons entitled to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions mentioned before. Such medical examinations may not be required as a matter of routine.

8 ECJ Case 139/85 Kempf.

9 The Directive states that “in order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months” (art. 27 (3)).

10 ECJ Case 67/74 Bonsignore.


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The Legality of Expulsion of Roma as Union Citizens under the Conditions Imposed by the Directive

take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security. Therefore, in case of other Union citizens, who do not possess the right of permanent residence, the condition of “serious grounds” are not imposed? More, the Directive states that an expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they have resided in the host Member State for the previous 10 years or are a minor, except if the expulsion is necessary for the best interests of the child. These texts can lead very easily to an untrustworthy interpretation. The Directive tries to introduce a gradation, somehow imprecisely. In all cases, the expulsion must rely on serious grounds. In case of permanent residents, the term used is “serious grounds” suggests that in all cases expulsion is possible only in more serious cases of public policy or public security, than in case of persons without the right of permanent residence. And in case of residents for 10 years and minors, imperative case of public security is the only situation which justifies an expulsion (public policy is not applicable, serious ground of public security is not enough!).

7. The decision of expulsion must be properly motivated and communicated to that person, in such a way that they are able to comprehend its content and the implications for them. The persons concerned shall be informed, precisely and in full, on the public policy, public security or public health grounds, basis of the decision taken in their case, unless this is contrary to the interests of State security.

8. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health. Therefore, the national legislation must grant a right to an appeal – an action of the executive power must be controlled by the judiciary, a redress procedure is mandatory, even if is not accompanied with the automatic suspension of the measure taken. The notification on expulsion shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate. Member States may exclude the individual concerned

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14 In this context, recitals 23 and 24 from the preamble of the Directive, states that “expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin. Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life.”
15 Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except: where the expulsion decision is based on a previous judicial decision; or where the persons concerned have had previous access to judicial review; or where the expulsion decision is based on imperative grounds of public security (art. 31 (3) from the Directive).
from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defense in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

9. And finally, it is necessary to **grant a time for the person to leave** the territory of the Member State. Except duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.16

5. Conclusions

The limitation of free movement as an answer to the Roma problem in my opinion is totally inappropriate. The good answer is to make special efforts on integrating the Roma community. The Romanian and Bulgarian States made and are making an effort in this area, but unfortunately the capacity of the state to implement such policies is limited. This is a fact. This capacity must be strengthened, with special focus on education, in my conception the key element of integration. Obviously, this is not a quick solution that satisfies the migration target Member States.

But my subject is different: the case of migrants Roma, with EU citizenship, and the unprotective/protective provisions of the Directive. At first, we are situated in the “grey zone”, a real life situation not fully covered by the legislation in force, where the correct interpretation of the rules is crucial. The border between misinterpretation and abuse, on one hand, and the right application of norms is very thin.

As a situation of non-fulfillment of residence conditions (with inaccurate wording in case of EU citizens: “illegal residence”) is a very easily obtainable status under the Directive, the expulsion conditionality is a very complex one. The future jurisprudence must clarify these complex issues of expulsion, the particular meanings of different terms, and the conformity of national legislations with the European Law, especially with the Directive. Expulsion is very rarely used tool towards EU citizens, except Romanian and Bulgarian Romas. Is this a possible infringement of Article 18 TFEU (discrimination on grounds of nationality)?

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16 According to the Directive, “the Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute” (art. 27 (4) from the Directive).
RALUCA BERCEA*

An Overview of the Cultural Application of the European Union Law by the Romanian Judge

1. Preliminaries

1.1. The position held by the Court of Justice of the European Union on the relationship between the European Union law and the national law

As it has been pointed out more than once, it is generally accepted today that European Union law takes primacy over the national law of Member States. In fact, already in the early sixties1, the European Court of Justice imposed the direct effect and the integration theories, on which was later based the principle of precedence of the European Union law in its relationship with the Member States’ legal orders. Interestingly enough, the precedence was justified by the very specific nature of the European Communities, that is not as the result of a real hierarchy established between legal rules, but as a principle arising from the relationship between two different types of legal orders. Also, from the very beginning of its relevant jurisprudence, the European Court imposed the idea that the precedence of the European Union law should be guaranteed by the national judge, which led the court to establish, in subsequent cases2, a series of rules functioning as the national judges’ toolbox. Since, according to the Court, the national legislative acts that interfered with the European Union law could not form themselves validly, the national judges must consider them null and void, without waiting for the legislator’s reaction, the same kind of obligation pending on all the national authorities, including public administration.

However, although the primacy principle is accepted nowadays with regard to national ordinary statutory law, views on the relationship between national constitutional law and Union law are controversial and inconsistent, allowing an author to affirm as follows: “from the viewpoint of EU law and constitutional law, it appears now clear that an ‘all or nothing’ approach is both unwarranted and inappropriate considering the aims of EU law. The assumption of a full primacy of Community law over constitutional law would neglect the dependence of Community law on intact, functioning and accepted constitutional orders of Member States”3.

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2 Case 26/62, NV Algemene Transporten Expedite Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen [1963]; case 6/64 Flaminio Costa v ENEL [1964].
3 The most famous of them is, undoubtfully, case 106/77, Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978]; for a recent illustration of the same idea, see case 314/08, Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu [2009] and cases 188/10, 189/10 Melki & Abdeli [2010].
1.2. The position held by the national courts in the relationship between the European Union law and the national law

In this very respect, one would certainly recall the resistance of several eminent national constitutional courts to the principle of primacy, a refusal that has known only very recent illustrations. Or it can reasonably be argued that the reasons the French Conseil constitutionnel has put forward in order to avoid full primacy are quite different as compared to those advanced by the German constitutional judge (BVerfG), the Italian Corte Costituzionale, the Supreme Court in Ireland or the Højesteret in Denmark. This asymmetry is indeed “intrinsic to the heterogeneity of the EU Member States, which is one of the crucial constitutional hallmarks of the Union”4, to the point that constitutions may be seen as “chains of continual intercultural negotiations”5.

In this perspective, the reactions of the constitutional national courts to the primacy principle may be considered cultural responses that should be decoded as such, law within the European Union legal order making the object of a fight for supremacy on a cultural battlefield6.

A fortiori the cultural element becomes relevant when focusing on the national ordinary courts, accomplishing their mission of common European Union judges. This very legal fiction that concentrates on a national judge the simultaneous quality of European Union judicial authority opens the European Union (presumably unitary) law to the indefinite variations of national cultural reactions7.

1.3. The French doctrine – an example

Only such a perspective might explain the logics of the French books on European Union law which, while discussing the precedence principle, simultaneously indicate the “position of the ECJ”, “position of the [French] Cour de Cassation”, “position of the [French] Conseil Constitutionnel” and “position of the [French] Conseil d’Etat” on the matter8.

1.4. The Common law courts – an example

The same cultural explanation would help us understand the way in which the common law courts refer to the European Union law9. Thus, since – even today – nine out of ten cases before the Court of Appeal

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7 John Henry Merryman, *On the Convergence (and Divergence) of the Civil law and the Common Law*, in Mauro Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (Leyden, Sijthoff 1978) 224: “it is, indeed, the legal culture that provides the internal logic to law”.


9 The author is grateful to dr. Simone Glanert from Kent Law Scool, University of Kent, guest professor of the Law Faculty in Timisoara for her very precious insights and illustrations on the matter.
or High Court in the United Kingdom deal with the interpretation of legal texts, an English judge remarks the need that national courts forget about the local interpretative canons in favour of the teleological approach imposed by the European Court of Justice: “It is apparent that in very many cases the English courts will interpret the Treaty themselves. They will not refer the question to the European Court of Justice. […] [W]hat are the English judges to do when they are faced with a problem of interpretation? They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about precise grammatical sense. They must look to the purpose or intent” […] “It would be absurd that the Courts in England should interpret differently from the courts of France, or Holland, or Germany […] We must, therefore, put on one side our traditional rules of interpretation. We have for years intended to stick too closely to the letter – to the literal interpretation of words. We ought to adopt the European method. […] In interpreting the Treaty of Rome (which is part of our law) we must certainly adopt the new approach. Just as in Rome, you should do as Rome does, so in the European Community you should do as the European Court does”10.

Such a point will perhaps astonish the reader, coming from a judge belonging to a legal system based on the rigidity of precedents and on the force of tradition, for the specifics of which the following opinion seems to be more accurate: “we are but of yesterday […] our days upon the earth are but as a shadow in respect of the old ancient days and times past, wherein the laws have been […] by long and continual experience […] redefined”11.

However, the first judge quoted comes back to his first remarks and notices, less enthusiastically, within the same judgement that “[t]he Treaty is quite unlike any of the enactments to which we have become accustomed. The draftsmen of our statutes have striven to express themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise and provide for them […] How different is this Treaty! It lays down general principles. It expresses its aims and purposes. […] But it lacks precision. It uses words without defining what they mean […] All the way through the treaty there are gaps and lacunae. These have to be filled in by the judges, or by Regulations or Directives. It is the European way”12.

1.5. The concept of glocalization

The interpreters are forced to conclude that the implication of this last statement might be that, in spite of the national judge’s resolution to use – with loyalty and in good faith – the interpretative methods indicated by the European Court of Justice, the globalization arising in the context of the natural cultural resistance opposed by the local legal tradition inevitably results in the partial failure already theorized by the doctrine having imposed the concept of glocalization13. In fact, not only does the legal interpretation depend on the (culturally conditioned) judge’s understanding, but the efficiency of the European Union law itself is submitted to cultural constraints14.

11  Coke CJ, Calvin’s Case [1608].
14  Cotterrell, Law in Culture (n 6) 2. In the same sense, see Franz C. Mayer, The European Constitutions and the Courts, in Armin von Bogdandy, Jürgen Bast (eds.), Principles of European Constitutional Law (n 4) 303, who explicitly asserts that “what appears to be particularly threatening for legal unity and the uniform legal interpretation of European law from the perspective of the national constitutional order, generating a parallel version of European law (a constitutional law version of European law)”. 

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Quite neutrally, it has been concluded in this general context that beyond the law, national courts also reflect changes in mood or opinion regarding European integration within the respective Member States, so that “it is still premature to regard the relationship between the ECJ and the highest national courts and tribunals to be a consolidated relation”\textsuperscript{15}

2. The Romanian Experience – the Constitutional Court and the constitutional judge

2.1. The revision of the national constitution

In Romania, the intersection between the national and the European Union law provoked enthusiasm before the 1\textsuperscript{st} of January 2007 and confusion afterwards.

Thus, for the purpose of a correct integration and so as to avoid the potential constitutional impediments that might have conditioned the respect of the Union law by the future Member State, Romania revised its national constitution already in 2003. One of the modifications consisted in the introduction of Title VI, \textit{Euro-Atlantic Integration}, art. 148 \textit{Integration into the European Union}, with the following content: “(2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations, shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act”.

The above mentioned article was interpreted by the specialists in European Union law in the sense of acknowledging the precedence of the latter in respect with the national law within the limits stipulated by the European Court of Justice (precedence over the whole national legislation, including the constitution, within the fields in which competence has been irreversibly ceded), given the purpose for which the revision was made (namely to comply with the European Union law requirements!).

However, the constitutional law national doctrine interpreted the text quite differently. Preoccupied with protecting the national sovereignty, the authors enshrined the thesis according to which the precedence of the European Union law should be regarded as limited to the ordinary legislation, with the exclusion of the constitutional text itself.

Certainly, at this point one may bring into discussion the deficient revision of the national constitution from the point of view of the European Union law, given that in art. 148 § 2 the legislator has indistinctively stipulated the precedence of European Union Law over “national laws”, without any explicit reference to the national constitution, despite the fact that it has nevertheless introduced an explicit derogation to art. 1 § 5, stating the supremacy of the Constitution\textsuperscript{16} in the hypothesis of the international treaties on fundamental human rights (art. 20 § 2)\textsuperscript{17}. The difficulties were increased by the fact that, inspired by other European legislations, the Romanian constitutional legislator has attributed for the first time in the competence of the national Constitutional Court the prerogative to control the constitutionality of

\textsuperscript{15} Franz C. Mayer, \textit{The European Constitutions and the Courts}, in Armin von Bogdandy, Jürgen Bast (eds.), \textit{Principles of European Constitutional Law} (n 4)333.

\textsuperscript{16} Art. 1 Romanian State: “(5) In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory”.

\textsuperscript{17} Art. 20 \textit{International Treaties on Human Rights}: “(2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights that Romania is a party to and the national laws, the international regulations shall take precedence, unless the Constitution and the national laws comprise more favourable provisions”.

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international treaties, also mentioning that the prevalence of the European law will depend on the strict compliance with the limits of the accession act\textsuperscript{18}.

The national legislator has thus generated a doctrinal controversy on the difficult issue of the necessity that the Constitutional Court should control the constitutionality of European law (from the perspective of the national constitutional provisions) and the contradiction between such control and the undisputed precedence of the European law over the national (including the constitutional) one (from the perspective of the case-law of the European Court of Justice).

The Romanian Constitutional Court itself had the opportunity to state its opinion on the relationship between the European Union law and the national law, prior to Romania’s accession. Thus, in Decision no. 148/2003\textsuperscript{19}, the constitutional judge reasons that the proposal for revision whose constitutionality they are about to control does not overpass the limits of revision since the European Union law is placed, as it is the case in other Member States, “in an intermediate position above the ordinary laws, but under the Constitution”\textsuperscript{20}. The Court affirms, therefore, without saying it explicitly, that within the national legal system the European Union law is subordinated to the Constitution. Subsequent to the accession, the Constitutional Court has rendered several decisions in matters of European Union law. However, the Court has avoided an explicit reference to the actual position between the two legal systems, despite the fact that such a statement would have been of utmost importance for the national jurisdictions.

2.2. Post-accession national difficulties – a cultural perspective

If before the accession the indecision of the national constitutional judge can partly be explained by the deficient revision of the national constitution (which, itself, might be regarded as a cultural mark!), his reaction after the accession is entirely determined by cultural peculiarities (a phrase that, in the present context, refers to specific elements inherent to the national legal system).

\textsuperscript{18} Art. 146 Title V of Romania’s Constitution, Constitutional Court, art. 146 Powers: “b) to adjudicate on the constitutionality of treaties or other international agreements, upon notification of one of the presidents of the two chambers, a number of at least 50 deputies or at least 25 senators”.


\textsuperscript{20} The Court’s argument as such is not very convincing: not only does the Court omit to mention the Member States whose internal tradition has favoured this position, operating by generalization (all Member States allegedly have chosen this type of hierarchy), but the constitutional judge also equals the European Union law with the public international law in general, by appreciating that such national hierarchy derives, as a particular application, from art. 11 § 2 of the Constitution according to which “The treaties duly ratified by Parliament are integrated in the national law”. As for the position held by the various Member States on the relationship between the European Union law and the national law, see Grabenwarter, National Constitutional Law Relating to the European Union (n 3), who classifies the Member States and finds that in some of them one can speak of complete pre-eminence of the European Union law over the national (including constitutional) one (Austria), whereas in others the European Union law enjoys only limited pre-eminence (Italy, Denmark, Belgium, Spain, Sweden, Ireland, Great Britain), or no precedence at all (France, Greece).
2.3. Difficulties arising from the national nomothetical legal tradition – shall the jurisprudential European Union law prevail over the national law?

One of the fundamental oppositions in law has been established between the Romanic nomothetical and the common law idiographic legal traditions. If the latter is based on facts, the former is centred upon the (written) laws, which condition the judge’s understanding and their possibility to apply the law.

As the Romanian legal system belongs to the Romano-Germanic tradition, prior to Romania’s accession to the European Union the authors have anticipated that the national judge will find it difficult to put into practice (let alone with precedence in relationship with the national regulations) the case-law of the European Court of Justice and the main principles of the European Union law. In this respect, one author pointed out that “in the spirit of nomothetical tradition to which they belong, the national judge is expected to admit only with difficulty that a piece of national law (rendered by a legal text) might be invalidated by a legal principle (be it of European origin) jurisprudentially imposed (thus belonging to the logics of an idiographic tradition)”22.

In such a context, it would have been impossible for the national constitutional judges to admit the precedence of a jurisprudential rule of European Union law (the principle of the precedence of the European Union law, in the present occurrence) over the text of their own national constitution (valued as the highest authoritative legal text within the national order).

2.4. Difficulties generated by the peculiarities of the national constitutional system – immediate application of the European law?

In relation with the general public international law, the Romanian legal system is dualist, therefore an international treaty will have to be ratified by the Parliament, so as to trigger effects within the internal law. Two types of judges’ reticence arise from this constitutional position, as they would traditionally contrast the national and the non-national law.

Firstly, the national judge will mistrust the idea that the positive law that he is to interpret and enforce consists both of national (internal) law and of European law (a system that, although need not be formally received by the national system, as it is the case of the general public international law, is, however, automatically integrated therein, as a consequence of the immediate application principle).

Secondly, the same traditional opposition between the internal law proper and the law extraneous to the system will determine the national judge to mistrust the text of the international rule, even if the national constitution expressly places the latter in a privileged position. Such appears to be the exceptional case of the public international law of human rights, in respect with which the Romanian Constitution favours the monism with the precedence of the international regulations. However, the national judge would frequently hesitate: fifteen years after the European Convention of Human Rights has become compulsory for the Romanian legal system, the national judge considers himself to be bound rather by the case-law of the Court in Strasbourg than by the conventional text itself (undoubtedly out of the very many condemnations by the Court in Strasbourg), which he traditionally avoids to enforce directly and to make it prevail against the contradictory national law.

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23 Romania has been bound by the Convention since the 20th June 1994.
2.5. Difficulties arising from the position expressed by the Romanian Constitutional Court in respect of the control of conventionality exercised within the system of the Romanian High Court of Justice: control of constitutionality or control of conventionality?

The experience that the national Constitutional Court has developed in relation with the ordinary jurisdictions in the field of enforcing and interpreting the international law of human rights determined the authors to express their concern regarding the correct position of the national jurisdictions in general in respect to the European Union law.

Before the accession, at least in one landmark decision, when seized with the contradiction between an internal regulation and a rule of the public international law of human rights that Romania ratified, the Constitutional Court appreciated that the matter implied a constitutionality issue and declared itself competent to solve it. Only one of the judges expressed his dissenting opinion according to which the direct conflict between an internal rule and an international rule on human rights triggered the general competence of the ordinary jurisdictions that were entitled to appreciate the alleged non-conventionality of the internal norm, to be considered either as tacitly abrogated or inapplicable inter partes. Correlatively, the Constitutional Court would only be competent in the hypotheses in which an indirect contradiction between the two systems was alleged, mediated by the national constitution. In such a case, the unconstitutionality of the internal law would operate erga omnes.

In this context, it was considered “debatable whether the ordinary national judge will be prepared to assume his position as European Union law judge”.

This very circumstance made, in fact, the doctrine suggest the necessity that the national constitutional text be revised in the sense of explicitly including a disposition that might “acknowledge the jurisdictional competence of the national judge over the European Union law”. Although very useful in practice, such a solution would have mistaken the meaning of the central principle of competence attribution, according to which the national judge is supposed to be the first to enforce the European Union law, while the European judge proper sees his competence conditioned and limited by an express transfer and attribution of competence.

In this context, one can only notice the same hesitation of the Constitutional Court in respect to the European Union law in the post-accession period.

In Decision no. 59 of 17 January 2007, rendering a judgment based on art. 148 § 2 of the Constitution and establishing the constitutionality of the dispositions controlled, the majority of the Constitutional

24 Decision no. 308/2002, published in Romania’s Official Journal no. 78/06.02.2003, declaring unconstitutional several dispositions of the Government’s Ordinance no. 25/1997 on the legal regime of the adoption, in relation to the international treaty dealing with the same matter, that Romania ratified. According to the majority of the judges, an omission of the internal law (as the one alleged in the pending litigation) may represent a “contradiction” between the national law and the treaty on the fundamental human rights, hypothesis in which the national constitution establishes the prevalence of the international regulation. In fact, the international regulations ratified by Romania have been integrated in the internal law and are, thus, assimilated to the internal constitutional rules, therefore any contradiction between such a rule and an internal rule represents a matter of constitutionality. On the other hand, the dissenting judge explicitly points out that the hypothesis in which the national rule contradicts an international regulation on human rights only involves issues of legislative interpretation and enforcement, triggering the competence of the ordinary jurisdictions and excluding the control of the Constitutional Court.

25 Raluca Bercea, Drept comunitar. Principii (n 22) 288.


Court judges’ opinion goes in the sense that “although this may exceed the limits of the control of constitutionality (sic!), the Court acknowledges that the dispositions of the internal law thus controlled should (…) be correlated with the dispositions of art. 87–89 of the European Community Treaty”. On the other hand, the minority of the Constitutional Court judges esteems that such discordance between the national and the European Union law would trigger the non-constitutionality of the national rule, also based on art. 148 § 2 of the Constitution: “the national law [incriminated] disregards the dispositions of the European Union law, thus also contradicting art. 148 § 2 of the national Constitution”. As one can notice, in the opinion of the majority, the incompatibility between an internal rule and the European Union law “exceeds the limits of the control of constitutionality”, a control that is, however, made by the Court, while, in the opinion of the minority, the same incompatibility triggers the non-constitutionality of the national rule.

In Decision no. 1031 of 13 November 200728, the Constitutional Court explicitly states as follows: “given that, since January 1st 2007, Romania has acceded to the European Union as a Member State, the national Constitutional Court is to examine the compatibility of the national legislation in the field of intellectual property rights in the customs operations with the European Union legislation in the same field, because, according to art. 148 § 2 of the national Constitution, « as a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory Community regulations, shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession acts”’. Therefore, the Constitutional Court declares itself ready to assess the compatibility of the internal law with the European Union law, based on the provisions of art. 148 § 2 of the national Constitution, which, in fact, regulates the relationship between the two systems of rules.

However, in Decision no. 413 of 10 April 2008, the Constitutional Court denies itself this competence, stating that “with respect to art. 151 § 1 and art. 155 of the Law no. 105/1992 on the private international law relations, the Court notices that the author of the exception of unconstitutionality criticizes the above mentioned dispositions as being contrary to the dispositions of Regulation (CE) no. 2201/2003 of the European Union Council, which should prevail over the national law, pursuant to art. 148 § 2 of the national Constitution. The Court considers that such aspects cannot be qualified as issues of constitutionality; they would rather interest the application of the law by the ordinary courts, excluding the competence of the Constitutional Court”29.

In this context, the intervention of the doctrine appears but necessary, pointing out to the national constitutional judge that article 148 § 2, which he wrongfully uses as a basis to assess constitutionality, “neither establishes a standard for the control of constitutionality nor assesses a hierarchy or an equivalence between the internal and European Union norms, merely indicating the way in which obligatory rules placed in distinct legal systems may apply in the same factual situation in the hypothesis that their normative contents are contradictory”30.

2.6. The national perspective upon the issue of the human rights within the European context

In a rather recent decision (Decision no. 1258/08.10.200931), the Romanian Constitutional Court finds unconstitutional the national law stipulating the obligation of the providers of electronic communications

30 E. S. Tănăsescu, Comentariu la Decizia Curții Constituționale nr. 59/2007 in Curierul Judiciar (no. 5/2007) 15.
services to the public to keep various data generated or accessed while providing the respective services. The national law in discussion\textsuperscript{32} was the national instrument of accurate transposition of the Directive no. 2006/24/CE. The Constitutional Court based its judgment on art. 25, 26, 28 and 30 of the national Constitution (protecting the freedom of movement; the intimate, private and family life; the secrecy of correspondence; the freedom of expression) interpreted in the framework of the European Convention of Human Rights and the case-law of the Court in Strasbourg.

The national Constitutional Court was, of course, aware of the fact that infringement proceedings had been brought against Ireland (C-202/09), Sweden (C-185/09), the Netherlands (C-192/09) and Austria (C-189/09), for the refusal to implement the same Directive no. 2006/24/CE. Also, as a relevant element for the discussion, it should be pointed out that the Court of Justice of the European Union rejected the annulment action formulated by Ireland against the European Union Parliament and Council within which the plaintiff claimed that art. 95 TCE could not represent a legal ground for the Directive\textsuperscript{33}.

How would one interpret the decision of the Romanian Constitutional Court? Obviously, the topic of the multi-levelled standard of the human rights in Europe has recently become of outmost importance, given the entry into force of the Lisbon Treaty, on December 1\textsuperscript{st}, 2009 (stating the obligatory nature for the Member States of the Charter of Fundamental Human Rights within the European Union and, at the same time, opening the possibility for the European Union to become a Contracting Party of the Convention for the Protection of Human Rights and Fundamental Freedoms), the entry into force of Protocole No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, on June 1\textsuperscript{st}, 2010 (which aims to reform the European Court of Human Rights and, in general, the Council of Europe, \textit{inter alia} in the event of the European Union's accession to the system), and, especially, the start of official negotiations between the European Commission and the Council of Europe on the European Union's accession to the Convention for the Protection of Human Rights and Fundamental Freedoms, on July 7\textsuperscript{th}, 2010.

Or, within such a complex context, one is forced to notice that the choice of the national constitutional judge goes in favour of the national constitution and the European Convention of Human Rights. This choice is but reasonable in a cultural perspective: apart from protecting the national sovereignty and the fundamental rights of his nationals, which has been an effort well known to several eminent European Union courts, the national judge also gives precedence to the case-law of the European judge of human rights as compared to the judge in Luxembourg, because of his longer experience with the former, whom he considers the ultimate authority in the field.

3. The Romanian Experience – the ordinary courts and the ordinary judges– from inconsistency to trust

3.1. Who are the subjects of the European Union law?

If between the years 2007–2008 the national courts expressed a hesitant attitude towards the European Union law, making sometimes unacceptable mistakes, within the last few years they have, on the contrary, had a rather correct and loyal attitude.

A relevant example from this point of view could be considered the various solutions given by the national ordinary judge to the conflict between a rule of national ordinary law and a European Union compulsory text (a directive). As a matter of fact, the question in the title of the present paragraph has

\textsuperscript{32} Law no.298/2008.

\textsuperscript{33} Case 301/06, \textit{Ireland v Parliament and Council} [2009].
been asked within the national litigations on the restraint of the free movement of persons, when the litigants alleged the contradiction between national Law no. 248/2005 on the regime of the free movement of the Romanian citizens and the European Union law (in this case, Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States).

One can notice that the responses of the national courts to this kind of conflicts have been of three types.

First, a practical case of the same typology mentioned above was correctly solved by the national High Court of Justice, but also, praiseworthily, by one of the first degree jurisdictions rendering its decision on 23 February 2007. The judgement applied, for the very first time in Romania, the Simmenthal case-law, from the perspective of art. 148 paragraph 2 of the national Constitution, with all the practical consequences thereof, among which the obligation of the judge to deem implicitly abrogated the national rule that contradicts the European law.

Secondly, the same type of conflict in the same matter generated the first request of a preliminary ruling addressed by a Romanian jurisdiction to the European Court of Justice. Apart from this solution with *inter partes* effects, one should also notice, thirdly, the fluctuant position of the national jurisdictions that have had the opportunity to render decisions in similar cases. A survey dealing with the period April – October 2007 and having as an object the relevant judgements rendered by one of the national courts of appeal reveals that in 34 affairs with an identical object 16 judges acknowledged the prevalence of the European Union law, while 18 refused to admit it and enforced the national law. On the same day, 6 cases were decided in favour and 6 against the prevalence of the European Union law. Furthermore, out of 16 cases in which the judges enforced the European Union law, that solution was maintained by the High Court in only 10 situations. On the contrary, some of the 14 decisions that enforced the national law in the detriment of the European Union law were afterwards rejected by the High Court.

But besides that, one should also point out the unacceptable character of the difficulties that the European Union law raised to the national judge. In one judgement, while rejecting an inferior court’s correct decision, the judge refuses to enforce the European Union law in favour of his own nationals, estimating that the latter only concerns the nationals of the other Member States: “By restricting the free movement of persons, article 38 of (national) Law no. 248/2005 does not infringe the European Union law (Directive no. 2004/38/CEE), as the restrictive measure only refers to the legislator’s own national, a Romanian citizen, and not to the nationals of other Member States in the European Union, whose right to enter the territory of a Member State could not, obviously, be restricted, pursuant to art. 27 of the Directive. In fact, the directive does not exclude a Member State’s prerogative to establish restrictive measures.”

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34 Decision no. 5982/2007 of the High Court of Justice. Similar decisions at the beginning of the activity as European Union law judge of the High Court of Justice are Decisions no. 2620/2007 or 4403/2007.
35 Decision no. 212/2007 of the First Instance Court Maramures. A similar decision was rendered by the Court of Appeal in Bucharest (Decision no. 21/A/2007). One must notice that, praiseworthily, the European Union law was correctly enforced in its relationship with the internal law by jurisdictions that are not at the top of the jurisdictional hierarchy and, moreover, the enforcement occurred in matters unprecedented to judges at the beginning of the exercise of enforcing the European Union law.
37 The request was published in the Official Journal of the European Union no. C 140 of June 23th 2007, p. 6, and dealt with as the case C-33/07.
38 Lead by Cosmin Costas, lecturer at the Law Faculty of “Babes Bolyai” University in Cluj Napoca, Romania.
39 Decision no. 148/A/2007 of the Cluj Court of Appeal.
measures for its own nationals, as the directive concerns any European Union citizen who enters or resides in a Member State, other than the one whose national he or she is.

In this particular instance again, the national judge has responded culturally: he is in principle familiar with the direct effect of the European Union law, triggering the consequence of the creation of rights for the Member States’ citizens. However, he cannot comply with the European Union law requirement to accept that the same effect occurs when Romania’s own citizens are concerned, mainly because in a dualist system’s logics the national Parliament and the national constitution are the entities concerned by the creation and the granting of rights for the nationals.

3.2. Can the European Union judge help?

Of course, the hesitations of the national judge on the enforcement of the European Union law might have been solved through the preliminary ruling procedure. In this respect, the most recent surveys (as of May 25th, 2011) indicate that 23 orders for reference were sent by Romanian courts to the European Court of Justice for preliminary rulings. This fact may be interpreted in the sense of a certain growth in awareness among the national courts concerning the importance of the judicial dialogue with the European Court of Justice and, also, concerning the obligatory nature of the cooperation in certain situations. In fact, year 2010 has represented a turning point for the Romanian courts, quite reticent before to cooperate with the European Union judge. Additional remarks can be made on the relationship established between the national and the European judge in the framework of the preliminary request procedure. Thus, on the one hand, one may notice that the content of the judicial dialogue initiated by the Romanian ordinary judge still lacks precision. In this respect, it may be relevant that 3 requests have been declared inadmissible because of the imprecision of the factual description made by the national judge or because the situation described by the national judge had no European Union dimension (involving, for instance, goods coming from third party States). On the other hand, it seems but remarkable that the European Court of Justice encourages the judicial dialogue with the Romanian courts, rephrasing the questions or partially responding to the demand.

4. Concluding remarks

Romania’s accession to the European Union legal order has represented a challenge for all the national judges, whether constitutional or ordinary ones. In most cases, the national judges have proved their good faith and loyalty to the Union project, while the European Union judge himself has encouraged the judicial dialogue. Also, the reactions of the national judges to the application principles of the European Union law can be said to be culturally influenced. Thus, the nomothetical dualistic national tradition has conditioned in some hypotheses the direct, immediate and with priority enforcement of the European Union law.
1. Introduction

Since accession to the EU in May 2004 the Czech legal system has been opened to impact from EU law. This openness has created the space for the application of supranational law by all kinds of Czech judiciary. As we near the end of the first decade following the accession to the Union there has been a comprehensive experience with the use of EU law and its principles in the Czech legal practice. Even though there may be some doubts or criticism (Bobek and Kühn speak about some expected tide which did not come1) connected with the initial hesitation to use EU law or mistakes connected with this new phenomenon an important steps have been made and now we may conclude that there is some standard habit of dealing with EU law as part of the legal system applicable on the soil of the Czech Republic.

One of the immanent part or consequence of the application of EU law and dealing with EU law questions is a potentiality of complications with the right usage and interpretation of EU law norms. The establishment of the instrument of preliminary questions (now under article 267 Treaty on the Functioning of the European Union – TFEU) was based precisely on this threat. Questions about the meaning, scope and validity of EU law norms resulting from their complicated structure and special character of EU law itself are never rare. These types of problems have actual meaning especially in the situation of the inexperienced courts and administrative bodies of new Member States. It is not surprising that these courts (12 new Member States which acceded to European Union in 2004 and 2007) welcomed the possibility to cooperate with the Court of Justice of the European Union (CJEU) and right after accession they submitted over one hundred of preliminary questions.2 Also Czech judiciary participated on this movement and by the end of the year 2010 submitted 15 preliminary references to the Luxembourg
In truth the Czech Constitutional Court (CCC) has not had any experience in this area yet. Therefore this work can not offer any statistical overview or evaluation. However this fact does not prevent us from offering some general assumptions on the question of active role of the CCC in connection with the preliminary questions instrument. The goal of this work is to describe its arguments and to unveil its position on this matter.

2. An Active Role – CCC and Others

Even though the CCC did not join the group of active Czech courts yet there is relevant case-law in this field which leads us to the conclusion that its position can not be ignored. We may determine its attitude as silent rather than passive. There were several cases in the past where the CCC had to resolve the question whether to submit a preliminary question to the CJEU or not. This kind of query forms part of its forming doctrine on the application of EU law within the Czech legal order and on the relation between supranational and domestic law and the need to bear in mind that the CCC stands as an Europe friendly Court. Let me briefly overview this matter. In its developing case-law the CCC accepted the autonomy of supranational law and its applicability within the Czech legal order. At the same time it also presented some sort of opposition to the absolute meaning of the principle of the primacy of EU law insisting on the need to maintain the basic elements of national constitutionalism. But when CCC consciously or implicitly puts limits on the effects of EU law it does not do so with the intent to hinder the achievement of the objectives of European integration. This Solange position serves as a hypothetical warning. It is a manifestation of self-awareness and the need to maintain the core values on which Czech Republic is based and do not obstruct the real application of EU norms. The CCC expressed its pro-European position also by wide acceptation and use of so called indirect effect of EU law. It is open to interpret the national law (including the constitutional norms) in the light of European goals. In general we may conclude that the CCC is aware of pros and cons of the membership of the Czech Republic in the EU and is open to balance the needs of both Czech and European law.

Abovementioned conclusion leads us to an assumption that CCC could be open also to the active use of the preliminary references procedure. Nevertheless one can not ignore the fact that there are not

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5 The spinal decisions within this doctrine are Sugar Quota Regulation III, PLÚS 50/04, decided on 8 March 2006; European Arrest Warrant, PLÚS 66/04 decided on 3 May 2006; Treaty of Lisbon I, Pl. US 19/08, decided on 26 November 2008; Pfitzer, II. ÚS 1009/08, decided on 1 January 2009.

6 Sugar Quota Regulation III, PLÚS 50/04, decided on 8 March 2006.

7 European Arrest Warrant, PLÚS 66/04 decided on 3 May 2006.

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many constitutional courts9 which decided to enter the ring of communication with the CJEU yet.10 The position of these courts is ranging between acceptance and real experience with submitting of references, some sort of open but passive position and also negative attitude.11 Even though the question of making references by the constitutional courts (or highest national courts in general) is a sensitive issue12 in my view there is a space and there could be motivation for an active participation of them. This assumption is based on the hope that the relationship of national and supranational law (as well as the relationship between national courts and the CJEU) may be understood more as a result of pluralistic dialogue13 rather than as a system for promoting unilateral views of those who have the privilege of the final word. The positive attitude of those national authorities towards the possibility of using a preliminary ruling procedure under Article 267 TFEU may serve as the best expression of a cooperative relationship between the constitutional courts and the CJEU.

What are the main questions generally applicable to all constitutional courts in connection with the active role of constitutional judiciaries within the system of preliminary rulings? We have to point out some prerequisites for this determination. First of all one has to keep in mind that preliminary question procedure was built as a formal chain between national judiciaries and CJEU within which the Luxembourg court has a doctrinal dominance. It is this court which presented the binding interpretation on some key features of the preliminary request procedure. One of the most important is the independent notion of the term court or tribunal. By its own independent delimitation of this term CJEU in fact determined the sum of its national partners. In connection with our goal we have to ask whether the constitutional courts are fulfilling the criteria introduced by CJEU and whether they are allowed to submit the question to Luxembourg. After this rather abstract question which is rooted in the supranational level we need to focus on the internal view of the constitutional courts themselves. We can not ignore their special character and unique role within the national system. It is very important to find out whether constitutional courts alone perceive themselves as the courts allowed to submit the question and whether they are acting within the established logic and practice of the preliminary ruling procedure rules. These questions are rather analytical and may be based on some statistics. The issue of the active role of the constitutional courts in connection with the preliminary ruling procedure needs the balancing the requirement of equivalent interpretation of EU law and requirement of unique position of constitutional judiciary. Therefore one may ask the third important (let say doctrinal) question which is

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9 It is important to mention here that at this place and elsewhere in this article I am speaking only about separate and concentrated constitutional judiciary known as “Austrian model”. Constitutional Court of the Czech Republic is the example of this type. There were of course some preliminary questions submitted by the highest courts which perform some kind of constitutional review (for example Cypriot Ανώτατο Δικαστήριο or Danish Højesteret) but I will focus only on the specialized constitutional courts which serve as autonomous and particular protectors of constitutionality.


whether the active role of constitutional courts is even desirable and needed and what sort of general structural consequences must be connected with it. I will present these three questions further in this work.

3. The CCC and the “Waassen” Criteria?

The question in the title is rather academic and abstract. It serves to test the preconditions for active participation of any constitutional court. It is appropriate to ask whether any constitutional court may be determined as a court according the logic of article 267 TFEU. In answering this question the perception of CJEU is the most relevant. The Luxembourg Court has developed it own concept and definition of the term “court”. Within its case-law it has gradually developed the criteria that national authorities must meet in order to determine them to be a “court” within the meaning of Article 267 TFEU.14 These criteria are:

- a formal legal basis – a national body must be created by the law of the state. A private treaty is not enough;
- it must be a permanent body;
- the institution must have obligatory jurisdiction to hear particular things;
- the authority must resolve some dispute;
- in deciding the case it must apply positive law;
- it shall be institutionally and functionally independent of other organs and bodies of national law.15

The aforementioned criteria were established by the CJEU in order to determine the character of its potential future partners. The CJEU is serving as master of interpretation of EU law and especially Treaties and do not want to leave any room for some inconsistencies and different practice in several Member States. But even though CJEU developed the criteria on the notion of the “court” it is still more or less a question of the national legal system to determine which courts in which position may meet these supranational criteria. Therefore it is not a completely autonomous concept and to some extent it is dependent on procedural autonomy of national law.

Special importance of this question appears when we want to determine the role of constitutional courts. Whether any constitutional court will fit with the aforementioned Waassen criteria depends precisely on the system of constitutional review and the competences of the court. If there is concrete control of the constitutionality and the classical constitutional complaint established within the national system the criteria for determination of the term “court” as body accessible to the preliminary ruling should be met. Constitutional complaint (against the decision or other act of the public authority) is the traditional part of the Czech constitutional system.16 Within this procedure the CCC is acting as the court resolving the (constitutional) dispute and it is the independent and permanent court established

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16 See Constitutional Law no. 1/1993 Coll., Constitution of the Czech Republic article 87 para 1 letters c) and d) and Law no. 182/1993 Coll., on the Constitutional Court, article 72.
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by law having the obligatory jurisdiction and applying the law. Taking into account these facts we may conclude that the CCC is the “court” allowed to submit the preliminary questions to the CJEU.17

4. Hesitation, Cautiousness or Coincidence? Some Practical Experiences with (non)Submission of Preliminary Questions by CCC

4.1. Foreword

Even though the CCC should be theoretically determined as the “court” according to the Waassen criteria its own internal position and its practice can not be overlooked. Theoretical or doctrinal answer to question whether the constitutional courts should be determined as the courts involved in the logic of preliminary references procedure seems to be irrelevant. It is so mainly because the special role of the constitutional judiciary. The real answer can be expressed only by the constitutional courts themselves. The definition of their position within the European judicial system and especially exploring their role within the European judicial dialogue depends on the casuistic experience of each individual one of them. The CCC proclaimed itself as the court capable to submit the preliminary question. It has approved the theoretical assumption and tested itself by Waassen criteria. In several decisions it approved that in certain circumstances (especially in connection with constitutional complaints in the situations where lower courts which had dealt with the case before it had not submitted the question) it may act as the court actively using the instrument of preliminary questions. The reality is that it did not employ this active position till now. But it adopted the position of opened door for this question. Another piece of evidence for the conclusion about willingness to (rarely but yet) submit the question to Luxembourg is inhered in its practical position. The CCC conducts within the established logic and practice of the preliminary ruling procedure rules. On one side it considers itself as the court competent to send the question and at the same time it is using the well known CILFIT18 criteria to avoid the real cooperation with the Court of Justice. Michal Bobek pointed that this fact serves as a tacit/silent approval of the logic of preliminary proceedings.19 In the next part I will look at the response of the CCC and its willingness to initiate the preliminary references procedure in concrete cases.

4.2. Practical Experience

The CCC had to resolve the problem of the submission of reference in several decisions right after accession of the Czech Republic to the EU. However the initiatives of the participants of proceeding before the CCC in most cases played a secondary role or they were used by the complainants in some “artificial” or abusive way. These first attempts were rejected mainly for the reasons of ratione temporis (time base of issues beyond the time limit of the applicability of the EU law within the Czech legal order) or ratione materiae (the question outside the scope of EU law).20 Regardless the negative results of the objections asking for the submission of the question to the CJEU one interesting obiter dictum appeared

20 See BOBEK, Michal. Learning to Talk: Preliminary Rulings, the Courts of the New Member States and Court of Justice. Common Market Law Review, 2008, roč. 45, č. 6, s. 1630.
within this group of decisions. Arguments of the CCC in a case II.ÚS 14/04\(^{21}\) CCC suggested that under certain circumstances it could be considered as a court for the purposes of the article 267 TFEU. This anticipated in many ways its future approach on this issue. According to the CCC’s view it is not generally the court of last instance which is obliged to submit the preliminary question but under some special circumstances it may consider this option. The CCC held that proposal for preliminary question could be addressed by it only when the general court whose decision could not be contested by judicial remedy did not submit to the CJEU the question which participant suggested.

This *obiter* opened the space for further development of the attitude of CCC towards the preliminary question procedure. It was faced with the question whether to submit reference to the CJEU or not in several cases. When studying its case law one may be able to point out main reasons why its experience is still void and it did not actively use the opportunities to initiate the preliminary question procedure. The first reason is that the CCC dealt with the questions already resolved by the CJEU or the so called clear situations and used the CILFIT doctrine in order to justify non-submission of preliminary question. Second reason was rooted in the circumstances of the case when the CCC rejected the idea to submit the question by the argument that similar questions were already submitted by another European court. In case *Sugar Quota Regulation III*, Pl.ÚS 50/04 the CCC dealt with the idea of submitting the question more seriously. After examination and analysis of relevant case law of the CJEU however it came to the conclusion that a problematic question had been sufficiently clarified in the Luxembourg case-law and therefore did not consider necessary to initiate a preliminary ruling. The CCC proved its serious approach to this question and relevant “coquetry” with the issue of preliminary reference. The CCC repeated that role of the constitutional judiciary in connection with preliminary question procedure is special and has its peculiarities. The CCC pointed out that especially in connection with the abstract norm control it has very small if any relevance. On the other hand the CCC expressed that it takes the question of determination of its own role in connection with preliminary question procedure as a delicate thing and left this question open for the further consideration in future cases. In this decision it did not express any final judgments on this question also because in its view there was no need to submit the question to the CJEU. The CCC relied on the established case law of the CJEU and understood the problematic questions as already resolved. By this argument it avoided the resolution of the hot question of its own active role. Michal Bobek speaks on behalf of this decision about some internal contradictions in the approach of the CCC. On one side it did not want to conclude the problem definitively and to answer whether it can or can not be considered as the court according to scope of article 267 TFEU. But at the same time it acted as a “court” within this meaning because it tried to justify non-submission of question by the *acte éclairé* doctrine.\(^{22}\) This serves as evidence for the assumptions that the CCC not only defines itself as a “court” within the preliminary question logic but anticipates that it is the court of last instance obliged to ask the questions.\(^{23}\)

Another example of this contradiction in the CCC’s approach is connected with the use of the *acté clair* doctrine. Here the CCC once more did not express precisely whether it understands itself as a “court” within the preliminary question logic but at the same time it acted as the court obliged to refer the question which is looking for some exemption which allows it not to do that. This appeared in the series of decisions concerning the constitutionality of the impossibility of judicial review of the opinion

\(^{21}\) CCC decision II. ÚS 14/04 decided on 25 January 2006.


\(^{23}\) BOBEK, Michal. Ústavní soud České republiky: obecné soudy mají povinnost aplikovat komunitární právo samostatně. *Soudní rozhledy*, 2006, roč. 12, č. 5, s. 175.
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of the Ministry of Environment declared within the Environmental Impact Assessment procedure in 2008. CCC was called to cancel the Supreme Administrative Court decisions because this court did not submit the question to the CJEU and therefore breached the complainants’ constitutional right to a fair trial. Alternatively the CCC was asked to initiate the preliminary question procedure itself. The CCC rejected this second alternative and decided the case without reference to Luxembourg. It used the acte clair doctrine and indirectly expressed that it is the court normally entitled to initiate the preliminary ruling which in specific cases of clear situations does have a duty to do so.

The question of potential cooperation between the CCC and CJEU by the means of preliminary reference was opened once more in the decision Pl. US 66/04 European arrest warrant. In this case an ideal situation appeared (Such a situation presents perhaps ideal circumstances for referring the mentioned issues to the ECJ for a preliminary ruling). European Arrest Warrant case opened the question of the legal nature of the framework decisions as an act of a third pillar, the relation between this act and national law in general and finally the question of the legality of the Framework decision on European Arrest Warrant itself. The CCC recognized these issues as the most crucial but it did not make any preliminary reference to the Luxembourg court because similar questions had been submitted to the CJEU by Belgian constitutional court some time before. The attitude of the CCC once again confirms the hypothesis that it considers itself as a “court” entitled to initiate the preliminary ruling procedure.

The CCC still did not determine finally whether it may be considered as the “court” in relation with the preliminary questions procedure. The experience confirms that it might actively cooperate with the CJEU through the instrument of preliminary questions in some special circumstances. What is clear is that the CCC left the door opened for the resolution of this issue in the future. Even without explicit recognition of itself as a court within the meaning of article 267 TFEU it confirmed (at least implicitly) that this possibility is not excluded.

5. Necessity of an Active Role. Is there a need of chain?

When we want to determine whether there is a need to establish the chain between the constitutional courts and the Court of Justice by use of the preliminary questions procedure we need to distinguish the point of view at two levels – the national on one hand and the supranational on the other. I assume that from the national perspective the question of submission of the preliminary question is closely connected with the understanding of national autonomy and the role of constitutional courts. On the one side the submission of the preliminary question may be understood as a chance to open the space for the accenting and supporting the internal national views and its own constitutional prerogatives within the communication with the CJEU. On the other side this submission may be understand as getting under the sub-ordinance and authority of the CJEU which may limit the autonomy of the constitutional court. From the supranational perspective there might be also some positive and negative assumptions. The pros are connected with the establishment of the real cooperative dialogue but with the notion of the final word from Luxemburg. The cons are proliferation and growth of the number of preliminary questions and in connection with hard constitutional questions there is a kind of risk that the answers won't be accepted by the constitutional courts. Another negative assumption is that CJEU will be preoccupied and overloaded by the questions. The number of questions and the level of complexity (one may assume that because of their constitutional origin they could be more complicated) might lead to

the prolonging of the proceedings and decrease of the effectivity of the preliminary questions proceedings. All these factors are important and we need to keep them in mind when we are thinking about the active role of the constitutional courts within the preliminary questions procedure. Notwithstanding these problems we need to mark that from the point of view of the constitutional courts the instrument of preliminary questions might be used as an effective tool to participating within the pluralistic dialogue. Even though submissions of the questions may seem as a one-way process and as an expression of subordination between national courts and the CJEU the special role of constitutional courts requires the special understanding of this legal institution. It may serve as an excellent tool for the creation of a system of effective participation. Zdeněk Kühn pointed out that the participation of the constitutional courts in this discourse should be pragmatic. With reference to Joseph Weiler he noted that a possibility to submit the questions to the CJEU opens space for the constitutional courts to deal with domestic issues and to mention all their opinions and have an influence on the development of the doctrines of European law.26

Václav Stehlik*

Czech constitutional rules vis-à-vis EU fundamental rights standards: systematic remarks

1. Introductory remarks

The relationship between EU and national law is a long saga which started with the ambitious van Gend en Loos1 and Costa2 cases at the beginning of the 60s and since then it has not been free of commotions and disturbances. The reasons behind are the divergent views on the EU law application in the Member States formulated by the European Court of Justice (further the “ECJ”), on one side, and acceptance of EU law by national supreme judiciaries, on the other.

Most generally discrepant approaches are rooted in the nature of the European Union and the state of integration, its constant expansion and aspirations to cover more “in breadth and depth” areas formerly occupied by national law, and simultaneously no openly worded EU status/finality approved by Member States and internalised by their nationals. This is complemented with legal, social and cultural diversity of Member States and their needs to safeguard their own traditions and identity and to avoid excessive intrusion in what they think is fundamental for their own countries and nationals.

The divergence may be seen in the fact that, although the ECJ in its decisions formulated an absolute primacy of EU law over national law, including the constitutional rules,3 national courts did not accept unconditionally this doctrine and formulated limits for full application of EU law in relation to national constitutional rules.4 Thus, national judiciaries expressed their will to control the use of competences transferred from Member States to the EU and, consequently, reserved for themselves the power to review whether the EU institutions act within the limits of conferred powers; that means whether they do not interfere outside the area of transferred competences.5 The ECJ reacted to this requirement by an

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5  Comp. ibid, p. 678 et seq.

increased scrutiny of EU legislation; the prominent, often quoted examples in the 90s being the Tobacco Advertising Directive case⁶ or the Opinion on the EC Accession to the European Convention.⁷

Further, the national courts reserve for themselves the control of whether the EU law and, consequently also the ECJ in its judgments, do not breach the fundamental rights standards⁸ as guaranteed by national constitutional rules. The case-law of the Italian Constitutional Court in Frontini case⁹ and most prominently the German Federal Constitutional Court in Solange I case¹⁰ forced the ECJ to actively protect fundamental rights as general principles of law as earlier formulated in Stauder case.¹¹ Thereby the national courts took guard against an excessive expansion of EU competences when sufficient fundamental rights guarantees are missing at the EU level. From that time the EU fundamental rights protection has undergone complex developments that resulted in the adoption of the EU Charter of Fundamental Rights (further referred as “EU Charter”){¹² and its incorporation to the EU primary law and, thus, again reshaped the EU-national fundamental rights dialogue.

After the accession of countries from Central and Eastern Europe in 2004 the question was whether and, consequently, how these countries and their supreme and constitutional courts will track the tradition initiated by their counterparts in “old” Member States. In the following we will focus on the developments in the case-law of the Czech Constitutional Court (further referred to as the “CCC”) in relation to the EU law and fundamental rights protection/standards. We do not intend to make a detailed analysis of the CCC approach to the EU law, this already having been done elsewhere;¹³ preferably we will try to formulate general conclusions and the CCC’s grasp of this subject as it appeared in its seminal judgments; the individual postulates reoccur in the case-law, however, we will focus on the most distinctive examples.

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⁸ Although the term “human rights” is used in theory and case-law as well, in this paper we will use the term “fundamental rights” as it is used officially both by the Czech and EU Charter.
¹² OJ 2007/C 303/01.
2. Fundamental rights in the case-law of the Czech Constitutional Court

2.1. Basic doctrinal characteristics of the judicial practice – “Sugar Quotas” judgment

2.1.1. The Constitution as the basis for the application of EU law – principal of conditional conferral

The first fundamental decision laying down the principles of relations between Czech and EU law was the “Sugar Quotas” judgment\(^{14}\) where the CCC expressed itself on the legal basis for the application of EU law in the Czech legal order. This legal basis is to be found in the art. 10a of the Constitution which was introduced in the Constitution in the context of the Czech accession to the EU. It enables to transfer certain powers/competences to an international organisation or institution;\(^{15}\) in practice to the EU and its institutions.\(^{16}\)

The interpretation of these provisions and the extent of the transfer of powers\(^{17}\) are under the auspices of the CCC. It reviews application of this article with regard to its tasks and competences – that is the protection of Czech constitutionality\(^{18}\) – and not primarily with regard to the requirements/notions of EU constitutionality or legality and EU interests.\(^{19}\) This means that the application of the EU law in the Czech Republic is based on the Czech Constitution and even after the accession to the EU the original bearer of sovereignty and competences stemming therefrom is still the Czech Republic.

At the same time the CCC showed respect to the doctrines developed by the ECJ and acknowledged that the EU law has applicational precedence in the legal order of Member States, the Czech legal order included. It accepted that no national court including the CCC has the right to express itself on validity of EU law; this is a domaine réservé for the ECJ.\(^{20}\) However, if the application of EU law is based on the Czech Constitution, then the EU law cannot take (full) precedence over it and it is possible to use national limits for its application entrenched in the Czech Constitution, and broadly taken in the whole constitutional order. In that regard the CCC referred to the practice of other Member States and especially the constitutional developments in Germany, Ireland and Italy and found itself obliged to make conclusions also in that regard. It stated that the precedence of EU law is not absolute and the principle of conditional conferral applies.

\(^{14}\) The CCC judgment of 8 March 2006, No. Pl. ÚS 50/04; selected CCC’s judgments are available in English at www.cocnourt.cz.

\(^{15}\) *Article 10a*


\(^{17}\) Comp. the arguments used in the judgment of the CCC in “Lisbon I” on the term “powers” in points 96 and 97.

\(^{18}\) Comp. art. 83 of the Act No.182/1993 o Ústavním soudu (on the Constitutional Court).

\(^{19}\) Still, the CCC reflects the EU reality – see can seen below in its argumentation e.g. in “European Arrest Warrant” judgment on the free movement of persons.

Under art. 1 par. 1 of the Constitution the Czech Republic is a sovereign and democratic state founded on respect for fundamental rights. Further, under art. 9 par. 2 of the Constitution the transfer of powers through art. 10a is permissible only if the essential characteristics/requirements of the democratic state based on rule of law are not compromised. The article 9 par. 2 cannot be changed even by constitutional acts and procedures and it forms the material core of the Constitution. The essential requirements of a democratic state are not defined in the Constitution expressis verbis and their interpretation is the exclusive task of the CCC.

Expressly a part of these essential requirements of democratic state are fundamental rights as they are put in the fundaments of the Czech constitutionality by art. 1 par. 1 of the Constitution. This means that a breach of them in the EU law may lead to the refusal of EU application in the Czech legal order authoritatively in proceedings before the CCC.

### 2.1.2. Restrictions of the discretion of the Czech legislator by general principles of law

As outlined above, fundamental rights protection became a factor limiting a full application of EU law in Member States; in that regard a prominent position is taken by the developments in Germany, especially the well known Solange I case. Despite its initial refusal to protect fundamental rights the ECJ reacted to the Solange I decision by an increased protection of fundamental rights as general principles of EC (now EU) law and, thus, gave a protection of fundamental rights in individual cases despite the absence of any explicit competence in EC primary law at that time.

The CCC also analysed this question in the “Sugar Quotas” judgment. It stated that if Member States implement EU policies by their own legal instruments, their discretion is limited by these general principles of law that belong to the EU primary law, fundamental rights being part of them. Although the CCC deals only with the general principles of law, we assume that a similar principle applies in relation to the EU secondary legislation that bears fundamental rights provisions or implications. Also in relation to these norms the principle of precedence will apply and in individual cases these norms may be under scrutiny whether they do not breach rights as guaranteed by the Czech Charter of Fundamental Rights (further referred as “Czech Charter”).

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21 The art. 1 par. 1 says that “the Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens.”

22 The art. 9 par. 2 says that “Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible”.

23 See part B of the judgment, comp. also point 196 of the “Lisbon I” judgment, see below.

24 This concept having been introduced already before the Solange I decision, see case 29/69 Stauder [1969] ECR 419.

25 From a general perspective the secondary legislation brings into action fundamental rights formulated in the general principles of law. The general principles are part of ECJ’s arguments even after the EU Charter of Fundamental Rights has become a part of primary law – see f.e. the much debated case C555/07 Küçükdeveci where the ECJ talks about “the principle of non-discrimination on grounds of age as given expression in Directive 2000/78” – comp. point 51 of the decision; at the same time it makes a supportive referral to the EU Charter, see point 22 of the decision.

26 This Charter is part of the Czech Constitutional order and is at the same level as the Constitution.

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2.1.3. Limitation of review in the abstract constitutionality control

The “Sugar Quotas” judgment as well as subsequent cases\(^{27}\) concerned abstract control of constitutionality; that is a constitutional review initiated by a group of MPs.\(^{28}\) The Constitutional Court scrutinised the compliance of EU law implementation with the provisions of the Charter as it was pleaded by the complainants – that is at the general level without a concrete dispute in process. Therefore, it could have done only a systematic analysis via the prism of general principles of law. In this general analysis the CCC came out of the case-law of the ECJ in the area of fundamental rights and at the general level it did not find any breach of their standards.\(^{29}\) Repeatedly it stated that it is difficult to judge at the general level whether or at what extent there will be an interference with fundamental rights of individual persons in individual cases.

2.2. Euro-conform interpretation of the Constitution and Charter – “EAW” judgment

In “Sugar Quotas” judgment the CCC set up basic fundaments for EU law application in the Czech legal order and formulated general constitutional limits including the analysis of fundamental rights provisions.\(^{30}\) The mosaic was enriched by CCC’s conclusions adopted in the “European Arrest Warrant” judgment (“EAW” judgment).\(^{31}\)

Alike the “Sugar Quotas” judgment this case concerned an abstract review of constitutionality initiated by a group of MPs and Senators that asserted unconstitutionality of the Framework Decision on the European Arrest Warrant\(^{32}\) and especially its implementation in the Czech legal order. The Czech Criminal Code allows extradition of a Czech national for criminal proceedings to another EU Member State by means of the European Arrest Warrant.\(^{33}\) According to the complainants this breaches art. 14 par. 4 of the Charter which prohibits to force Czech nationals out of the country.\(^{34}\)

First of all, in its decision the CCC stated that the Czech legislation and also the Czech constitutional rules must be interpreted in a euro-conform way; that means with respect to the principles of European integration. The principle of euro-conform interpretation of national law has become an important

\(^{27}\) See below the “EAW” and “Lisbon I” judgments.

\(^{28}\) The abstract norm control may be initiated by a group of MPs of the Lower of Upper Chamber of the Czech Parliament or the Chambers themselves.

\(^{29}\) The CCC cancelled the concerned governmental regulation as it was an implementation of the EU regulation which was unacceptable due to the doctrine of direct applicability of EU regulations.


\(^{31}\) The CCC judgment of 3 May 2006; No. Pl. ÚS 66/04. The constitutionality of the European Arrest Warrant was under review also in other EU Member States; see i.e. developments in Germany where the implementation of the EU framework decision on the EAW was found void in 2005, for details see i.e. Mölders, S.: European Arrest Warrant Act is Void – The Decision of the German Federal Constitutional Court of 18 July 2005. German Law Journal, Vol. 7, No. 1, 2007; available on-line at http://www.germanlawjournal.com/pdfs/Vol07No01/PDF_Vol_07_No_1_45-58_Developments_Moelders.pdf.

\(^{32}\) Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States; 2002/584/JHA.

\(^{33}\) See par.21 subpar. 2 of the Act No. 140/1961 of the Coll. – Criminal Code.

\(^{34}\) Art. 14 of the Charter:

“(4) Every citizen is free to enter the territory of the Czech and Slovak Federal Republic. No citizen may be forced to leave her homeland.”
means to support the proper application of EU law in Member States and in that respect is a less intrusive complement to the principle of direct effect of EU law.35

Let us recall at this point that the euro-conform interpretation (also called indirect effect) was first formulated by the ECJ in respect to EU directives. It is more easily acceptable by national courts as in deciding conflicts they are not forced to the more radical direct application of EU law and non-application of conflicting national law; it enables them to use their interpretative discretion and try to find out and use the interpretation and consequent application of national law in conformity with EU law obligations.36 The euro-conform interpretation of national law is applicable both in vertical and horizontal situations in relation to all EU primary law and secondary legislation including directives (which is actually not possible with direct effect).37 It will apply also in the area of fundamental rights as their protection is safeguarded both by EU primary and secondary law.38

By analogy the CCC concluded that if the Constitution and the Charter may be interpreted in several ways, the interpretation which is most suitable for the fulfilment of the obligations of the Czech Republic should be chosen. The CCC did not decide on the superiority of the EU fundamental rights standard but applied Czech fundamental rights standards interpreted in the context of the EU integration.

In the “EA W” judgment the CCC used the historic and teleological analysis of the origin and raison d’être of the provision 14 par. 4 of the Charter; this provision was introduced in the Charter as a reaction to practices of the Communist regime when regime-non-conform citizens were forced to leave the country. At the same time the CCC reacted to the present state of the EU integration which, due to Schengen acquis, is based on the free movement of persons without border controls. This benefit was outweighed by the necessity to create common rules on common fight against the most serious forms of crime.

The “EA W” case concerned the abstract control of constitutionality and in general the CCC declared that the Czech Charter may be interpreted in a euro-conform way. Again it is very difficult at an abstract level to evaluate the impact on individual rights. Therefore, the CCC admitted that in individual cases which are not criminal acts in the Czech legal order but which may be penalised in other Member States the extradition could lead to the breach of the Czech Charter. However, the Criminal Procedure Code covers these situations.40

35 The euro-conform interpretation of Czech Law may be found already in “Sugar Quotas” judgment, comp. the interpretation of the prohibition of discrimination which had to be done in the light of the ECJ’s judgments – comp. part VI, point A1, letter d) of the judgment.
36 This obligation was formulated also in relation to the former third pillar where the framework decisions were used which otherwise lack the effects of EC law except f.e. euro-conform interpretation, see case C-105/03 Maria Pupino [2005] ECR I-5285.
38 Although the horizontal application of fundamental rights is a complex topic – comp. the German doctrine of “Drittwirkung”. In the Czech legal order the Czech Charter is not applied directly in horizontal situations but only indirectly through the interpretation of private law norms. See f.e. the CCC judgment of 10 November 1999, No. I. ÚS 315/99. Most recently see the ECJ case Küçükdeveci that concerned the horizontal application of the prohibition of discrimination as contained in general principles of EU law and expressed in the EU directive.
39 According to the CCC this may concern f.e. “distance delicts” which may be committed by means of electronic devices or breach of freedom of expression.
40 Comp. par. 377 of the Act No. 141/1961 of the Coll – Criminal Procedure Code; this provision enables to refuse the extradition in case it would lead to the breach of the Constitution or other provision of the Czech legal order which it necessary to insist upon or it would breach some other important protected interest of the Czech Republic.
2.3 European Convention – a common European standard of fundamental rights – “EAW” and “Lisbon I” judgments

No doubts the protection of fundamental rights both at the EU level and in the Member States is complemented by the Strasbourg control mechanism represented by the European Convention and the European Court of Human Rights (further "ECtHR"). The relationship among national, EU and all European standards of fundamental rights protection appear in the CCC’s case-law basically in context of two judgments – “EAW” and “Lisbon I”.

In “EAW” judgment the first important conclusion formulated by the CCC was that, as all Member States are signatories of the European Convention, they are subordinated to the Strasbourg control mechanism. Thus, European Convention as interpreted by the ECtHR sets up a common standard for the protection of fundamental rights and possible excess in that regard in the legal system and judicial proceedings in individual Member States may be eliminated through the individual complaint to the ECtHR. In other words standards of fundamental rights protection in the Czech Republic and in other EU Member States should be equivalent and the case-law of the ECtHR should lead to unification of fundamental rights interpretation and application and can lead to remove discrepancies in the protection in the country where the Czech citizen should be extradited.

The “Lisbon I” judgment concerned an abstract review of constitutionality in relation to the revisions of EU primary law by the Lisbon Treaty; this review was initiated by the Senate (the Upper Chamber of the Czech Parliament). In this judgment the CCC had a chance to reflect the impact of the future EU accession to the European Convention as envisaged by art. 6 par. 2 of the revised TEU. According to the CCC after that accession to the European Convention the EU institutions and also the ECJ will become subject to the Strasbourg control mechanism including the European Court of Human Rights. This inclusion of the ECtHR in the system of protection “is a step which only strengthens the mutual conformity of these systems.” This conclusion is a logical consequence of the CCC’s approach to all European unified standard described above in the “EAW” judgment.

2.4 EU Charter of Fundamental Rights and Czech constitutional order – “Lisbon I” judgment

Apart from the effect of EU accession to the European Convention another issue raised in the “Lisbon I” by the complainants concerned the lack of clarity about the future status of the EU Charter and its effect on the standards of fundamental rights protection guaranteed in the Czech Charter.

The CCC emphasized that the EU Charter is primarily binding on the EU institutions and Czech institutions are bound only if they apply the EU law. The EU Charter does not expand the application of EU law outside the EU competencies and respects fundamental rights stemming from the constitutional

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41 Comp. point 86 of the judgment.
42 In that regard we may refer to the art. 52 par. 3 of the EU Charter which sets that in case of corresponding rights both in the EU Charter and the European Convention "the meaning and scope of those rights shall be the same as those laid down by the said Convention", higher level of protection being allowed; and art. 53 that prohibits the decrease of protection already achieved by the Convention and other sources of fundamental rights at international and national level.
43 The CCC’s judgment of 26 November 2008, No. Pl. ÚS 19/08 – “Lisbon I”.
44 Art. 6, par. 2: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.”
45 See point 193 of the “Lisbon I” judgment.
46 Comp. art. 51 of the EU Charter.
traditions common to Member States; the EU Charter must be interpreted in conformity with these traditions.\textsuperscript{47}

Further, it confirmed its conclusions in previous judgments. The fundamental rights protection belongs to the material core of the Czech Constitution; if the standard of protection would be unacceptable, then the Czech institutions would have to take back the transferred powers and would insure the necessary standard. It concluded that at an abstract level it is difficult to review mutual harmony of various rights; \textit{prima facie} no provision of the EU Charter is in breach of this necessary standard.\textsuperscript{48} The catalogue of fundamental rights in the Charter is \textit{fully comparable} with the catalogue of rights and freedoms protected in the Czech Republic. In case of conflict of these sources of law the applying bodies would have to give precedence to higher standard of protection and individual cases should be decided in the constitutional review process.\textsuperscript{49}

2.5 Active use of the Czech Charter to insure EU law application – \textit{“Pfizer”}

A different perspective on the relationship between Czech Charter of Fundamental Rights and its application \textit{vis-à-vis} EU law can be seen in the CCC’s judgment in case \textit{“Pfizer”}.\textsuperscript{50} The case concerned a commercial company that made a complaint to the CCC and alleged that the Czech Supreme Administrative Court should have initiated the preliminary ruling procedure under art. 267 TFEU (at that time art. 234 TEC) and refer questions to the ECJ in order to get the proper interpretation of EU law.\textsuperscript{51} Pfizer claimed a breach of few fundamental rights guaranteed in the Czech Charter, among others the right to fair process.

The details of the case and main arguments are analysed in detail elsewhere.\textsuperscript{52} In the context of this article suffice it say that according to the CCC although the referral of preliminary questions is the EU law matter, the failure to make a reference, in certain circumstances, may also cause a violation of the constitutionally guaranteed \textit{right to one’s statutory judge} as formulated in art. 38 par. 1 of the Czech Charter. This is so if the Czech court applies EU law but fails, in an arbitrary manner, to refer a preliminary question to the ECJ. Further, the CCC explained what it conceives under the breach of the right to statutory judge in relation to the preliminary ruling procedure.\textsuperscript{53} Finally, the CCC concluded that the Supreme Administrative Court did not sufficiently substantiate why it did not refer questions to the ECJ even though it, as the court of last instance, had this obligation and, thus, breached the art. 38 par. 1 of the Czech Charter.

The case \textit{“Pfizer”} was different than the previous cases basically in two aspects. First, it was not a case on an abstract control of constitutionality but an individual complaint for the breach of fundamental rights with the employ of both EU law and Czech constitutional law. Human rights of an individual

\textsuperscript{47} Comp. point 189 of the judgment \textit{“Lisbon I”} a art. 51 and 52 of the EU Charter.

\textsuperscript{48} Comp. point 197 of the judgment.


\textsuperscript{50} The CCC’s judgment of 8 January 2009, No. II. 1009/08.

\textsuperscript{51} The case concerned company’s standing in administrative proceeding on the registration of medical product and the EU Directive 2001/83/EC which emphasized the necessity to protect innovative firms from being disadvantaged in the registration process.


\textsuperscript{53} Comp. par. 22 of the judgment. In that respect it refers to the case-law of the German Federal Constitutional Court.
company were affected in an existing situation and the CCC was willing to read the provisions of the Czech Charter in a euro-conform way in a real fundamental rights violation.

Secondly, previous cases showed that in case of the breach of the material core of the Czech Constitution the EU law could be disapplied – these cases were mainly about setting up limits for the application of EU law in the Czech legal order. However, the case “Pfizer” concerns a situation when the proper application of EU law is supported and enforced also by means of national fundamental rights provisions and standards contained therein. By this, the case “Pfizer” adds a specific piece into the mosaic of interaction between national and EU law in the area of law enforcement and fundamental rights protection.

3. Summary and concluding remarks

The developments in the case-law of the CCC and conclusions in relation to EU standard of fundamental rights may be summarised in the following general postulates:

i) the basis for the application of EU law in the Czech legal order is the Czech Constitution. The conferral of competencies to the EU is conditional and their exercise may not interfere with the most fundamental values of the Czech constitutionality. These fundamental values also comprise the fundamental rights protection; in case of the breach of these fundamental values the EU law would lose its precedence (“Sugar Quotas”);

ii) the EU standard as formulated in the general principles of EU law is adequate (“EA W”);

iii) it is necessary to interpret the fundamental rights provisions of the Czech Charter as far as possible in conformity with EU fundamental standard (“EA W”);

iv) the CCC indorsed the application of the EU Charter in the sphere of the EU law application (“Lisbon I”);

v) the catalogue in the EU Charter is fully comparable to the catalogue in the Czech Charter (“Lisbon I”);

vi) the envisaged accession of the EU to the European Convention will strengthen the mutual conformity of EU and national fundamental rights standards since the interpretation of fundamental rights by the ECtHR will be equally binding both to the EU and national institutions (“Lisbon I”);

vii) the Czech Charter may also be used to support a proper application of EU law by Czech courts; namely it concerns the obligation of courts of last instance to initiate the preliminary ruling procedure under art. 267 TFEU (“Pfizer”).

Generally, the CCC’s approach may be evaluated as i) pro-European, ii) reflecting EU reality and ambitions, iii) in line with developments in other Member States and iv) keeping an ultimate power to protect the fundamental national values in case of any excess on the side of the EU. We suppose that it well reflects both the EU reality and need to protect national identity and fundamental interests.

Although the CCC found the EU standard sufficient, at various places it emphasized that in individual cases it cannot exclude a conflict between Czech and EU fundamental rights standards. Definitely it

54 Next to the potential EU law-based enforcement mechanisms such as the infringement proceedings or state liability for the breach of EU law. Clearly a direct constitutional complaint and possible quash of the deficient court decision may be much more effective and straight-forward than the EU law based means which would require new proceedings not dealing directly with the claims formulated in the original procedure.
cannot be expected that such cases would be common – this kind of decision would be an *ultima ratio*\textsuperscript{55} solution – especially in a situation when there would be a common standard of protection binding both to the EU and Czech law formulated by the ECtHR. Even then a “*Solange I*”-style judgment may not be excluded.\textsuperscript{56}

We believe that as far as real and necessary national values, expressed in national constitutional rules and protected by constitutional review procedures, are in the centre of national corrections or limits for the EU law, these national developments are legitimate and potentially also fruitful as they could help to make the EU action more reasoned and reflect needs and interests of EU citizens. A simple notion behind is the fact that EU as an entity *sui generis*\textsuperscript{57} was created with set aims, should respect MSs’ will and make efforts to reach them.\textsuperscript{58}

As announced at the beginning of this paper its ambition was not to give a full-range analysis of individual cases where the CCC ruled on the EU law and fundamental rights and their application in the Czech legal order. Rather we intended to show the most important corner-stones and their form and shape which the CCC put into the bridge interconnecting Czech and EU law. Its conclusions were necessarily general as also the proceedings concerned mostly abstract control of constitutionality without any alleged actual fundamental rights violation caused by the EU law. In future cases it will be seen how this bridge will be used and whether (at all) the “closing gate of the material core of the Czech Constitution” erected in the middle of the bridge will ever have to be used.

\textsuperscript{55} Comp. point 216 of the “*Lisbon I*” judgment.

\textsuperscript{56} One of the much debated issues and also the reason why the Czech Republic expressed its will to join Protocol No. 35 on the application of the EU Charter is the issue of president Beneš’s decrees concerning the post-war displacement of Germans from Czechoslovakia and claims they might raise based on EU Charter. Although we suppose that this area is *ratione temporis* and *ratione materiae* out of the application of EU law, activist case-law of the ECJ in that respect could lead to such a decision.

\textsuperscript{57} Comp. the arguments of the CCC in point 104 of the “*Lisbon I*” judgment.

\textsuperscript{58} Anyway national interests and specificities will be always in friction with any kind of supranational or international integration. Often we may witness it in the formulation of “all-European” fundamental rights standards before the ECtHR. Most recently see i.e. decisions on the presence of crosses at Italian schools in case *Lautsi* (application No. 30814/06) and divergent conclusions of the ECtHR Chamber and, consequently, Grand Chamber that repealed the former’s decision; we believe that the reversal in the decision was also due to the turmoil caused by the initial decision when twenty European countries supported the position held by Italy.
JUDIT FAZEKAS*

Legislative initiatives on European Contract Law and the Proposal for a Directive on Consumer Rights

1. Introduction

Since we have already heard two excellent contributions on different aspects of contract law, namely Professor Király's paper on “The limits of harmonising contract law in the EU” and the paper of István Erdős on “A possible direction of consumer contract law in Europe, the purpose of this short contribution is to concentrate on the common denominators of these two topics, namely the connection between the legislative initiatives on European Contract Law and the proposal on Consumer Rights Directive1. In a very pointillist way, I will touch upon some of their core elements and try to express my personal point of view about them.

2. The needs of recast of European consumer contract law acquis and the needs of harmonisation the European contract law

Although general contract law and consumer contract law are in close connection in every private law system, their regulation and treatment requires different approaches because the development of European consumer contract law acquis and that of general European contract law are different in nature, with different legislative history and with different characteristics. The consumer contract law acquis has developed gradually2 since the 80's and in a fragmented way without comprehensive definitions. The legal basis of EU consumer legislation was mainly Article 95 EC (Article 114 TFEU) on the approximation of laws and the level of harmonisation was at the minimum. The majority of experts and policy makers shared the view that the existing EU consumer aquis needs a comprehensive revision

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for the sake of coherency.\textsuperscript{3} It was also commonly stated that some substantial elements of consumer directives, such as the right of information, the cooling-off periods\textsuperscript{4} could be subject to further harmonisation.\textsuperscript{5} Based on the earlier preparatory papers\textsuperscript{6} and the results of consultations with stakeholders and Member States, the Commission issued its proposal for a directive on consumer rights (pCRD)\textsuperscript{7} with the aim to improve and simplify consumer contract law acquis through a comprehensive horizontal instrument and the use of maximum harmonisation policy in order to avoid the problems arising from transpositions of EU consumer law directives. But during the debates on the pCRD in different decision-making bodies of the Council, the general adoption of the maximum harmonization approach has been criticised widely because of the main focus which favoured the better functioning of the internal market to the interests of consumers. The full harmonisation would create a standardised level of consumer protection in every Member State and would not allow the maintenance of more consumer friendly national regimes or the adoption of national rules that provide higher level of consumer protection than EU directives. At the end of the day maximum harmonisation may result in the pre-emption of the whole legislative competence of consumer law and a uniform European consumer contract law. Taking into consideration the concerns expressed by some Member States and consumer groups, the full harmonisation concept was changed by the approach of targeted harmonisation in the compromised version of the proposal. As part of the compromise, the scope of the proposal was limited as well. Thanks to this change and the efforts made by the Spanish-Belgian – Hungarian trio presidency of the Council, on 16th of June 2011 the European Parliament’s Committee on the Internal Market and Consumer Protection approved the first reading agreement between Council and Parliament on the Consumer Rights Directive.

As far as the needs for harmonisation of European contract law are concerned, the process is much slower and the opinions are less supportive.

The main concerns are the followings: loosing Members State competence on Private Contract law matters, loosing the non- mandatory nature of general contract law and imposing unnecessary costs of change.

3. \textbf{Is there a close connection between the European contract law initiative and the review and rationalisation of EU consumer acquis?}

The first step of this long lasting debate and process started in 2001 with a Commission’s Communication on European Contract Law\textsuperscript{8} followed by an extensive consultation process on national characteristics of contract laws and on potential future steps towards a European contract law.


\textsuperscript{4} There are different terminologies used in the directives such as right of withdrawal, right to cancellation, right to renounce and the cooling-off periods differ as well form directive to directive.


\textsuperscript{7} Proposal for a Directive on consumer rights COM (2008) 614 final

\textsuperscript{8} COM (2001) 398, 11.7.2001
At the beginning of the process, the Commission’s Action Plan (2003) suggested that the CFR should cover a broad range of general contract law issues and other measures beyond the CFR, such as the adoption of an optional instrument. The most important questions was what form, content and role of the final CFR should be. The European Parliament – in its 2005 resolution – considered that “it is by no means clear what it will lead to in terms of practical outcomes”.9

It was also pointed out that there is a close connection between CFR and the process of the review of the consumer acquis. The First Annual Progress Report from the Commission (2005) clearly refocused the project by giving priority to the review of the consumer acquis. One speaker of the Vienna CFR-conference summarised this as follows: “The grand EU contract law project has been drawn from the high seas towards narrower waters.”10 As the Commission stated the preparatory work for the CFR of the researchers and of stakeholders has already served as a starting point for the Green Paper on the Review of the Consumer Acquis, adopted by the Commission on 8 February 2007.11

In February 2007, a Green Paper on the Review of the Consumer Acquis was presented by the European Commission12 giving priority to the improvement of consumer contract law acquis and not to wait for the completion of DCFR. This Green Paper invited views on three possible options. Option II was described in the Green Paper as a “horizontal approach consisting of the adoption of one or more framework instruments to regulate common features of the acquis, underpinned whenever necessary by sectoral rules”. (Horizontal instrument combined, where necessary, with vertical action.) The more detailed description of Option II envisaged an instrument with a general part which would apply to all consumer contracts (e.g. rules on unfair terms, rights of withdrawal) and a second part that would “regulate the contract of sale, which is the most common and broad consumer contract”. This horizontal instrument “would repeal, through a recasting exercise, the existing consumer directives fully or in part, and so reduce the volume of the acquis”.

As the Commission’s Report on the outcome of the public consultation states, the vast majority of the stakeholders responding to the Green Paper (Member States, businesses and consumers alike) supported Option II, i.e. the mixed approach combining the adoption of a horizontal instrument with revision of existing sectoral directives whenever necessary. Hungary also supported this proposal.

It was however unclear what would be the relationship between such a horizontal instrument and a CFR focusing on consumer contract law. Would the CFR be absorbed by such a horizontal instrument? Would the CFR contain more than this horizontal instrument? These questions were not answered by the Green Paper, quite the contrary: the Green Paper did not even mention the CFR-process. Many of the respondents had the same problem. As the analytical report on the responses to the Green Paper concludes: many contributors “fear that there will be overlap in structure and subject matter between both projects.”13 Therefore many of them found it to be “premature to discuss the options proposed in the Green Paper, as they first would like to see the results of the work being undertaken in the Common Frame of Reference exercise.” Some were of the opinion that “a horizontal approach is already underway within the scope of the Common Frame of Reference”, therefore – in their view – the reform of the consumer acquis should be restricted to a vertical review of the existing directives.

In the meantime, the Commission adopted the Proposal for a Directive on Consumer Rights (CRD) in 2008, unfortunately the situation had not become clearer. There were no provisions concerning the

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CFR and what is more, there wasn’t any mentioning in its preamble. The draft report of the Council dated on 7 November 2008 contains, that “[…] the CFR should include consumer contracts because of their specific nature […] In that connection, particular attention should be paid to the consistency of the CFR and the Directive.”

It was obvious that the proposal for the Consumer Rights Directive and the DCFR developed in a disconnected way, there wasn’t too much co-ordination between the two initiatives. The proposal on Consumer Rights Directives had a characteristic of mandatory sets of consumer contracts law. The DCFR intended to be a toolbox and model rules for the European legislator (European Parliament, Council and Commission) in the field of general contract law – including new consumer contract law – in order to improve the coherence of any future acquis. In other words, the form meant to be something like an inter-institutional agreement binding only the European institutions in their legislative drafting. The content (or scope) would “cover all relevant aspects of contractual relations from the pre-contractual phase to performance or default in performance. Such a comprehensive Common Frame of Reference could constitute an effective tool for better lawmaking in the field of contract law.”

In fact, not only the relationship between a horizontal consumer law instrument and a CFR was unclear, as was the relationship between the pCRD and the vertical review of the single directives. Let me remind you of the discussion in the context of the review of the timeshare directive. The question was whether to regulate the right of withdrawal and its legal effects in the timeshare directive or to leave it to the horizontal instrument. The main point of the discussion was, how to regulate the scope of the pCRD in order to avoid the parallelism or collision with the vertical consumer contract law directives and in order to create a single legal framework.

In 2010, the Commission launched the Green Paper on policy options for progress towards a European contract law for consumers and businesses. The purpose of the Green Paper was to set out the options of how to make progress in European Contract Law. The Commission summarized the developments and the possible options from a toolbox to an optional instrument, The Green Paper’s options contain a wide range of legal forms from recommendation to binding regulation. The paper even raises the possibility of the adoption of a European Civil Code. In addition, in April 2010 the Commission adopted a Decision to set up the CFR expert group to finalise the CFR using the DCFR as a basis of the work. The expert group dealt mainly with the drafting of an Optional Instrument and abandoned a bit of the toolbox concept of the CFR, although the toolbox approach is still a valid option of the Green Paper.

On 3 May 2011 the Commission published the so called feasibility study of the expert group what is equivalent of the option 4 of the Green Paper. The expert group drafted an Optional Instrument which covers the general part of contract law including unfair terms and sales contract. Taking into consideration of the scopes of the proposal on the Consumer Rights Directive and the recently published draft on Optional Instrument we can observe that both have a narrowed and limited scope of cross-border aspects.

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14 Draft report to the Council on the setting up of a Common Frame of Reference for European contract law (8286/08 JUSTIV 68)
15 COM (2010) 348 final, Brussels, 1.7.2010
17 http://ec.europa.eu/justice/policies/consumer/policies_consumer_intro_en.htm
4. The issue of full/maximum harmonisation

The Green paper on the Review of the Consumer Acquis in 2007 already proposed a move to maximum harmonisation and the original proposal for the CRD, covering four consumer contracts directives: distance selling\(^{18}\), door to door selling,\(^{19}\) unfair terms\(^{20}\) and consumer sales guarantees\(^{21}\) preserved this approach. The targeted full harmonisation was justified by the Commission with different arguments. The first is the incoherency of consumer law due to the minimum harmonisation approach used in the consumer directives. The second is the creation a single consumer contract law environment for the sake of the better functioning of the internal market.

The approach of maximum harmonisation of consumer contracts had got a bunch of critical remarks. A strong criticism came from the consumer side pointing out of the negative effects of full harmonisation, namely the possible decrease of the level of consumer protection in those Member States where more stringent consumer regulations are existed. This will not allow the Member States to provide or maintain higher level consumer protection for the consumers. Some Member States have been concerned about the proportionality and subsidiarity stated that the full harmonisation will lead to exclusive competence of EU to regulate consumer contracts, Member States will loose their competence on consumer law. As a result of full harmonisation the Directive – as the form of secondary legal act – would have similar legal effects as a Regulation.

5. Conclusions

Taking into consideration the strong criticisms on maximum harmonisation of European consumer law, and the Member States’ reluctance to accept even the targeted full harmonisation approach in the proposal for the Directive on Consumer Rights\(^{22}\) and the fact that there is no evidence proving that the full harmonisation approach will increase the cross-border consumer transactions, the confidence of consumers or the better functioning of the single market, as a first step I am supportive of this very cautious introduction of maximum harmonisation in the field of consumer law. On the other side, I am convinced that there will be positive effects on consumers if the horizontal recast of basic European consumer contract laws will be soon adopted.\(^{23}\)

As far as the future of the European contract law is concerned, I am favourable of the approach that the DCFR has taken as a starting point for the development of an optional instrument, in other words a model law, which seems to be realised with the draft Optional Instrument of the Expert Group with a limited scope.

The extension of the scope of such an instrument to property law or tort law is unrealistic, taking into account the profound divergences in the laws of Member States and that the exercise of identifying the “best solutions” from among those available in the jurisdictions of the EU would be much more difficult on the level of EU legislation than it may have been on the academic level.

I would also prefer to keep the concept of toolbox CFR alive, because it can be used for future legislation to ensure a terminological coherence of consumer law.

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\(^{18}\) Directive 97/7/EC
\(^{19}\) Directive 85/577/EEC
\(^{20}\) Directive 93/13/EEC
\(^{21}\) Directive 99/44/EC
\(^{22}\) See the compromised text of the pCRD –general approach 16933/10, 10 December 2010
\(^{23}\) On 16th of June 2011 the European Parliament’s Committee on the Internal Market and Consumer Protection approved the first reading agreement between Council and Parliament on the Consumer Rights Directive
1. Introduction

E-commerce\(^1\) plays a significant role in trade of goods and provision of services. It is a form of trade which pervades every segment of the modern market environment. E-commerce develops new type of relationship with consumers that creates B2C (business-to-consumer) market as an integral part of retail market presenting transactions of products and services to consumers over Internet. In this way traditional business models are changed because mediating role of retail companies is gradually being replaced by intensified straightforward linkages between businesses and consumers, increasing cross-border trade, facilitating competition and lowering prices.\(^2\)

However, this intensification of the trade throughout blossoming of e-commerce is a significant regulatory challenge due to the peculiar nature of e-commerce. Namely, it eases provision of trade and services as economic subjects satisfy consumers’ preferences by offering them tailor-made products. At the same time this raises questions of effective consumers’ rights protection in this changing environment. Indeed, there are several challenges accompanying e-commerce such as increased consumers’ exposure to various threats, insufficient market transparency and lack of information about products. These elements decrease consumers’ confidence towards this type of trade, consequently hindering further integration of the EU Internal Market.

The paper analyzes consumer protection in the domain of e-commerce by focusing on appropriate insurance of legal certainty and satisfying level of consumers’ confidence. In that regard the elaboration

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\(^1\) The term e-commerce is used in the text to describe a form of trade encompassing business activities from supply of goods and services from the provider, to their delivery to the final consumer. Some authors define it as presenting all information technologies, which speed up production process and make it simpler (shopping over Internet or on-line shopping). For more details see, Tepeš, Nina, “Elektronička trgovina – određivanje nadležnosti u potrošačkim sporovima” (E-commerce – determining the authorities in consumer’s disputes), Pravo i porezi, vol. 14, no. 6, 2005, p. 61. Business to consumer e-commerce (B2C) is in the focus of our interests because although it represents just one segment of the much larger e-commerce, it has the largest impact on the consumers, because the consumers have been most directly involved in this type of e-commerce. Apart from B2C e-commerce, there are for example B2B e-commerce (business to business) or B2G (business to government), etc. Some other terms in the text have to be defined as well. In that regard, distance shopping means a purchase made by consumers via the Internet, by telephone of by post, while sellers are situated either in the country of consumer’s residence or some other country.

is based on relevant European and Croatian legal and institutional framework. Having in mind the spread of e-commerce among Croatian consumers as well as the level of their awareness on their rights as consumers, the second part of the paper deals with selected aspects of implementation and interpretation of the Directive on electronic commerce relevant for Croatia as a future EU Member State. Finally, the third part focuses on Croatian preparedness in selected interpretation issues of the Directive on electronic commerce in the context of its future integration into the Internal Market of the EU. This part of the paper assesses the level in which relevant data are recorded in Croatia and reveals some major flaws that undermine Croatian preparedness for efficient interpretation of the Directive. The paper stresses the importance of the consumer protection associations and consumer counselling centres (CCC) as vital stakeholders in enhancing legal certainty and consumers' confidence in e-commerce. Furthermore, the paper reveals significant issues of the functioning of consumer protection system in Croatia, especially if taking into consideration the threats of e-commerce for consumers' confidence and required legal certainty.

2. E-commerce and consumer protection in the EU

2.1. Defining the basic terms, legal and institutional framework

At the beginning the definitions of basic terms used in this elaboration need to be presented. In that regard, the definition of the “information society services” means any information society service, i.e., any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of service. Furthermore, this definition determines in a more detailed way the term “at distance” explaining it as a service provided without the parties being simultaneously present. The term “by electronic means” understands the service which is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means. The term “at the individual request of recipients of services” is defined in more details as a service which is provided through the transmission of data at individual request. The notion of consumer is defined as any natural person who enters into the legal matter or acts on the market with the purposes which are not aimed on personal business activity or on the pursue of an independent economic activity. However, the notion of services provider is defined through the

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5 The relevant provisions of Croatian legal acts (more specific the Art. 2, p. 2 of the Croatian Electronic Commerce Act) have incorporated such definition of the information society services.

6 Art. 3, p. 1 of the Consumer Protection Act and Art. 2, p. 8 of the Electronic Commerce Act. Such definition follows the notion of consumer set by the Directive on electronic commerce, where consumer is defined as any natural person who is acting for purposes which are outside his or her trade, business or profession (see Art. 2 of the Directive on electronic commerce).
provisions of the Directive on electronic commerce, as any natural or legal person providing an information society service.\(^7\)

In order to provide analysis on the EU consumer protection in the e-commerce it is necessary to elaborate the relevant acts at the European level. Among the main strategic documents stands the current EU Consumer Policy Strategy 2007–2013 (Strategy) which strongly emphasizes consumers’ protection in e-commerce. The Strategy aims to empower EU consumers through providing them with accurate information, market transparency and confidence coming from effective protection. Furthermore, the Strategy aims to enhance consumers’ welfare in terms of choice, quality and safety, as well as provide them with effective protection from serious risks and threats, that they cannot tackle as individuals.\(^8\) The goals of improving consumers’ welfare, market transparency and effective protection related to e-commerce have been integral part of the EU’s policy-planning within the Lisbon Agenda as well, with the main aim to fully utilize potentials of Internal Market, improve competition and overall increase the EU competitiveness. Thus, the same goals are included in the new Europe 2020 strategy that explicitly stresses the importance of consumers’ confidence to buy goods and services on-line for growth and innovation.\(^9\) One of the main focuses of the Europe’s 2020 Integrated Guideline no. 6 is improvement of consumer environment by fostering open and transparent competition.\(^10\) All mentioned strategic documents have stated the importance of e-commerce for further consolidation of Internal Market.

However, when speaking about consumer protection in e-commerce at the EU level, the Directive on electronic commerce presents the central act that aims to ensure European citizens and entrepreneurs to take full advantages of all benefits provided by e-commerce. Considering the disparities between the national provisions of the Member States, which are regulating the provision of information society services, the absence of proper coordination of relevant provisions results in the legal uncertainty and the betrayal of the consumers’ trust. One of the main issues which contribute to the greater legal uncertainty is the lack of capability of the Member States to handle and control services originating from other Member States. In that regard, the Directive on electronic commerce specifies the scope of the term “coordinated field” describing it as the requirements which the provider of a service needs to satisfy in respect of:

a) taking up of the information society services activity (requirements on qualifications, notification and authorization),

b) the pursuit of the information society services activity relating to the behavior of the services provider, quality and content of the service, as well as concerning the liability of the services provider.\(^11\) Having this in mind it can be said that the coordinated field covers only requirements on on-line shopping, on-line advertising, on-line contracting and on-line information activities, while it does not extend to the area of requirements on goods (for example, labelling requirements,

\(^7\) This definition is incorporated into the text of the Directive on electronic commerce, in a way of implication to the definition provided by the Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules of Information Society Services. The same wording has been taken over by the Art. 2 of the Electronic Commerce Act.


safety conditions, liability of goods, transport and delivery of goods, as well as requirements relating to the services which are not provided by electronic means). Here the intention of the European Union to leave the space for information society services to be regulated at the national levels of Member States is clearly visible.

For the purposes of better determination of the scope of the Directive on electronic commerce, it is necessary to explain which areas are excluded from its application. Hence, the field of taxation, as well as questions relating to information society services covered by the Directives on the protection of individuals with regard to the processing of personal data and on the free movement of such data\(^\text{12}\) and **processing of personal data and the protection of privacy in the telecommunications sector**\(^\text{13}\) are excluded from the scope of the Directive on electronic commerce. Furthermore, the issues of practices and agreements from the cartel law, next to the activities of notaries or equivalent professions insofar the pursuit of these activities is directly connected with the exercise of public authority are also excluded from the application of the Directive on electronic commerce. The areas of gambling activities, lotteries and betting where activities in question involve a stake with monetary value in games of chance as well as representation and defense of clients before the courts do not fall in the scope of the Directive on electronic commerce.\(^\text{14}\) Although being the central act which regulates e-commerce, it should be pointed out that the Directive on electronic commerce does not prejudice the level of protection provided for the public health and consumer interests through the acts on European level.\(^\text{15}\)

The European Consumer Centres Network (ECC-Net) is the institutional framework relevant for rising of consumers’ confidence in the phenomena of e-commerce. Provision of information on consumer rights, counselling and support in realization of these rights are just some of the activities which help to reduce legal uncertainty and suspicious attitude of consumers towards e-commerce. ECC-Net is an EU-wide network co-sponsored by the European Commission and the Member States, made up of 29 centres, one in each of 27 EU Member States and also in Iceland and Norway. They handle over sixty thousand cases every year originating from the cross-border shopping problems.\(^\text{16}\) These cases cover complaints not only originating from e-commerce but include other types of transactions as well. However, the data clearly show that complaints stemming from e-commerce have a predominant role with 55.9% of all cases in 2009.

\(^{12}\) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.


\(^{14}\) Art. 1, p. 5 of the Directive on electronic commerce.


The bodies linked through the ECC-Net provide information, advice and support to the consumer on their rights when they are buying services in another EU country, Iceland and Norway. These services are free or charge, and they also include giving legal and practical advices in the cases when consumer wants to make a complaint against a trader located in another EU country. In these cases, bodies linked through the ECC-Net can assist consumer, contact trader on his behalf and direct consumer to a dispute resolution scheme or propose other solutions. However, these bodies cannot handle cases where the trader is located in the same country as consumer as these cases are then forwarded to national consumer organizations. In this way securing of information and helping the consumers in their complaints and settlement of disputes contributes to the EU’s single market utilization and, at the same time, protects consumers’ health and safety. Also, bodies linked through ECC-Net are important because they provide information on domestic and the EU legislation and jurisdiction and develop comparative analyses regarding prices that is also a consequence of their intensified cooperation with other European networks such as: FIN-NET (Financial Network), SOLVIT and European Judicial network in civil and commercial matters.

The EU accession of the Central and Eastern European (CEE) states during the 2000s caused emergence of bodies from the ECC-Net in these countries, and their active consumer protection role in cross-border cases. For instance, the European Consumer Center (ECC) in Poland was established in January 2005 by the joint EU’s and Polish state’s financing and it functions as an expert group, tightly cooperating with European and domestic organisations of consumer protection and other organisations.

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solving certain problems of consumers. Its tasks have so far included raising knowledge on available legal means, legal consultancy and inspections regarding cross-border cases. Also, ECC Poland has popularized out-of-court disputes settlements, informed entrepreneurs and other opinion-making groups about consumers’ rights and duties and in generally enhanced consumers’ awareness regarding their rights. 19 Thus, ECC Poland established itself as a principal focal point regarding cross-border matters that was repeated in other CEE states such as Slovakia, Slovenia and Romania. For instance, in 2009 ECC Slovakia intensively offered assistance and advices for consumers regarding their cross-border complaints and disputes that included both Slovak consumers that purchased their products and services outside Slovakia, and foreign consumers that purchased the same in Slovakia. Also, it performed educational activities, established strong media presence and endorsed alternative dispute resolution schemes in cross-border cases.20 In 2010 ECC Slovakia similarly informed and assisted consumers in resolving their cross-border disputes and performed educational and public campaigns with the aim to enhance consumers’ rights awareness.21 For instance it assisted 837 consumers and dealt with 264 consumer complaints in 2010 (an increase in comparison with the 2009), 22 while the largest number of difficulties was found in the e-commerce domain. Namely, it is important to emphasize that 63% of all cross-border cases related to the e-shopping (i.e. consumers experienced difficulties due to non-deliverance of the goods they had already ordered and paid for) despite the offered intervention largely remained unresolved.23 Finally, ECC Romania has raised awareness about all peculiarities of the e-commerce in the Romanian society, and has clearly offered information about the related consumer protection measures.24

These new ECCs have been established by the joint financial efforts from the national state administrations and the European Commission. Nevertheless, their relation towards the state administrative bodies is not clear enough. In the cases of the Czech Republic, Slovakia and Poland, ECCs are integral part of the state administration. For example, the ECC is in the Czech Republic embodied in the Czech Trade Inspectorate,25 in Slovakia it is established at the Ministry of Economy and Construction26 while in Poland it is situated at the Competition and Consumer Protection Office, a central government administration body.27 However, the ECCs’ linkage towards the state apparatus has been weaker in the cases of Slovenia and Romania. Namely, the ECC in Slovenia operates under the auspices of the Slovene Consumers’ Association28 an independent, non-profit, internationally recognised

19 Ibid.
23 Ibid., p. 10–11.
28 ECC Slovenia: Annual Report 2010., p. 3.
non-governmental organization\textsuperscript{29} that is similar to Romania whose ECC is logistically supported by another NGO, the Romanian Association for Consumer Protection.\textsuperscript{30}

Thus, it is obvious that the bodies linked through the ECC-Net have an important role in resolving disputes linked to the cross-border acquisition of goods and services. This particularly relates to the e-commerce domain as the dominant sphere in entire volume of complaints. In other words, the advisory and mandatory roles of these bodies have an important place in increasing legal certainty and consumers’ confidence in e-commerce and therefore are important actors in underpinning the proper implementation of the Directive on electronic commerce.

2.2. Consumer protection as justification through the case law

Having in mind that the maintenance of the free provision of the information society services\textsuperscript{31} has been set as the general objective of the Directive, it is necessary to find the balancing point between restrictions which have to be set in order to protect consumers on one side and freedom to provide information society services on the other. The importance of the proper implementation as well as interpretation of the Directive on electronic commerce is even greater if the consolidation and integration of the Internal Market are taken into consideration. The coordination of national rules of the Member States, regulating electronic commerce actually facilitates the functioning of Internal Market to a great extent, thus making it less fragmentized. The restrictions on the freedom to provide information society services (originating from another Member State) are forbidden in the coordinated field of the application of the Directive on electronic commerce.\textsuperscript{32} However, Member States are permitted to derogate from this obligation from listed reasons.\textsuperscript{33} The list of grounds for derogation has closed character, which means that only grounds which are explicitly named in the Directive on electronic commerce can be used for justifying the restrictions at national level. It is evident that the concept of the Directive on electronic commerce puts the objective of consumer protection on the list of potential reasons, being capable to justify the restriction in question. So, in case the free provision of services is hindered or prevented through the application of restrictive national measures, the consumer protection can be used as the excuse for derogation. The Directive on electronic commerce aims on provision of guarantees of consumer protection interests through its Article 1, p. 3, as well as through its recitals of the preamble.\textsuperscript{34}

In case of derogation from the basic obligation of the Member States on establishment or maintenance of restrictions, which are capable to restrict the freedom of provision of information society services, the measures have to fulfil cumulatively few requirements. First of all, they have to be necessary due to the mentioned reasons, as well as taken against the information society service which prejudices named

\textsuperscript{29} ZPS Zveza Potrošnikov Slovenije (Slovene Consumers’ Association) \(<\text{http://www.zps.si/onas/english/3.html?Itemid=697}>\) accessed 27 May 2011.

\textsuperscript{30} Centrul European Al Consumatorilor Romania (The European Consumer Centre Romania) \(<\text{http://www.en.eccromania.ro/about-us}>\) accessed 27 May 2011.

\textsuperscript{31} Art. 1, p. 2 of the Directive on electronic commerce.

\textsuperscript{32} Art. 3, p. 2 of the Directive on electronic commerce.

\textsuperscript{33} Art. 3, p. 4 of the Directive on electronic commerce determines the following reasons as potential ground for derogation: public policy, particularly prevention, investigation, detection and prosecution of criminal offences; protection of minors; fight against any incitement to hatred on the grounds of race, sex, religion, nationality and violations of human dignity of individuals; protection of public health; public security, which includes safeguarding of national security and defense; protection of consumers, as well as investors.

\textsuperscript{34} Recital no. 7, 10 and 11 of the preamble of the Directive on electronic commerce.
objectives or present a serious or grave risk of prejudice to those objectives, and proportionate for the preservation and protection of those objectives.35

The implementation of the Directive on electronic commerce aims at the elimination of various obstacles and blurred situations, which diminish the level of legal certainty and maintain the satisfactory level of the confidence of consumers. Certain examples from well established case law can be useful in order to make closer how the interpretation of the Directive on electronic commerce establishes a balance between maintenance of free provision of information society services on the one hand, and restrictions created on national level on the other, which sometimes needs to be tolerated in order to keep the required level of consumer protection. Furthermore, selected examples from the case law can serve for analyses of the attempts for preservation of the consumers’ confidence, along with the required level of legal certainty. In this regard, the dispute in the main proceedings between the German Federation of Consumer’s Associations and automobile insurance company which provides services exclusively through the Internet can be mentioned. The European Court of Justice (Court) was deciding on the obligation of the services provider (in this case automobile insurance company) to provide its telephone number, next to postal and electronic e-mail address while operating with the consumers in e-commerce. The subject of the Court’s interpretation concerns the Article 5 of the Directive on electronic commerce, which determines the minimum information requirements which the services provider has to ensure to the recipients of the service and competent authorities in direct and permanently accessible way. More precisely, according to the Article 5 the information which has to be provided by services provider mean: the name of the services provider, the geographic address at which services provider is established, and the details of the services provider, including his electronic mail address, which allows direct communication with the services provider, in a direct and effective manner. In the relevant case, the provision of needed information is in the phase when the contract between the services provider and consumer as services recipient is not signed yet. Exactly the interpretation of the notion of “rapid, direct and effective means of communication”, which the services provider is obliged to ensure in addition to his electronic mail address, was in the focus of the Court’s observations. According to the Court, the communication over the telephone can be regarded as the form of direct and effective communication. However, according to the interpretation of the Court, the use of the word “directly” in the wording of the Directive on electronic commerce cannot be regarded as necessarily requiring communication in the form of an exchange of words and actual dialogue. Furthermore, the practical implications of the interpretation of the term “effective communication” do not mean that the response given to a question posed has to be instantaneous. In other words, the communication would be effective enough if it permits adequate information to be obtained within a period of time which is compatible with the needs and expectations of the consumer as the recipient of the service. However, it does not mean that these kinds of information which services provider must ensure for the services recipient before the contract is concluded have to include telephone number.36

The relevant case law shows the tendency of the Court to preserve protection of consumers while interpreting the main elements of the Directive on electronic commerce. The preservation of the intention incorporated into the EU law on encouraging the development of e-commerce, without limiting it to the Internal Market, is also visible through the interpretations provided by the Court. The example of such interpretations can be found in the previously analyzed case, where the services recipient was deprived from the access to the electronic network. In this case the Court determines that the

35 Next to this derogation possibility, it is necessary to point out the existence of the fields where the provisions of this Directive do not apply. See for more Annex of the Directive on electronic commerce.


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obligation of the services provider is to ensure the access to a non-electronic means of communication, which enable effective communication. According to the Opinion of the Advocate General certain threats to the consumers cannot be found in this case. The consumer approaches undertaking with an aim of getting information on the services which the undertaking provides by using the Internet. According to him, no contractual relationship carries any possibility of seriously harming interests of consumers. The main argument for this kind of interpretation is the fact that the consumer chooses the services provider which has the required characteristics, while the media used by the services provider are incorporated in the offer and have additional, not necessarily crucial, characteristics that can influence the decision of the consumer. Freedom to choose services provider on the market (with all additional conditions and characteristics, which consumer prefers) is actually the main argument which supports the interpretation of the Court.

Furthermore, on the list of the reasons for derogation, the public health protection and even the protection of minors can be observed in close connection with consumer protection through the case law. Although not being explicitly mentioned, consumer protection can be observed as integral part on these grounds, in a way of analyzing the position of patients and children as consumers. The selected cases actually show how the Court was creating its interpretations on the grounds other than consumer protection, although the protection of consumers was always somewhere in the background. In the case Ker-Optika v. ÁNTSZ Dél-dunántúli Regionális Intézete Pécsi the Court was judging on the selling of the contact lenses via the Internet. The observations of the Court relating to the scope of the Directive on electronic commerce, determine the selling of contact lenses as belonging to the coordinated field encompassed by the Directive, especially concerning on-line offer and the conclusion of the contract by electronic means. However, considering that the coordinated field does not cover requirements applicable to the supply of goods in respect of which the contract is concluded by electronic means, the national provisions regulating the requirements of the supply of goods which is sold by using the Internet in another Member State are not encompassed within the scope of the Directive on electronic commerce. In this case the Court underlined the objective of the protection of public health, as being ranked (next to the life of humans) among main assets and interests protected by the Treaty, while the Member States have to decide on the level of protection provided for this kind of objective. In other words, the great range of discretion of the Member States is granted in this field. In this case the justification relied on

40 In this case the Court has established that the national legislation prohibiting the selling of contact lenses over the Internet can not be justified with the objective of public health, considering it goes beyond what is necessary to accomplish the objective of public health protection. In that regard, the restrictions which are applicable only in the case of the first supply of contact lenses and which require traders to make available a qualified optician to the customer, can be sufficient for public health protection. However, the national provisions on selling of contact lenses have been characterized as falling within the scope of the Directive on electronic commerce, while those which relate to the supply of the contact lenses do not fall within the scope of coordinated field under the Directive on electronic commerce. See for more, Ker-Optika bt v. ÁNTSZ Dél-dunántúli Regionális Intézete, 2 December, 2010, C-322/01, p. 74, 77.
42 See Joined Cases C-570/07 and C-571/07 Blanco Pérez and Chao Gómez [2010] ECR I-0000, para. 44.
the protection of public health of the contact lenses users. The main threat was has seen in the specific ways of use and maintenance of contact lenses. The main argument used for justification of the restriction imposed, was the necessity of selling the contact lenses by the qualified staff. The purpose of such care was the insurance of the customer to be informed on potential risks, as well as provided with advices of which kind of contact lenses to use and how to use them, as well as of recommending the proper advice of an ophthalmologist. In the Court’s observations apart from the main objective of public health protection, the protection of consumers (advising possibilities on proper contact lenses use and care through the Internet) was observed as well, although it was not explicitly mentioned.

Furthermore, in the case Dynamic Medien Vertriebs GmbH v. Avides Media AG, the Court elaborated the prohibition of sale and transfer by mail order of image storage media, which have not been examined or classified by competent authority for the purposes of protection of young people. The main issue was the lack of required age-limit label (authorized from the competent German authority) for image storage media. Again, the elaboration encompassed the Article 3, p. 4 of Directive on electronic commerce, which allows Member States to take measures necessary for the protection of public policy, protection of young persons, protection of public health and consumers. Although the main objective for justification was the protection of young people, the imperative requirement of consumer protection was pointed out as well.

The level of implementation of the Directive into the Croatian legal framework, along with the level of Croatian preparedness for proper application and interpretation of relevant acquis are in the focus of elaboration. The Croatian capacity to provide satisfying level of legal certainty and consumers’ confidence in e-commerce, will start with analyses of two main Croatian legal acts: Electronic Commerce Act and the Consumer Protection Act.

3. Consumer protection in e-commerce on Croatian market

3.1. Legal and institutional framework

Analysis of consumer protection in Croatia in the sphere of e-commerce cannot be done without taking into consideration the development of entire consumer protection policy that has fundamentally been shaped by the EU accession process. Namely, Stabilization and Association Agreement (SAA) set clear provisions that streamlined legal approximation with the EU acquis and subsequent development of consumer protection policy in Croatia. According to the Article 74 of the SAA, Croatia agreed to align its consumer protection standards with those at the EU level through harmonization of its legislation, development of an active consumer protection policy including the increase of information and development of independent organizations and finally through effective legal protection for consumers in order to improve the quality of consumer goods and maintenance of appropriate safety standards. It

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(State: 21 March 2011).
44 Ker-Optika bt v. ÁNTSZ Dél-dunántúli Regionális Intézete, 2 December, 2010, C-322/01, para. 63.
45 C-244/06, Dynamic Medien Vertriebs GmbH v. Avides Media AG, 14 February, 2008.
47 Electronic Commerce Act, Official Gazette No. 173/03, 67/08, 36/09.
48 Consumer Protection Act, Official Gazette No. 79/07, 125/07, 79/09, 89/09.
is important to mention that Article 74 defines effective consumer protection as necessary in order to ensure that the market economy functions properly, and this protection will depend on the development of an administrative infrastructure in order to ensure market surveillance and law enforcement in this field. This has clearly defined consumer protection policy as an integral part of the functioning of the EU’s Internal Market, demanding special attention and endeavors from the Croatian side. Namely, Article 74 was positioned under the SAA’s Title VI “Approximation of laws, law enforcement and competition rules” that streamlined approximation of Croatian legislation and policies across all major domains of the EU Internal Market. The title’s opening Article 69 claimed that Croatia “shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community acquis” and this approximation will “at an early stage, focus on fundamental elements of the Internal Market acquis as well as on other trade-related areas”. This means that Croatia obliged itself to start with the legal approximation in the domain of the EU Internal Market, including consumer protection, from the earliest stage since the SAA’s signature, thus clearly stressing it as a priority area. This prioritization of the EU’s Internal Market acquis is understandable because “Internal Market remains the EU’s pivotal point”, as each rapprochement’s strategy towards the Union has to ensure legislative and economic convergence necessary for the participation at the EU Internal Market. Therefore, it is important to understand development of both Croatian legislative and institutional framework as a process induced by the EU with the goal to ensure effective involvement in the EU Internal Market.

The first Croatian Consumer Protection Act entered into force in 2003 within the ambit of this policy dynamics, thus creating legal basis for the consumer protection policy in Croatia. Some analysts claim that this Act had revolutionary impact due to its firm citizen-focused standpoint, which represented positive change in comparison with the previous practices. Indeed, the Act constituted “game-change” in this policy domain and inaugurated basic elements of institutional scheme whose relevance will be explained further. However, our focus here is on the 2007 Consumer Protection Act (CPA) which has been passed with the aim to enhance consumers’ protection. Its provisions carried important consequences for the protection in e-commerce. Apart of the CPA, the second significant act

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50 Ibid.
51 These articles were Art. 70. Competition and other economic provisions, Art. 71. Intellectual, industrial and commercial property, Art. 72. Public contracts, Art. 73. Standardisation, Metrology, Accreditation and Conformity Assessment and Art. 74. Consumer protection.
52 Art. 69 of the SAA.
54 Consumer Protection Act, Official Gazette No. 96/03.
57 The analyses focus on relevant provisions of Consumer Protection Act, determining main definitions of the terms used in the text, besides to the relevant provisions on Croatian institutional framework on consumer protection. The selected provisions of the Electronic Commerce Act relate to the aspects of implemented Directive on electronic commerce.
regulating the sphere of e-commerce and relevant for this analysis is Electronic Commerce Act (ECA). As far as the relationship of the ECA and CPA is concerned, it can be said that the first regulates the matter of consumer protection as lex specialis, while the second grants the protection of consumers in general. However, it is important to point out that the protection granted through the ECA does not preclude nor prejudice the protection granted in other relevant provisions of Croatian consumer protection system. Exactly the same attitude is granted through the CPA, meaning that the consumer protection provided by this legal act does not preclude nor prejudice the protection provided through other laws. This leads to the conclusion that the intention to provide wide and complete protection of consumers (the intention incorporated into the text of the Directive on electronic commerce as well) can be recognized through relevant Croatian legal acts.

The ECA is the central legal act in the analysis of the implementation of the Directive on electronic commerce into Croatian legal system. It sets out the package of rules determining the provision of information social services, liability of the provider of the information society services and the conclusion of electronic contracts. However, the ECA incorporates the same list of exclusions from the application of the provisions of electronic commerce as the one accepted at the European level through the Directive on electronic commerce. The ECA uses the same wording as the Directive on electronic commerce concerning the provisions which regulate the general information having to be provided by the services provider. While analyzing the possible justifications of restrictive national measures, it can be noticed that the ECA, through its amendments in 2008, introduced the possibility for Croatian court of competent state authority to derogate from the general obligation of the free provision of information society services. In other words, certain restrictive measures can be introduced towards the services providers which have the registered seat in the EU, in case they harm, or threat to harm the public health, public security, including the safeguarding of the national security and defense, protection of consumers as well as investors, or when such measures are necessary for the reasons of prevention, investigation, detection and prosecution of criminal offences, protection of minors, and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons. It can be said that in strictly formal terms, the ECA has followed the wording of the Directive on electronic commerce. However, more important is whether such act is implemented and interpreted properly through the Croatian legal practice. The evaluation of the achievement of a satisfying level of legal certainty and consumers’ confidence in e-commerce can actually provide certain conclusions on the proper implementation of the Directive on electronic commerce in the Croatian legal system. Only in this way, the transposed wording of the Directive can be evaluated as meaningful in the Croatian legal system.

Croatian EU’s accession process fundamentally shaped institutional building in the domain of the consumer protection policy. The previously analyzed legal harmonization was followed by the subsequent need to strengthen administrative capacities necessary for its efficient application. These incentives to adjust Croatian consumer protection system to the EU standards and criteria were encouraged by the various EU projects, that among the others, aimed to strengthen institutional and administrative

59 Electronic Commerce Act, Official Gazette No. 173/03, 67/08, 36/09.
60 For example, the Consumer Protection Act grants the application of the Croatian Civil Law Obligations Act on the legal matters of this kind within the consumer protection system (see for more Art. 2, p. 2 of the Consumer Protection Act).
61 The list contains as follows: the requests on clearly identifiable character of commercial communications as well as on natural or legal persons on whose behalf commercial communication is made, and also on promotional offers, competitions and games (discounts, gifts etc.) where requirements for qualifying for those promotional offers, promotional competitions and games have to be easily accessible, clear and unambiguously presented.
capacity and improve professional and technical capacities of the staff involved.\textsuperscript{62} That especially refers to the upgraded capacities of the Croatian Ministry of the Economy, Labour and Entrepreneurship (MELE) as the primary body responsible for creation and implementation of consumer protection policy that coordinates the activities of all stakeholders regarding the implementation of the National Consumer Protection Programme.\textsuperscript{63}

Regarding the responsible authorities included in this institutional scheme, CPA has explicitly determined subjects involved in the consumer protection system in Croatia.\textsuperscript{64} The analysis will focus on the three main segments of institutional framework architecture: National Consumer Protection Council (NCPC), consumer counselling centres (CCCs) and associations. These three segments are selected in order to get a clearer picture on the functioning of the institutional mechanisms that should properly apply legal framework, but also to facilitate the maintenance of consumers’ confidence due to well informed and advised consumers. The strategic orientation of their work is shaped by the National Consumer Protection Programme (National Programme)\textsuperscript{65} which defines consumer protection policy, its principles, objectives and selected tasks to be undertaken on prioritized areas. It is adopted by the Croatian Parliament that has so far enacted three programmes, the most recent one being the National Programme for the 2009–2012 period.\textsuperscript{66}

The NCPC is a Governmental advisory body, established in 2008\textsuperscript{67} as an Interdepartmental body that ensures greater coordination of activities among relevant stakeholders regarding consumer protection policy, initiates legislation and overall streamlines improvement within the mentioned area. Its members, together with the Council’s President, are appointed by the Croatian Government for a four-year period. The NCPC comprises representatives of state administrative bodies responsible for consumer protection, representatives of Croatian Chamber of Economy, Croatian Chamber of Trades and Crafts, Croatian Employers’ Association, Commercial Court in Zagreb, consumer protection associations and independent experts in the consumer protection area. The tasks of the NCPC cover drafting of the National Programme, encouraging the amendment of the existing and passing of new regulations and laws in the consumer protection field, participating in the development of the national consumer protection policy and reporting to the Government on cases of good business custom violation.\textsuperscript{68} In this way the Government ensured high political backing of the policy and set ground for its more successful implementation. In chronological comparison with associations and CCCs the establishment of the NCPC was realized as the latest, what can be seen as the upgrading of the institutional framework.


\textsuperscript{64} The list of relevant authorities includes the Croatian Parliament, the Government of the Republic of Croatia, ministry responsible for the consumer protection, the State inspectorate and other competent inspections, National Consumer Protection Council, regional and local authorities, the Croatian Chamber of Economy, the Croatian Chamber of Arts and Crafts, the Croatian Employers’ Association, other public authorities and consumer protection associations (Art. 122 of the Consumer Protection Act).

\textsuperscript{65} Art. 121 of the Consumer Protection Act.


\textsuperscript{68} Art.123 of the Consumer Protection Act.
According to the CPA, associations are established by the consumers for promotion and protection of consumers’ rights and interests. They can join into unions in order to implement consumer protection policy, ensure mutual support and achieve common interests at the national and international level. These unions can act in the public and towards state administration bodies with the aim to protect common consumers’ interests or express their opinions on relevant legal proposals. Associations are independent in their work and must act apart of any commercial interest. In that regard, legal provisions strictly prohibit any acquisition of assets or financing from tradesmen. The Act provides a list of associations’ activities that include:

- Providing preventive protection by offering information and advice with the aim of educating consumers;
- Providing information to consumers on their rights and obligations and various market appearances;
- Undertaking accredited comparative tests of products and publishing the results in the media;
- Providing assistance to harmed consumers in their dealings with traders;
- Keeping records on customer complaints received and activities undertaken for their settlement;
- Issuing comments and proposals to the legislation drafting within the domain of consumer protection.

It is important to stress that associations undertake consumer protection activities articulated by the National Programme, especially in the domain of education, informing and counselling, and these activities are jointly undertaken with state administration bodies and regional and local authorities. Therefore, major source of associations’ funding is the state budget because their consumer protection projects have to fulfil criteria of public tenders set by the Croatian MELE.

Finally, this nexus between the state-driven funding and the consumer protection performed by the consumer protection organizations is also seen in the example of last stakeholder that is in the focus of our analysis, namely consumer counselling centres (CCCs). These centres are supposed to provide organized support to the consumers, while they are established by the associations. There are four CCCs in Croatia that have been established as the projects of the associations on the basis of tenders announced by MELE in order to provide organized assistance to the consumers. CCCs should provide expert advices to the consumers, keep records about the number and type of the given advices and regularly submit working reports towards MELE and relevant inspectorates. In this way, the relevant ministry simply transferred the advisory role towards the associations driven by the rationale that the non-governmental sector would enjoy greater consumers’ trust than if the role remained in the realm of state-based counselling. MELE’s financing of these projects ensures that the associations that have established CCCs can employ additional staff, namely nine people.

At this point it is important to mention that the position of associations and CCCs has been significantly upgraded with the establishment of the Central Consumer Protection Information System

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69 Art. 125 of the Consumer Protection Act.
70 Art. 126 of the Consumer Protection Act.
71 Art. 127 of the Consumer Protection Act.
74 Art. 128 of the Consumer Protection Act.
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(CCPIs) in 2008. This system was created as the outcome of the previously mentioned EU projects and it permanently linked three relevant institutions: MELE as a principal body that proposes legislative recommendations, State inspectorate as the relevant implementation authority and the CCCs, securing their better coordination and information flow. Consequently, this incorporation of the CCCs in the CCPIs provides them with a greater range of accepted inquiries and provided advices because increased collaboration efficiently reveals cases of consumer rights abuses and ensures undertaking of appropriate measures by the relevant inspectorates. In other words, both the associations and CCCs benefit from the establishment of the major information hub such as CCPIs because it enables the consumers to seek advice and legislative interpretation, as well as to submit notifications towards the State inspectorate at one place. Associations and CCCs have a great possibility now for increased engagement in the monitoring of the market behavior, drafting of the legal proposals and overall increasing of the level of consumers’ education and information. Thus, their role is indispensable in raising the level of consumers’ confidence and efficient implementation of legal provisions.

The underpinning role of the associations and CCCs as the agents of consumers’ rights protection has to be properly analyzed in the Croatian context, especially taking into consideration challenges stemming from the upcoming EU membership and participation in the Internal Market. One of the major challenges deals with the cross-border trades of services and goods, an increasingly developing form of retail that brings numerous regulatory issues in Croatia as well. Therefore, it is important to assess position of consumer protection associations and CCCs in this domain since their involvement is vital in securing efficient legislative implementation, market transparency and particularly in increasing consumers’ confidence in e-commerce.

3.2. Some remarks on practical functioning of institutional framework

Generally speaking, Croatia has significantly upgraded its institutional framework system in the consumer protection field. In favour of this statement speaks the provisional closure of the EU accession negotiation chapter 28 – Consumer and health protection in November 2009 and claims of the European Commission’s Progress Reports. The Commission has endorsed Croatian institutional building-up in the 2006–2010 period resulting in the establishment of the CCCs, upgrading of the MELE’s capacities and establishment of the NCPC as the Governmental advisory body. The institutional system was significantly upgraded with the adoption of the Consumer Protection Act in July 2007 whose modification was an opening benchmark for the Croatian negotiations. Already since then the Commission stated that the good level of legal alignment has been reached with the further challenges being its implementation and effective enforcement. However, the 2009 and 2010 reports stated that sustained efforts were necessary for further strengthening of administrative capacity in order to implement and

76 See the footnote no. 62.
79 This is based on the evaluation of the five European Commission’s Progress Reports for Croatia since 2006
enforce the legislation. More precisely, the last report stated that the support for the consumer movement needs to be continued and consumers’ access to justice further improved with the aid of effective implementation of the National Consumer Protection Programme.

It is necessary to ensure adequate institutional capacities, which operate in transparent and efficient way, by providing information and proper interpretations of relevant Croatian acts. The role of the associations and CCCs is essential in all this. There is a significant space for greater cooperation between these associations that would pool their resources and enhance their advocacy capabilities with the positive consequence for the consumers’ confidence. Nevertheless, despite obvious benefits of this cooperation, associations are relatively fragmented into 25 different associations, divided into two consumers association unions. This fragmentation, lack of mutual cooperation between associations and the absence of single consumer association union downsizes relevance of the associations in the policy-process that is the first remark regarding practical functioning of institutional framework. Consequently, this weakens consumer protection and generally undermines consumers’ confidence. Also, activities and capacities of some associations should be questioned as well. Namely, according to some critics, MELE’s criteria for the funding of associations are not elaborated precisely. They claim that the ministry does not evaluate well the projects’ contents thus hindering appropriate allocation of funds and “artificially” maintaining numerous associations in force, whose existence would otherwise be questioned.

The second issue is the work of CCCs. Four of them were established with the main purpose of attaining basic consumer rights more efficiently. Nevertheless, there are several flaws here as well. Firstly, the same CCCs’ network has been in force since 2005, so maybe it should be enlarged facilitating the creation of new centres, thus raising the quality and spreading the scope of consumers’ protection. Secondly, the same staff works in the associations as well as in the CCCs. Therefore, although new people can be employed once the CCCs are approved, the increased work load will put pressure on the human resource and hinder the quality of the work. Regardless of the fact that CCCs can employ additional staff this is often not enough to effectively tackle the pressing needs of the consumers. Thirdly, the research has shown that the CCCs operate in fragmentized way towards each other, without standardized working reports that are prepared on annual basis. They are not made public and in certain cases are very confusing, even unreadable. These reports do not offer relevant data on the efficiency of their work that raises serious questions about the real impact of their work and their proper evaluation.

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84 For example, associations in Croatia aim to ensure consumers’ confidence by advocating consumers’ interest and rights, by providing advices and assistance to consumers through education and information activities that aim to enhance consumers’ knowledge and awareness. These activities ensure greater market transparency and efficient implementation of the legal provisions.

85 One of them is Savez “Potrošač” (Union “Potrošač”) from Zagreb and the other one is Savez udruga za zaštitu potrošača Hrvatske (Croatian Union of Consumer Protection Associations) from Split. These data are confirmed in the telephone conversation with the MELE’s official in April 2011.


87 Information based on the telephone interviews with experts from CCCs in April 2011.

88 For example, the CCC in Pula and in Split have not made public the official reports on their work in consumer protection, while CCC in Zagreb has done that, although with the Report for 2010 which is very confusing and offers only few general data in hardly systemized way. However, it has to be noticed that the Official report for 2010 provided (on request) by CCC in Pula can be described as the most helpful and organized one.
and oversight by the relevant institutions. MELE’s inspection in 2008 stressed the need to undertake overall standardization of their work, i.e. standardization of working and financial reports, statistics as well as introduction of a single form for consumers’ complaints and answers to them. However, it seems that since 2008 there has not been visible improvement in this field, which can have negative impact on the consumers’ confidence. This is especially odd because CCCs are exclusively funded from the MELE in order to undertake counselling activities and protect consumers in their cases towards tradesmen; still their insufficient transparency towards general public undermines the entire rationale of their work. The fourth objection deals with the fact that the CCCs’ work is of a “combined type”, that means without specialized expertise for a specific sector of the consumer protection. MELE tried to introduce specialization where each counselling centre would specialize in a specific field such as trade or public services thus providing narrowed focus, greater expertise and better consumers’ protection. However, CCCs opposed this initiative by rather staying non-specialized. This fourth remark is closely connected to the fifth remark concerning the fact that CCCs have not recognized e-commerce as a distinguished domain within the general trade at all. Such shortcomings impede appropriate consumer protection given the dynamics of e-commerce in the EU Internal Market where Croatia will soon accede. Therefore, although the adopted legal framework shows a satisfying level of formal implementation of the Directive on electronic commerce, some weaknesses of the institutional dimension can threaten Directive’s main aims, i.e. greater legal certainty and increased consumers’ confidence. Namely, total neglecting by the relevant stakeholders of e-commerce as a distinct category does not provide solid ground for informed and protected consumers and their strong confidence in e-commerce. Finally, the entire institutional system is marked by a certain degree of inter-institutional tension that does not yield benefits to the Croatian situation. It rather results in a fragmentized, vague system, lacking efficient cooperation that could significantly been improved in order to ensure greater level of consumers’ welfare.


4.1. The EU’s and Croatian consumer protection in e-commerce: data evaluation

Croatian candidate status requires certain elaborations and comparisons regarding the consumer protection in the domain of e-commerce which can be helpful in rising Croatian preparedness for proper implementation and interpretation of the Directive on electronic commerce after its EU accession. Therefore, relevant data from the selected aspects of consumer protection in e-commerce in the EU and Croatia should be compared, considering the upcoming Croatia’s accession to the EU and the challenges stemming from the EU Internal Market. These categories include the spread of e-commerce and consumers’ confidence towards it but they also assess position of CCCs and associations in enhancing consumers’ confidence and securing their better protection. Hence, this analysis elaborates Croatian preparedness for proper interpretation of selected issues of the Directive on electronic commerce. However, the basis for analyses is very weak, considering that relevant authorities do not have systematic

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90 Ibid.
91 High official within the MELE’s Consumer Protection Department stated that in a telephone interview given on April 21, 2011.
monitoring of e-commerce. **Croatia still does not have a centralized data basis that would track the volume of e-commerce in the market, level of consumers’ confidence towards it and the level of consumers’ awareness of consumer protection organizations.** Finally, the analysis also shows some examples of the Croatian business practices regarding cross-border provision of services and goods on-line, as an important prerequisite for the proper implementation of the selected aspects of the Directive. It is important to assess the level in which business subjects have incorporated consumer-friendly practices that follow Directive’s objective of consumers’ confidence by providing them with enough information and support.

When analyzing the Internet access data, it is necessary to mention that last available data from 2010 show that the percentage of households who have Internet access in the EU27 is 70%. Although this data is not directly connected with the consumer protection in e-commerce, it is obvious that the Internet access is a basic precondition for the Internet purchase and increases the likelihood of its usage, therefore it is important to elaborate this data as well. The leading EU member states in this category are the Netherlands (91%) and Sweden (88%) while major laggards are Bulgaria (33%) and Romania (42%). Croatia stands relatively well with the 56% as it witnesses 5% average annual growth in the last three years.\(^92\)

The relevant data on the growth of e-commerce from Eurobarometer 2011\(^93\) show that at the EU level there is gradual increase in the amount of Internet shopping\(^94\) from 27% in 2006 to 38% in 2009. However, the trend of “increase of popularity” of e-commerce has not continued after 2009, considering that it remained at 37% in 2010. In Croatia the available data show general increase in the volume of e-commerce in 2002–2007 period. This growth applies both to electronic commerce in general and business to consumer (B2C) e-commerce in particular as the category that is the most relevant regarding consumer protection due to their direct involvement.\(^95\) The average annual growth rates in Croatia are considerable due to the underdevelopment of this domain and the overall increase of households that have Internet access as previously analyzed.

Table 1: The volume of e-commerce in Croatia, 2002 – 2007 (in million kunas)

<table>
<thead>
<tr>
<th>Segment</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>Average annual growth rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Business to (B2C) consumer</td>
<td>39,85</td>
<td>103,46</td>
<td>172,1</td>
<td>253,50</td>
<td>329,05</td>
<td>416,15</td>
<td>59.9%</td>
</tr>
<tr>
<td>E-commerce (total)</td>
<td>398,84</td>
<td>983,84</td>
<td>1 659,77</td>
<td>2 032,50</td>
<td>2 445,05</td>
<td>2 920,57</td>
<td>48.9%</td>
</tr>
</tbody>
</table>


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\(^92\) Eurostat data 2010, “Percentage of households who have Internet access at home” \(<http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&code=tsiir040>\)


\(^94\) The analytical report Eurobarometer provides data on shopping over the Internet (as the example of performance of e-commerce). Eurobarometer in its analysis often uses terms of Internet shopping or Internet purchase. However, on the page 15, it is clearly obvious that it does not make distinction between these two terms and e-commerce, therefore the data in the paper covering Internet shopping or purchase over Internet actually show the level of e-commerce.

\(^95\) See footnote no. 1.
Regarding the scope of the Internet purchase in the EU, the data show that one in two of the EU consumers having the Internet access at home used online shopping in 2010 with the bigger percentages in 2009 (54%) and 2008 (56%). That clearly confirms the linkage between the possession of the Internet access and e-commerce. For example, the rise of Internet purchase in Slovenia between 2006 and 2010 is 15% (from 14% to 29%) and in Hungary it is 13% (from 11% to 24%), although it is also important to take into account the laggards in this domain, those being Bulgaria, Portugal, Italy and Romania where the scope of purchase in 2010 was between 12% (Bulgaria) and 16% (Romania). This is important for Croatia since in Croatia there are no relevant data that would enable comparison. However, we can assume that the rise of households with the Internet access is followed by the increase of e-commerce in Croatian case as well. Therefore, some parallels with the previously mentioned EU member states could be made, although there are no firm evidence which group of these states Croatia should be affiliated to. Furthermore, the level of cross-border Internet purchase remains relatively low at the EU level. In that regard, 7% of the EU consumers participated in cross-border online shopping, while only 4% bought goods and services from the country outside the EU (this percentage has not been changed since 2006). Eurobarometer 2011 concludes that the EU consumers have reserved attitude towards the opportunities offered by cross-border purchases, while majority of them likes to perform this face-to-face (almost half of them, meaning 48%, are more confident in participating in e-commerce with the services/goods provider from their own country). The data show that the largest cross-border online purchase is done in Malta (39%), Ireland (34%) and Cyprus (22%), thus showing greatest trust to purchase outside of their own countries. On the contrary, the weakest trust towards ordering from another EU state is shown in Romania (2%), Bulgaria and Poland (3%) with also low point for the Czech Republic, Poland and Italy (4%).

Lack of relevant data discourages the consumers’ confidence and awareness about the possibilities of e-commerce in Croatia. When we analyze the consumers’ confidence at the EU level, then consumers have greater trust when ordering from their own country in comparison with the cross-border purchasing because they are afraid of the frauds and scams in the case of latter. For example, countries with the leading trust in domestic purchasing are the United Kingdom (64%) and Finland (62%) while Luxembourg (20%), Bulgaria (25%) and Romania (27%) have the lowest trust in domestic purchasing. However, there is an increase in proportion of those with the same trust in the domestic and cross-border e-commerce. For example, consumers in Ireland and Baltic states have equal or even bigger trust in the cross-border than in domestic purchasing. Regarding Croatia, relevant state authorities, CCCs and associations do not track the level of confidence in e-commerce as a special category at all. Similarly to the previously seen flaws of the missing data, it is clear that this situation considerably undermines the proper implementation of the Directive on electronic commerce. This has negative consequences on the level of legal certainty and the consumers’ confidence in e-commerce in Croatia.

Consumer protection associations are particularly important in rising consumers’ confidence and informing them about consumer protection in the cross-border shopping. Data claim that the 32% of the consumers in the EU are informed on the opportunities of counselling and informing activities in consumer protection that is 8% increase comparing to 2008. Also, it should be pointed out that over

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97 Ibid, p. 11
98 In that regard, it is important to mention that 48% of consumers are more confident when they order goods and services from their own country compared with the 4% that have more confidence in the cross-border purchasing. See for more, Eurobarometar Analytical Report, March 2011, p.6.
99 Ibid., p. 27.
100 Ibid., p.6.
two-thirds of the EU consumers (69% of them) had confidence in consumer protection organizations to protect their rights, while 65% of them think that providers respect their right as consumers.\textsuperscript{101} The highest level of protection enabled by the existing measures of consumer protection is marked in the United Kingdom, Ireland and Austria while the lowest one is seen in Bulgaria and Greece.\textsuperscript{102}

In Croatia CCCs and associations stand at the front line in enhancing consumers’ awareness about their rights and obtaining advisory and supportive tasks in their relations with the tradesmen. CCCs as the primary advisory bodies have been receiving increasing number of complaints in the 2006–2010 period that confirms that consumers are becoming more aware of their rights and willing to protect them. For example, consumer counselling centre in Osijek received 3,257 complaints in 2010 compared with 1,473 in 2006, while consumer counselling centre in Pula in 2010 received 3,486 while in 2006 it received 686 complaints.\textsuperscript{103} Nevertheless, none of these bodies categorized e-commerce as a distinctive form of trade in their working reports because their categorization only recognizes sectors of public services, finance, trade, etc. Therefore, complaints in the domain of e-commerce could be encompassed by general scope of complaints in the area of trade. Recent data show that the complaints in the trade sector occupy 32.46% of all consumers’ complaints,\textsuperscript{104} thus proving their relevance for the consumer protection. Nevertheless, these cannot be taken as reliable data to prove that the consumers are becoming more aware of their rights in e-commerce. The counselling centre in Pula is the only exception as it could provide us with the information about the complaints in the close category to e-commerce, i.e. distance selling.\textsuperscript{105} The data clearly show the increase of the complaints in this domain because their number rose from 1 in 2008 over 11 in 2009 to 45 in 2010. However, such data are not comparative with the EU data considering the difference between e-commerce and distance selling. Furthermore, Croatian CCCs and associations while providing information and education activities for consumers have not recognized peculiarities of e-commerce at all. Their reports, documents and web-pages do not cover this increasingly propulsive sphere and their public campaigns and advisory activities remain inattentive to e-commerce.\textsuperscript{106}

In conclusion, failure to recognize category of e-commerce as a separate sphere has to be observed as a serious flaw in Croatian institutional framework. Consequently, this disables recording of the statistics according to the Eurobarometer methodology in the field of e-commerce. This current impossibility to provide data that could be compared with the EU in the domain of e-commerce causes major blow to the market transparency and discourages further development of e-commerce in Croatia. The whole picture is even worse if observed in the context of the future Croatian integration into the Internal Market of the EU. Therefore, two main focuses of the Directive on electronic commerce: legal certainty and consumers’ confidence remain far from their incorporation into the Croatian market reality.

Apart from data analysis, evaluation of Croatian preparedness for proper interpretation of the Directive on electronic commerce requires the analysis of selected segments of the Croatian business practice. The analysis focuses on two sectors, namely on the on-line selling of contact lenses and automobile insurances, more precisely on business practices used by entrepreneurs and potential

\textsuperscript{101} Ibid., p. 7, 8.
\textsuperscript{102} Ibid., p. 60
\textsuperscript{103} These data originate from the reports issued by the four consumer counselling centres in Croatia.
\textsuperscript{104} This information emerged after comprehensive insights into the above mentioned reports and then calculating the numbers of complaints in the trade sector within entire volume of complaints for the year 2010.
\textsuperscript{105} These data were given by the counselling centre in Pula over e-mail. For a definition of the distance selling and its division from e-commerce see the footnote no.1.
\textsuperscript{106} The authors have analyzed activities of all consumer protection associations published at their web-sites that were operational. The starting point the MELE’s web-page that has entire list of all consumer protection associations in Croatia: <http://potrosac.mingorp.hr/en/potrosac/clanak.php?id=12388> accessed May 27 2011.
problems which can emerge within this area. Some economic subjects in Croatia provide possibility of on-line selling of contact lenses, as well as of automobile insurances, although it is relatively new practice.\(^{107}\) In the analyzed areas of trade the cross-border on-line shopping of contact lenses is not possible, which implies general underdevelopment of the cross-border e-commerce. Nevertheless, regarding the Directive's concerns, optical shops ensure that lenses are sold by the qualified personnel offering information to the customers about the usage of the lenses and potential risks. This information is usually disseminated either through web-sites or instruction manuals sent to the customers together with the lenses. However, in case of the first acquisition of lenses it is highly recommended for the consumer to visit the relevant optical shop personally because he will get a more comprehensive information about all the details of lenses usage from an ophthalmologist. Therefore, it can be concluded that on-line shopping of contact lenses in Croatia has accomplished certain level of consumer protection, although it is in early phase of e-commerce usage, and should be opened towards cross-border trade. This impossibility to order lenses on-line from Croatian optical shops in cross-border trade is important in regard of eventual future application of relevant case-law. The lack of possibility for comparisons at this moment does not diminish the value of knowledge on relevant interpretations that can be very valuable in the future. Comparisons with Croatian neighbouring countries, Slovenia and Bosnia and Herzegovina\(^{108}\) have shown that these states are more open to cross-border trade of contact lenses. This is a significant indicator especially if Bosnia and Herzegovina is a potential candidate for the EU, while Croatia is on the eve of its EU accession.

Regarding the automobile insurances that can be purchased on-line in Croatia, all contacted insurance companies\(^{109}\) comply with the Directive's provisions on the minimum information requirement. That means that the four contacted companies offer their telephone numbers, postal and electronic address as a precondition for direct and effective communication.\(^{110}\) However, such compliance does not exclude the interpretations of the Directive on electronic commerce through the case law.

5. Conclusion and recommendations

The main aim of the paper is to analyze selected segments of consumer protection in e-commerce. More specifically, the focus of the analysis is the evaluation of the preparedness of Croatia to ensure complete implementation of the Directive on electronic commerce into the Croatian legal system. This Directive is important for e-commerce as a propulsive sphere of retail that brings significant regulatory challenges to welfare of the consumers. The two main aims stressed by the Directive are: establishment of the required level of legal certainty and consumers’ confidence. In that regard, the Court’s interpretations of the Directive on electronic commerce have been analysed towards the preparedness

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107 Contacted optical shops were: Optical studio Monokl, Opto Centar and Optotim d.o.o. Requested information dealt with the on-line ordering of the lenses. Specific questions related to the availability of information about the usage of the lenses and their provision towards the consumers that order them on-line. Also, we aimed to find out the level of expertise these centres provide to the consumers when they order lenses for the first time. Regarding the automobile insurance companies, contacted subjects were: Euroherc osiguranje d.d., Croatia osiguranje d.d., Euroherc Allianz and Jadransko osiguranje d.d. Those are all companies that have introduced the possibility to purchase automobile insurances on-line in the last several years. We were interested in finding out whether there is a possibility to purchase automobile insurance in Croatia from abroad.

108 Optika Salihbegović from Sarajevo, Bosnia and Herzegovina.

109 See footnote no. 107.

110 Croatian provisions regarding automobile insurance firmly stress that in order to get automobile insurance, all automobiles should first be registered in the national basis of the registered automobile cars in Croatia.
of the Croatian legal and institutional framework on consumer protection within the e-commerce sector. It is clear that Croatian legislator has managed to transpose the Directive on electronic commerce into Croatian legal system. However, it is obvious that such transposition remains only formal due to a number of reasons.

Firstly, the complete system of consumer protection provides rather fragmentized picture. The challenges and threats of e-commerce make the problem even bigger. Secondly, the institutional architecture (selected for this analysis) seems to be uncoordinated and pretty vague. Although legal preconditions have been set through the CPA, the efficiency and cooperation of the stakeholders involved is questionable especially taking into consideration fundamental role of the associations and CCCs in achieving a transparent market based on principles of legal certainty and firm confidence of consumers in e-commerce. Finally, CCCs operate in a vague way, considering that the level of their mutual cooperation is very low, and that their official reports in Croatia do not cover statistics in this domain and generally show weak understanding of this phenomenon. Therefore, the paper shows insufficient preparedness of the relevant bodies in Croatia regarding e-commerce because they do not record specific statistics about this sphere of trade that undermines consumers’ confidence.

Therefore, this paper results in the following recommendations:

- In accordance with European methodology of data records, the bodies incorporated into the Croatian institutional framework have to incorporate this methodology while estimating the spread of e-commerce, the level of consumers’ confidence and other categories required by the EU.
- Recognition of e-commerce as a distinct category within the relevant state authorities is necessary, in order to increase consumers’ confidence into the e-commerce usage. Furthermore, the main strategic documents, such as for example National Consumer Protection Programmes and accompanied Action Plans, have to recognize the importance of e-commerce.
- Dynamic activities (provided by the CCCs and associations) towards raising of consumers’ awareness about the benefits and opportunities of e-commerce are needed. Furthermore, active engagement in making the consumers more familiar with e-commerce within the Internal Market, by providing information activities on their rights is necessary.
- Serious devotion in planning of the establishment of the ECC Croatia, which would be an integral part of the ECC-Net after Croatia joins the EU is essential. The ECC Croatia will represent the focal point for the settlement of cross-border disputes and increase consumers’ confidence in e-commerce, thus ending the fragmentation in this domain.
- Introduction of specialization among the CCCs is encouraged where one of four of them would become specialized for the complaints in e-commerce and ensure better information and advisory service for the consumers.
- Improvement of mutual collaboration between associations and CCCs is required, with complete elimination of fragmentation and functioning tensions, next to the establishment of a single union of associations union in Croatia that would enable greater integrative force and policy advocacy in the domain of consumer protection.
- Complete standardization of the work of the CCCs is necessary through standardization of their working reports, making their activities transparent and available to the consumers at any time.

In this policy domain the list of proposed recommendations remains open, although their realization is conditioned by two main objectives: establishment of required level of legal certainty and consumers’ confidence.

All these proposals aim to increase consumers’ confidence in e-commerce and pave the way for its efficient utilization in Croatian context. Integration into the EU Internal Market is a process and not a single occasion, seeking further continuation of the reforms in order to fully harness benefits of the EU.
single market.\textsuperscript{111} Therefore, upgrading Croatian preparedness for the appropriate consumers’ protection in e-commerce is an important prerequisite for the efficient participation in the EU Internal Market, especially taking into consideration that the EU Consumer Protection Policy fits into realm of “shared competences”\textsuperscript{112} that apart from the EU’s activities seeks firm involvement and contribution of the stakeholders at the national level. Only these collaborated efforts can ensure the appropriate level of consumers’ protection, stressing the importance of the domestic CCCs and associations in Croatia as the upcoming EU member state. Finally, the forthcoming establishment of the ECC Croatia as the focal point for cross-border transaction issues will increase consumers’ confidence in e-commerce by ending the temporary fragmentation in this domain and by securing them appropriate legal protection.

\textsuperscript{112} Art. 4 of Treaty on the Functioning of the European Union (TFEU).
Commentary on the Stipulation of Inalienability under the New Romanian Civil Code

Elements of Reflection on the National Recodification and European Harmonization

This paper examines two important innovations brought by the new Romanian Civil code, namely the stipulation of inalienability and its most novel application, the “fiducia”, that we chose as the best example of an approximation between the Romano-Germanic law and the common law, offering in that respect the perfect pretext to start a discussion on the problem of civil recodification as an instrument of harmonization at the level of the EU member states, in a context in which codification is most often discussed in relation with the creation of a common European private law.

1. Concept, requisites and scope of the stipulation of inalienability

With the adoption of articles 626–629 of the new Civil Code, Romanian legislation has for the first time recognized conventional inalienability and regulated it explicitly. The stipulation of inalienability was not mentioned as possible before, neither was it prohibited by the Civil Code of 1864.

Article 627 of the new Civil Code defines the stipulation of inalienability, lays down its validity requisites and its scope, proving the way in which our lawmaker settled “the conflict of rules” it brings into discussion.

According to the provisions of this article, “(1) By convention or will one may prohibit the alienation of property, but only for a period of 49 years and if there is a serious and legitimate interest. This period begins to run from the date of acquisition of the property.

(2) A person whose property is inalienable may be authorized by the court to dispose of the property if the interest that had justified the stipulation of inalienability disappeared or where a greater interest comes to require it.

(3) The nullity of the stipulation of inalienability in a contract renders void the entire contract if it was determining when the contract was concluded. In onerous contracts, the determining character shall be presumed, until proven otherwise.

(4) The stipulation of inalienability is implicit in the conventions from which arises the future obligation to convey property to a determined or determinable person.

(5) The transfer of property by will may not be stopped by stipulating its inalienability”.

1 F. Thierry, La clause statutaire d’inaliénabilité, Bulletin Joly Sociétés 2010, n°1, p. 100.
A stipulation of inalienability or pactum de non alienando is a proviso whereby the parties agree on a restriction on their right to dispose of property, movable or immovable, which is thus removed from the civil general circuit for a limited duration and based on a serious and legitimate interest.

Indeed, the problem raised by such stipulation is that of a conflict between a right and a freedom. There is, on the one hand, the right of a person to freely dispose of his property, the essential prerogative of ownership, and, on the other, the freedom to restrict the free disposition of things, manifestation of the greater freedom to contract.

In the absence of express provisions in the Civil Code of 1864, certain scholars have argued for the invalidity of such stipulation, which should be sanctioned with absolute nullity as it is contrary to the provisions of art. 1310 of the Civil Code stating that “All property may be sold, unless a law especially prohibited it”. As inalienability is an exception to the principle of the free movement of goods, it should be obligatorily stipulated, the parties not being able to agree on such stipulation by convention. Only the law may allow the removal of property from the civil circuit and not the parties’ agreement.

The principle of free movement of goods and the owner’s right to freely dispose of his property were recognized by the provisions of art. 5, art. 480, art. 1306 and art. 1310 of the Civil Code of 1864, principles that may also be found in our new Civil Code, in the provisions of art. 11 para. 2, art. 12, art. 1652 and art. 1657, according to which “One may not derogate by agreements or unilateral legal acts from the laws that concern the public policy or from good morals” (art. 11 para. 2); “(1) Anyone may freely dispose of his property, if the law does not expressly provide otherwise. (2) No one may dispose of his property by gratuitous acts, if he is insolvent (article 12); “Anyone can buy or sell things unless it is prohibited by law” (art. 1652), “No restriction on the exercise of the right to dispose of property may be stipulated, except by gift or will” (art. 1657).

The provisions of art. 1657 of our new Civil Code refer to both legal and conventional inalienability, as exceptions to the principle of free movement of goods, while its counterpart in the Civil Code of 1864, respectively art. 1310, only provided for the legal inalienability as a derogation: “All things that are in commerce, may be sold, unless a law prohibited it”.

While there were authors who strongly opposed the doctrine of voluntary inalienability, eventually those opinions triumphed that had upheld the validity of such stipulations, only where two conditions are met: the stipulation is justified by a serious and legitimate interest and it has a temporary character.

It is interesting to point out here that in French law also, conventional inalienability, initially refused by both French scholars and courts on the grounds that, on the one hand, the owner was deprived of the legal attribute of disposition over his property and he was turned into a mere possessor or usufructuary, and on the other, it was contrary to the public policy principle of the free movement of goods, eventually got a legal basis, thanks to the Law 71–526 of 3 July 1971 and the introduction of art. 900–1 in the French Civil Code, under which the stipulations of inalienability are allowed in case of gifts or testaments, provided the conditions of the temporary nature of the stipulation and the need for serious and legitimate interest are observed. By exception, stipulations of inalienability which do not have a temporary

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3 F. Thierry, op. cit., p. 100.

4 I. Adam, op. cit., pp. 31–32.
character are also valid, when they concern a legal person or an individual responsible to set up a legal person.

Unlike the French Civil Code, our new Civil Code regulates the stipulation of inalienability without distinction based on the fact that it is provided in a contract transferring property, bilateral or unilateral, creating main or accessory real rights or in testaments. We should also underline that the lawmaker uses the phrase stipulation of inalienability, without distinguishing between the simple prohibition of alienation, which has the legal nature of an obligation not to do, corresponding to a claim, stipulated by the parties in consideration of the person and not the thing, and *propter rem* inalienability, which concerns the property itself.

*Propter rem* inalienability has as an effect the non-transferability of the thing, by means of *inter vivos* legal acts, onerous or gratuitous, such as sale, exchange, gift, contribution to a company’s capital, the creation of a *mortgage* on real or personal property, as well as the unseizability of the thing throughout the duration of the stipulation.5

Scholars have shown that the mere stipulation in an act of a prohibition of alienation does not, in all cases, suppose an inalienability as such, but it may also appear as a personal obligation of not to do. For example, in case of bilateral contracts, we rather speak of obligations not to do, while in case of unilateral contracts, most often, we are dealing with an inalienability as such.6

The prohibition of alienation is more rarely stipulated in commutative bilateral contracts than in aleatory ones. It is however recognized that one may be interested in stipulating such prohibition, which has the nature of an obligation not to do, in case of sales whose price is paid by instalments, until the last instalment has been paid or when the seller reserves a real right (of use, usufruct, occupation), during the duration of the respective real right.7

The stipulation is more commonly met in case of bilateral aleatory contracts and it appears more justified here than in case of commutative contracts, creating a real *propter rem* inalienability.8 For example, in case of a life care contract, the prohibition to alienate during the whole life of the beneficiary is justified if the thing is an essential element of the beneficiary creditor’s lien.

It was also shown that in case of mortgage agreements in which the mortgage creditor is a bank, the prohibitions to alienate and burden by an encumbrance have an abusive character, since they violate the legal principle according to which, in the field of interests in property, *res, non persona debet*.9

In the field of successions, the stipulation of inalienability inserted in a will is compatible with the new regulation of substitutions under art. 994 of the new Civil Code, according to which “A liberality may be burdened by an encumbrance consisting in the duty of the institute, donee or legatee, to preserve the property that is the subject matter of the liberality and transfer it, upon his death, to the substitute designated by the donor or testator.”

Art. 627 para. 1 of the new Civil Code lays down the conditions under which the stipulation of inalienability is deemed to be valid: the existence of a serious and legitimate interest and the temporary nature of the prohibition, limited to 49 years at the most.

The prohibition period begins to run on the date when the thing was acquired. One may, thus, stipulate any prohibition to alienate which does not exceed this duration. We may ask ourselves whether

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7 *Idem*
8 *Ibidem*
9 *Ibidem*, p. 106
the stipulation of a term that exceeds the legal limit brings about the invalidity of the stipulation and its ineffectiveness, or it may be considered valid within the statutory time limit.

In our opinion, the court will be sovereign in assessing if there is need for the protection of a serious and legitimate interest by means of the stipulation of inalienability and will be able, if the parties do not agree, to shorten the period stipulated in the contract up to the statutory time limit.

In all cases, the invalidity of the stipulation of inalienability must be verified by the court in terms of the interest that the parties had in view when drafting the respective stipulation. The two requirements for the validity of the clause should be interpreted interdependently. Thus, as the court is able to rule on the justification of the interest in the inalienability, the more it has the power to rule on the duration of the stipulation, upon request of the concerned party.

During the period of effectiveness of the stipulation, the person whose property is inalienable may be authorized by the court to dispose of the property if the interest that had justified the stipulation of inalienability has disappeared or where a greater interest comes to require it. The person whose property is inalienable will be the one required to prove the disappearance of the interest which justified the stipulation of inalienability or the occurrence of a greater interest.

Being subject to judicial control, voluntary inalienability has a relative and not an absolute character as does statutory inalienability, whose validity cannot be censured by the court.

When the stipulation of inalienability determined the conclusion of a contract, the nullity of the stipulation of inalienability will render void the entire contract. The lawmaker presumes the determining character of the inalienability in case of onerous contracts, according to para. 3 of art. 627. The presumption is, however, a relative one, the party interested in obtaining a total nullity of the contract and not merely a partial one, having to prove its lack of a determining character.

Where the contract including a stipulation of inalienability has a gratuitous character, the determining character of the stipulation will not be presumed, so that the party interested in obtaining the nullity of the whole contract will be required to prove its determining character. In the absence of such evidence, the invalidity of the clause will cause a partial invalidity of the contract, within the limits of the invalid stipulation.

According to the per a contrario interpretation of the provisions of para. 3 of art. 627 of the new Civil Code, when the stipulation of inalienability does not have a determining character for the conclusion of the act, its invalidity, if the absence of a serious and legitimate interest will be proved, will only bring about that nullity of the stipulation, i.e. a partial and not total nullity of the act.

The interest to be protected by the stipulation of inalienability may be mainly a private one, but it shall also respect public order and good morals. So that the court is able not only to assess the legitimacy of the interest, respectively its compliance with public policy and good morals, but also its serious nature, i.e. be able to justify the prohibition.

The interest to be protected by the stipulation of inalienability may be provided in favour of the person who transfers the thing, the acquirer or even a third party. For example, in case of a usufruct with a stipulation of inalienability, it may be in the interest of the usufructuary, the former owner, that the thing not be transferred during the usufruct. In case of liberalities, we may find stipulations of inalienability in the interest of the donee that the donor seeks to protect from his own buoyancy, in the

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10 In the French literature this action in reviewing the legal act was considered a review for frustration of purpose. But, it was stressed that the review proceedings of the stipulation of inalienability cannot be confused with the action for review of the conditions and charges encumbering liberalities, that have a highly personal character, see J. Carbonnier, Droit civil. Les biens. Les obligations, vol.II, Quadrige, PUF Publishing House, 2004, p. 1664.

interest of the donor or in the interest of a third party, until the completion of a certain duty, and in case of an annuity contract stipulated in favour of a third party, the inalienability may benefit, for example, the third party.

According to para. 4 of art. 627 of the new Civil Code, the stipulation of inalienability is implicit in the conventions from which there arises the future obligation to convey property to a determined or determinable person. In this situation, it is natural for the person who stipulated the clause to seek maintaining the thing in the estate of the person who is going to transfer ownership, or otherwise the concluded agreement could not be carried out.

The provisions of paragraph 4 are consistent with those relating to the “fiducia”, regulated itself for the first time by our legislation, in Title IV of Book III, as well as with the voluntary inalienability “fiducia” involves. The legal operation of substitution, prohibited by the Civil Code of 1864, but now allowed by the provisions of art. 994 of the new Civil Code, also contains a voluntary inalienability, arising from the obligation of the institute of a thing transferred by gift or legacy to preserve the thing and transfer it, upon his death, to the substitute appointed by the author.

Although the effects of conventional inalienability are restricted, according to the new Civil Code, to a period of 49 years, the essence of the substitution lies in maintaining the thing in the institute's estate up to his death, to be subsequently transferred to the substitute. In this case, it is likely for the inalienability to exceed the statutory duration. In our opinion, by recognizing the substitution, the lawmaker intended to derogate from the limit of 49 years under the new Civil Code, whenever the institute's death occurs after the passage of this time limit. This is because the reasoning behind inalienability, respectively the serious and legitimate interest underlying this stipulation is associated in this case with the interest that the thing be transferred to the substitute upon the institute's death. Or, this second goal of the substitution could not be achieved if, upon the expiry of a period of 49 years, the institute could freely dispose of the thing, so that the substitution would not anymore be effective.

Likewise, in case of the residual liberalities, according to art. 1003 para. 2 of the new Civil Code, the donor or the testator may prohibit the institute to transfer the property by gift, the restriction being less severe than in case of the substitution, as the residual liberality does not impede the institute to conclude onerous acts nor to keep the things or amounts obtained based on their conclusion, as provided by art. 1002 of the new Civil Code.

Finally, para. 5 provides that the transfer of property by will may not be stopped by stipulating an inalienability. The stipulation of inalienability supposes a restriction on the transfer of the thing by convention or by will during the specified time, and in no way does it imply the impossibility of transferring the property by will to the heirs of the deceased acquirer.

The provisions of para. 5 prove the in rem nature of the stipulation of inalienability. It must be effective until the expiry of the stipulated term, or otherwise we would speak of a mere personal prohibition to alienate the thing, that would end upon the death of the person concerned by the prohibition.

If we assume the in rem nature of the inalienability, the thing cannot be alienated by the heirs until the expiry of the term provided in the stipulation of inalienability. If, however, the death of the acquirer subject to the inalienability caused the disappearance of the interest that had justified the stipulation of inalienability, they will be allowed to go before the court to seek authorization to dispose of the property.

2. Effectiveness of the stipulation of inalienability

Article 628 of the new Civil Code regulates the effectiveness requisites of the stipulation of inalienability. According to its provisions, "(1) The stipulation of inalienability cannot be invoked against the persons
who acquired the property or against the creditors of the owner who has committed not to dispose of it unless it is valid and meets the effectiveness requisites.

(2) For effectiveness, the stipulation of inalienability should be subject to the publicity requirements provided by the law, if necessary.

(3) In case of personal property, the rules provided for the acquisition of property by the possession of good faith will be applicable, as appropriate.

(4) If the stipulation of inalienability was inserted in a gratuitous contract, it is effective against the previous creditors of the acquirer.

(5) The failure to comply with the effectiveness requisites does not deprive the beneficiary of the stipulation of inalienability of the right to claim damages from the owner breaching this obligation”.

We notice that we must distinguish between the validity requisites of the stipulation of inalienability, and those set forth for its effectiveness. If for the validity of the clause, the existence of a serious and legitimate interest and its temporary character, with the observance of the term prescribed by law, are sufficient, in order for it to be effective against third parties, one must fulfil the publicity requirements.

The publicity of the stipulation is not always possible, as our legislation provides for a coherent system of publicity only in the field of real property, while in case of personal property, quite disparately, in the New Civil Code publicity is available only for mortgages in personal property, for instance, by registration to the Electronic Archive of Security Interests or for mortgages on financial instruments, in the registers requested by the markets where they are traded (art. 2411 of the New Civil Code).

We shall analyse the effects of the stipulation of inalienability according to two criteria: the real or personal character of the property and the onerous or gratuitous nature of the act where the inalienability is stipulated, as we can see that in art. 628 of the new Civil Code, according to the provisions of para. 3 and para. 4, the lawmaker intended to apply a different legal regime to the clause according to these criteria.

The publicity of the stipulation of inalienability relating to real property registered in the land book is done by recording the stipulation, according to art. 902 para. 2 pt. 8 of the new Civil Code, the conventional prohibition to alienate or burden a right registered in the land book being part of the 20 acts or facts subject to recordation, expressly mentioned in this text.

The stipulation of inalienability for which the publicity requirements have not been fulfilled will not bind third parties acting in good faith. Therefore, if a third party enters into an act transferring property whose subject-matter is a thing deemed inalienable by a previous agreement, but whose inalienability was not recorded in the land book, and the third party has not been able to know it in any other way, the act will be valid, the primary conveyor or the person stipulating the clause not being able to require the abolition of the subsequent act.

If, however, the third party turns out to have been aware of the existence of the stipulation not to alienate, although this was not recorded in the land book, he will no longer enjoy the protection of the innocent third party acquirer in the field of the land book.

Although, according to para. 1 of art. 628 of the New Civil Code, the stipulation of inalienability cannot be invoked against the acquirer of the thing (in this context, acquirer refers to the third party who contracts with the owner of property affected by inalienability) or against the creditors of the owner who has committed not to dispose of the property, when the recordation requirements have not been fulfilled, we believe that the use of an exclusively objective criterion in assessing the good faith of the acquirer who relies on the record is contrary to art. 901 para. 2 pt. c of the new Civil Code, according to which the third party acquirer is deemed to be of good faith if he “has not become aware, in any other way, of the inaccuracy of the land book records”.

Scholars have considered that if the subsequent alienation or encumbering in breach of the prohibition to transfer is carried out by onerous acts, the failure to record the inalienability in the land book will
result in its ineffectiveness against the innocent acquirer, who relied on the record, but the effect of the ineffectiveness will be suspended for a period of three years in which the person concerned, the one who has stipulated the inalienability, may bring an action in rectification, based on art. 36 pt. 1 of the Law no. 7/1996 (art. 908 pt. 1 of the new Civil Code), as the recordation or the judgment upon which the registration was carried out cannot be deemed valid when the recorded document contained a stipulation of inalienability which had not been recorded. Only after the expiry of the three year term from the registration in the land book of the right of the one who acquired the thing affected by inalienability, the third party acquirer acting in good faith and for a consideration will be permanently protected from an action seeking the abolition of the act subject to a stipulation of inalienability.

Where the inalienable property is acquired by a third party acquirer acting in good faith and for no consideration, he will incur the risk of rectification 5 years from the date on which he records in the land book the application for recordation, according to art. 909 para. 2 of the new Civil Code.

If the effectiveness requisites of the stipulation of inalienability are fulfilled, the creditors of the owner of the real estate who committed not to alienate it, whose claim was born subsequently to the stipulation of the inalienability and is due during the period of effectiveness of the prohibition, must comply with the stipulation. As inalienability renders the property unseizable, they will not be able to require the sale of the inalienable property to satisfy their claim, as stated by art. 629 para. 3, according to which “Goods for which an inalienability was stipulated may not be seized, as long as the stipulation is effective, unless the law provides otherwise”. We have to notice that there is a suspension of the enforcement of the inalienable property while the stipulation is active.

As concerns the subsequent creditors of the acquirer, there is no difference in their legal status based on the onerous or gratuitous character of the act by which the debtor has acquired a thing to whose inalienability he agreed, the stipulation of inalienability being effective against them only if the publicity requirements have been fulfilled. However, as regards the previous creditors of the acquirer, the lawmaker introduces a distinction based on the onerous or gratuitous character the conveyancing act.

Thus, according to para. 4 of art. 628, “If the stipulation of inalienability was inserted in a gratuitous contract, it is also effective against the previous creditors of the acquirers”. The per a contrario interpretation of this paragraph shows that when the conveyancing act had an onerous character, the stipulation is not effective against the previous creditors of the acquirer. This means that, by derogating from the unseizable nature of the inalienable property, the previous creditors of the acquirer, whose debt is due during the period of inalienability, will be able to pursue the inalienable property to satisfy their claim.

The reason why the lawmaker has introduced such a distinction between the legal treatment of the previous creditors of the onerous acquirer, against who the stipulation is not effective, and the previous creditors of the acquirer with gratuitous title, against who the stipulation is effective, is to prevent an acquirer who received a thing in exchange for consideration to weaken or annihilate the general lien of the unsecured creditors, by accepting ownership over things that cannot be alienated and, therefore, pursued12. Scholars have considered that the acquirer would thus prevent the operation of the real universal subrogation, mechanism which ensures and allows the function of his estate to be the general lien of the unsecured creditors.

In our opinion, the lawmaker’s solution is excessive as regards the protection of the previous unsecured creditors of the onerous acquirer. The unsecured creditors are obliged to bear all the fluctuations of their debtor’s estate, caused both by onerous and gratuitous acts, the debtor keeping untouched the right of legal disposition of his property. In our case, there is no question of the impossibility of operation of the

real universal subrogation, as in exchange for the paid price, the debtor acquires ownership over a thing, even if it is inalienable for a certain period. Therefore, there is subrogation. What is suspended by stipulating an inalienability is the creditor's entitlement to pursue the assets acquired during the period of validity of the stipulation. But nothing impedes however the unsecured creditor to seek to set aside the act by way of a revocatory action if he can prove that, by signing the act, the acquirer intended to establish or to increase his insolvency, under art. 1562 of the new Civil Code.

But as we have already pointed out, the lawmaker opts for the ineffectiveness of the stipulation of inalienability in case of the previous creditors of the onerous acquirer. This explains why art. 629 para. 3 of the new Civil Code mentions that the inalienable property cannot be pursued during its period of inalienability, unless the law provides otherwise. Or the law provides otherwise in case of such creditors.

The stipulation of inalienability is less commonly met in case of personal property. The provisions of para. 3 of art. 627 of the new Civil Code refer to the effects of the conventional inalienability on a third party who acquired a personal property. In this case, one should apply the rules on the acquisition of ownership by the possession of good faith. This means that if the acquirer of the thing has gained possession of it by an onerous legal act, and if he has acted in good faith when gaining the possession, i.e. he did not know there was a prohibition on the alienation of such property, he will become the owner of this thing, without there being possible that one claim against him the existence of a stipulation of inalienability.

Although the provisions of para. 3 of art. 627 of the new Civil Code refer to those of art. 937 para. 1 of the new Civil Code, there are some differences between the two situations, even if the lawmaker has deemed them peripheral so as to impose the regulation of different effects. Thus, the good faith of the person who acquired a thing subject to an inalienability presents certain peculiarities compared to the good faith required by art. 937 para. 1 of the new Civil Code. The good faith of the possessor acquirer requires total ignorance, of any form, of the existence of the stipulation of inalienability concerning the thing of which he gains possession.

Where the stipulation of inalienability was not subject to any kind of publicity specific to the transfer of personal property, and the owner find out in any other way about its existence, his good faith ceases to exist, and he is no longer able to invoke the provisions of art. 628 para. 3 of the new Civil Code. Then, the possessor does not acquire the thing from a non-owner, but from its very owner, who was not entitled to transfer the property.

In the circumstances in which an owner sells a thing subject to a stipulation of inalienability, the sale made is invalid, as provided for by art. 629 para. 2 of the new Civil Code, the situation being similar to the sale of another one's property because the absence of a right to dispose of the property is equivalent to the legal absence of its object.\13

Due to the similar legal effects of the sale of personal property by a non-owner and the sale of personal property by the owner who was not authorized to dispose of it, the lawmaker opted for the solution provided for in art. 937 para. 1 of the new Civil Code.

At the same time, the possessor will neither be protected when acquiring a personal property by a gratuitous act, since he will be subject to the rules governing the acquisition of ownership by the possession of good faith, which require the onerous character of the conveyancing act.

If the personal property is not subject to pledge, but was acquired subject to a stipulation of inalienability, the unsecured creditors subsequent to the stipulation of inalienability may pursue the thing in order to satisfy their claim. It has been said\14 that, the absence of publicity in case of personal property engenders the idea of appearance in the debtor's estate of all the prerogatives of ownership over

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\13 I.F.Popa, op. cit., p. 115 and the cited authors and the case-law at footnotes 69 and 70.

\14 C. Zamșa, op. cit., p. 227.
Commentary on the Stipulation of Inalienability under the New Romanian Civil Code

the thing, here included the legal disposition, and it was on this appearance that the creditor whose claim had been born within the inalienability period relied. Accordingly, the stipulation has no effect in what concerns these unsecured creditors.

When the thing affected by the inalienability is subject to a security interest in real property\textsuperscript{15}, for instance, a mortgage on personal property, the stipulation of inalienability is also ineffective.

The provisions of art. 2392, para. 1 of the new Civil Code provide that “The mortgage extends to the fruit and the products of the mortgaged property, as well as to all the things gained by the mortgagor from an act of administration or of disposition concluded with respect to the mortgaged property”. Para. 2 is more suggestive in what concerns the possibility of selling the mortgaged personal property. Thus, “It shall also be deemed to be a product of the mortgaged property any property which replaces it or to which its value passes”. Therefore, even if we accepted the stipulation of an inalienability together with the creation of a mortgage on personal property and the publicity requirements were fulfilled, in our opinion, the mortgage creditor could hardly justify an interest in setting aside the sale as long as he can satisfy his claim by pursuing the thing that replaces the mortgaged thing or its value, the text of art. 2392 of the new Civil Code providing in his favour for a real subrogation with particular title.

According to para. 5 of art. 628 of the new Civil Code, the beneficiary of the stipulation of inalienability may claim damages from the owner who did not fulfil the publicity requirements.

The provisions of this paragraph should be read together with those of art. 629 of the new Civil Code concerning penalties for the breach of the stipulation of inalienability, and not just of its publicity requirements.

The beneficiary of the stipulation of inalienability may not only claim damages for the non-observance of the publicity requirements of the stipulation, when the inalienability was not breached, as he cannot prove the existence of a damage.

In these circumstances, the damages to which he is entitled, according to para. 5 of art. 628, may be required along with the cancellation of the contract, when the inalienability was stipulated in the interest of the person who alienates the thing or while invoking the nullity of the subsequent act of disposal when the beneficiary of the inalienability was the person who alienated the thing or a third party.

3. Sanctions for the breach of the stipulation of inalienability

In case of breach by the acquirer of his contractual obligation of inalienability, the lawmaker opts for the sanction of cancellation of the contract, based on the acquirer’s fault\textsuperscript{16}. According to art. 629 para 1 of

\textsuperscript{15} For the analysis of the situations which may arise in case of breach of the conventional inalienability concerning personal property subject to security interest, see C. Zamşa, op. cit., pp. 222–228.

\textsuperscript{16} For the sanction of cancellation in case of non-observance of the conventional inalienability, see Fr. Deak, \textit{Tratat de drept civil. Contracte speciale}, Universul Juridic Publishing House, Bucharest, 2001, pp. 52–53, E. Chelaru, \textit{Circulația juridică a terenurilor}, All Beck Publishing House, Bucharest, 1999, p. 14, V. Stoica, \textit{Drept civil. Drepturile reale principale}, Humanitas Publishing House, Bucharest, 2004, p. 239, Chr. Larroumet, \textit{Droit civil. Les biens. Droits réels principaux}, Economica Publishing House, Paris, 2006, pp. 204–205. According to this latter author, the fact that a thing is not encumbered by a conventional inalienability is not a validity requisite of conveyancing agreement. The agreement is valid even if the party transferring the thing did not observe the stipulation of inalienability. As he alienates the thing by failing to observe the obligation that has assumed, he may be required to pay damages to compensate the loss caused by non-fulfillment or to suffer the termination of the agreement, penalty at the disposal of the creditor of a contractual obligation to retroactively terminate the contract if the other party has not executed the obligations he has assumed.
the new Civil Code, “The person transferring the thing may require termination of the contract for breach by the acquirer of the stipulation of inalienability”.

The right to request termination of the contract belongs to the person transferring the thing. Although the law does not expressly specify, we must also admit this possibility in favour of the successors in title of the person transferring the thing. The third party in whose favour the inalienability was stipulated may not bring an action for cancellation of the contract, as he is not a party to the contract, but he may seek damages for non-fulfilment of the publicity requirements of the stipulation, under art. 628 para. 5 of the new Civil Code.

The termination of the initial act results in the abolition of the subsequent act by which the acquirer has alienated the inalienable thing, according to the resoluto dantis jure, resolvitur jus accipientis principle\(^\text{17}\).

However, the subsequent act can still be maintained if one invokes the acquisition of ownership by the possession of a personal property or usucaption in case of real property.

It is still possible that the sanction of termination of the original contract, where the inalienability was stipulated, which would lead to the return of the property in the estate of the person transferring the thing, not to be, in all cases, in the latter’s interest. There are cases in which the person transferring the thing only wants to abolish the subsequent act, wanting the goods to remain in the estate of the initial acquirer, as for instance where property was transferred in exchange for care services and the stipulation of inalienability was intended to maintain the legal relationships with the acquirer debtor of the care services\(^\text{18}\). If the person transferring the thing, in his capacity as creditor of the care services seeks to retain it, he will not be interested in bringing an action for cancellation of the contract.

In these circumstances, the lawmaker has provided in para. 2 of art. 629 of the new Civil Code for the relative nullity of the subsequent act of disposition, a sanction distinct from the cancellation applicable to the primary act, meant to protect potential private interests of the person transferring the thing and which also entitle a third party benefiting from the inalienability to require the termination of the act. Thus, according to art. 629 para 2 of the new Civil Code, “Both the party transferring the thing and the third party, whether the inalienability was stipulated in his favour, may request the cancellation of the subsequent alienation act concluded by breaching the stipulation”.

The lawmaker has opted for the sanction of relative nullity of the subsequent act, and not for the absolute nullity, having in mind the particular interest protected.

The person transferring the thing will opt to seek the rescission of the subsequent act in the event in which he only desires its abolition and the maintenance of the original act of alienation.

On the other hand, the sanction of relative nullity of the subsequent act is consistent with the foundation that scholars have recently argued for\(^\text{19}\) in case of the alienation of another one’s property, given the assimilation of a non-owner with an owner deprived of the legal disposition of his property. In both cases, we may speak of a lack or inexistence of the legal object of the agreement. The non-owner

\(^{17}\) For explanations concerning the different viewpoints expressed in relation with the different sanctions applicable in case of violations of the stipulation of inalienability, see I.F.Pop, op. cit., pp. 114–119.

\(^{18}\) See I.F.Pop, op. cit., p. 114.

cannot transfer his right of ownership because this right does not exist in his estate, and the owner of an
inalienable thing cannot transfer the right of ownership because he agreed not to dispose of the thing.

According to the third paragraph of art. 629 of the new Civil Code, inalienability of the property renders it unseizable during the period of inalienability, unless otherwise provided by the law. Since their first judgments recognizing the stipulation of inalienability, French courts have established that inalienability renders the property unseizable20.

Inalienability and, implicitly, unseizability impede the operation at the level of the entire estate of the universal real subrogation which assures and allows the general lien of the unsecured creditors.

Inalienability does not allow the creation of specialized securities over the thing (mortgages on real and personal property). Even if they were eventually admitted, subject to a term or a condition, they could not be enforced during the period of effectiveness of the clause21.

We will not refer to the controversy over the possibility of unsecured creditors prior to the stipulation of inalienability to require the sale of the property if their debt matures during the period of inalienability. We have shown that the lawmaker opted to solve this problem differently, according to the onerous or gratuitous character of the conveyancing act.

Only the unsecured creditors of the person who has acquired a good affected by an inalienability by an onerous act do not bear the consequences of the unseizability of the thing.

For the previous unsecured creditors of the acquirer of an inalienable thing by a gratuitous act, as well as for all the subsequent unsecured creditors of the stipulation of inalienability for which the publicity requirements have been met, if the maturity of the claim falls within the period of the alienability, the inalienable property cannot be subject to enforcement.

4. The practical interest of stipulating an inalienability

We shall now consider the applications of the stipulation of inalienability, by only insisting on those aspects which are relevant for our discussion.

An application of the stipulation of inalienability may be found in case of the “fiducia” (the civil-law equivalent for the trust agreement)22, one of the best examples of an approximation between the Romano-Germanic law and the common law, that creates a mixture of legal cultures, very favourable to the EU harmonization23.

According to para. 4 of art. 627 of our new Civil Code, the stipulation of inalienability is implicit in the conventions out of which there arises in the future the obligation to convey the property to a determined or determinable person. It is, thus, implied in a “fiducia” insofar as it supposes the legal operation whereby the settler transfers property, claims or securities from his patrimony to a fiduciary who undertakes to hold and administer them with a specific purpose, on account of a beneficiary (art. 773 of the new Civil Code), following that, at the end of the contract, the fiduciary property existing at the moment be transferred to the beneficiary, and in his absence, to the settler (art. 791 (1) of the new Civil Code).

21 M. Grimaldi, Droit civil. Libéralités. Partages d'ascendants, p. 170, footnote 437, cited by I. F. Popa, op. cit, p. 113
and footnote 59.
22 In common-law, the stipulation of inalienability especially appears in case of the trust, the equivalent of the “fiducia” in the civil law.
Inspired by the French Civil Code\textsuperscript{24}, but having definite kinship relations with the English trust\textsuperscript{25}, “fiducia” is a newly introduced institution into the Romanian Civil Code. As stated by its statutory definition, “fiducia” is an agreement between the settler and the fiduciary involving the transfer of full rights to the latter\textsuperscript{26} for a period which is necessarily limited and determined (art. 779 letter b) provides, on pain of absolute nullity, that parties to a “fiducia” shall specify the duration of such transfer of rights, which may not exceed 33 years from the date of its conclusion).

It is thus of the essence of a “fiducia” the existence of a temporary inalienability of the property provided for by the settler\textsuperscript{27}. To that effect, the lawmaker establishes in art. 31 (3) of the new Civil Code that the fiduciary mass of things is deemed to be an estate which was created for a specific purpose, reminding of the Anglo-Saxon model in which, “the trustee holds the property on trust for another”\textsuperscript{28}.

A brief return at the origins of this common-law institution helps us better understand the idea of inalienability implied by a “fiducia”.

The notion of fiduciary or, actually, equitable ownership has appeared in England, in the 12–13th centuries, when landowners would leave the country to fight in the Crusades, and would need the help of someone else to run their estates when they were gone. They would then convey ownership of their lands to an acquaintance, agreeing that ownership would be conveyed back on their return. However, “true” owners would rather often return home to find the legal owners’ refusal to hand over their property. And courts could not judge in their favour, as under the English law, the land then belonged to the trustee, who was under no obligation to return it.

This is why the disgruntled owners would then petition the king, who would refer the matter to his Lord Chancellor, to decide what was “just and equitable”, according to his conscience. Considering it unjust that the legal owner could deny the claims of the “true” owners, the Lord Chancellor would only find in favour of the latter. It was this idea, according to which the Crusader was the beneficiary and the legal owner the fiduciary, which in time developed into what we now know as a trust or “fiducia”; namely the trust “fides,-i” that binds the two parties and justifies the return of ownership.

Thus, as a rule, trust property implies the inalienability of things, unlike ordinary property which confers full powers on them (art. 555 (1) of the new Civil Code). The fiduciary’s rights are to be determined, as concerns their extent, by the “fiducia” agreement\textsuperscript{29}. To that effect, art. 779 letter f) establishes that the parties shall mention the purpose of the “fiducia” and the scope of the fiduciary powers of administration and disposition of the fiduciary, the absence of such provisions bringing about absolute nullity. Exceptionally, the parties may agree that the fiduciary dispose of the property or constitute a pledge, if this is expressly stipulated in the agreement.

\textsuperscript{24} See I. Boţi, V. Boţi, \textit{Administrarea bunurilor altuia în noul Cod civil român}, in Dreptul no. 11/2010, p. 84.
\textsuperscript{27} See also I. F. Popa, \textit{op. cit.}, p. 106; R. MARTY, \textit{De l’indisponibilité conventionnelle des biens (1re partie)}, Petites affiches, 21 novembre 2000 no 232, p. 4.
Another application of the stipulation of inalienability may be found in company law, in case of the **clauses restricting the transfer of shares**, very suggestively also called “honeymoon clauses”\(^{30}\).

In company law, the principle of contractual freedom also materializes in the shareholders’ entitlement to conclude statutory or extra-statutory agreements, among other things\(^{31}\) (articles 7 and 8 of the Companies Act no. 31/1990), letter f 2 of art. 8 of the Companies Act no. 31/1990\(^{32}\) expressly providing that the articles of association will have to include any restriction on the transfer of shares\(^{33}\). Introduced in the Companies Act no. 31/1990 only in 2006\(^{34}\), this provision confirms the previously expressed opinion of our scholars, who accepted without reserve the shareholders’ possibility to stipulate clauses restricting the transfer of their shares\(^{35}\).

But it does not go further, i.e. to also provide solutions concerning the validity requirements of such clauses or the sanctions imposed for their violation. Unfortunately, as, from the very beginning, we should specify that an assignment of corporate rights is not a mere transaction between two persons as a sale, pure and simple\(^ {36}\). On the contrary, it involves the issuing company, although not a contracting party, as with the transfer of the quality of shareholder to a new person, the company becomes a debtor to that person and, then, as an assignment of shares may cause a significant change in the distribution of capital among the shareholders, and, accordingly, disturb the company\(^ {37}\).

The impact of such assignments, especially on the company, gave rise in other countries to the concern to draw a legal regime for such stipulations. In Romania, it is legal scholars who have identified a typology of the clauses restricting the transfer of shares and the criteria to be met in order to ensure their validity.

To restrict the alienation of shares, which could destabilize the company, shareholders will most often resort to mechanisms such as the **right of approval clause**, the preemptive rights clause or the temporary **non-transferability clause**.

Expression of the free will of the shareholders, who voluntarily renounce their absolute freedom to transfer the shares, these clauses must be stipulated so as to also observe the principle of the free transfer of shares, expression of a more important legal rule\(^ {38}\), established by art. 555 para. 1 of the new Civil Code, and according to which “Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by the statutes or regulations”.

**The right of approval clauses** subject the transfer of shares to the approval of a company body, restricting as such the transferability of the shares\(^ {39}\). They assign an anonymous and “open” company an

\(^{30}\) F. Thierry, op. cit., p.100.

\(^{31}\) Concerning this, see also D. M. Şandru, *Pacte societare. Clauze, pacte, înţelegeri între asociaţii societăţilor comerciale*, Universitară Publishing House, Bucharest, 2010 p. 27 et seq.

\(^{32}\) Which takes over the provisions of the second Directive concerning the setting up, organization and functioning of the joint-stock company, *art. 3 lit. d)*.

\(^{33}\) However, Directive 2004/25/EC of the European Parliament and of the Council of 21 april 2004 on takeover bids institutes a neutralization of the restrictions on the free transfer of shares (art. 11 (2)).

\(^{34}\) Art. I pct. 5 of Law no. 441/2006.


\(^{37}\) L. Godon, op. cit., p. 128.


\(^{39}\) Also L. Tec, op. cit., p. 81.
intuitu personae character⁴⁰ – the holder of the right of approval preserves his control over the company in case of admission of new members, being thus able to prevent the entry of undesirable persons into the company⁴¹.

As it was shown in legal literature⁴², in order to be valid, such clause should include references to: the body expressing its approval, the time limit within which it is expressed, the cases of refusal of approval, the solution in case of refusal of the approval and the sanction.

In order to comply with the principle of the free transfer of shares and to avoid that the potential assignor turn into a “captive” of his shares, the approval clause is usually accompanied by a preemptive rights stipulation⁴³. Otherwise, the shareholder will anyway become “free” again as an effect of the expiry of the term set forth for the expression of approval⁴⁴.

In this regard, for example, the French Commercial Code expressly lays down the obligation to purchase the shares if the company does not approve the proposed assignee. The board of directors, the executive board or the executives, as applicable, shall, within three months from the date when the refusal was notified, arrange for the shares or transferable securities giving access to the capital to be purchased either by a shareholder or a third party, or, with the assignor’s consent, by the company in order to reduce its capital (art. L. 228–24 (2) of the French Commercial Code). Failing an agreement between the parties, the price of the securities is to be determined by an expert, designated by the parties or the court (article 1843–4 of the French Civil Code). If, upon expiry of the time limit of three months, the transfer of the shares has not been effected, approval is deemed to have been granted. This time limit may nevertheless be extended based on a court decision, upon the company’s request (art. L. 228–24 (3) of the French Commercial Code).

Scholars and courts have also brought other important specifications related to the approval procedure. Approval is, in principle, purely discretionary⁴⁵; it must pursue the legitimate interests of the company and not the particular interest of the individuals benefiting from the subsequent preemptive right⁴⁶; only approval should be aimed at pursuing the interests of the company, and not the approval clause itself, as it happens in case of the non-transferability clause⁴⁷.

The preemptive rights clauses require shareholders who wish to leave the company that, prior to their disposal of the held securities, to offer them to the beneficiaries of the clause⁴⁸. Just like the mechanism of approval, the requirement of a preference imposed by them restricts the free transfer of shares⁴⁹. And also just like the mechanism of approval, preemption is a mechanism aimed at enhancing the control of a shareholder or of a group of shareholders over the company, avoiding the intrusion of third parties by the acquisition of the assignor shareholder’s holdings.
To be validly concluded, preemptive rights clauses will have to mention the price, the payment method, the ways of transferring the shares and the rules of carrying out the sale50.

**Temporary non-transferability clauses** concern the prohibition of transmission by the underwriter of the securities held for a specified period51. The inalienability may be total or partial, as it affects all the shares or only some of them52. The aim of stipulating this type of clause is that of maintaining for a certain time a *status quo* in the company, thus preventing an uncontrolled change of the existing relationships53. That is why, it is shown in legal literature54, they enjoyed, for example, a great success in case of the French privatizations of the ’80s, gathering the investors around certain “stable nuclei”.

Although their radical effect of suppressing the right of disposition is confusing and they were, therefore, challenged by legal scholars, non-transferability clauses find their confirmation in the provisions of the new Civil Code (art. 626 of the new Civil Code). According to art. 627 (1) of the new Civil Code, the stipulation of inalienability is valid if it is limited in time and is justified by a serious and legitimate interest.

Regarding the first condition, of the time limitation, unless otherwise provided by the special provisions of company law55, we consider that the duration of the inalienability stipulated by the shareholders must be a reasonable one56. We will quote in this respect a relevant commentary of our Constitutional Court57 concerning the limits of contractual freedom, freedom which, according to it, “can only be exercised within its legal frame, in compliance with the reasonable limits imposed by the protection of legitimate public and private interests; exercised outside this framework, without hindrance, any freedom loses its legitimacy and tends to convert into anarchy”.

In practice, we can find stipulations of inalienability valid for periods ranging from two to five years58, but the prohibition to alienate may also have very long durations, of ten or even twenty years59.

Certainly, the requirement of a limit of time must be understood and applied in correlation with the requirement of a serious and legitimate interest. In the corporate framework, this interest can only be the legitimate interest of the company. Indeed, the interest of the company here acquires the value of a true principle designated to safeguard the company and its members against any possible abuse.

Unfortunately, the recognition this notion enjoys is not also completed by a uniform application. We shall not go into details on this issue, which exceeds the topic of our discussion, only limiting ourselves to specify the fact that, it was having in view the variable geometry60 of the notion of the

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50 P. de Wolf; G. Stevens, *op. cit.*, p. 12.
52 L. Tec, *op. cit.*, p. 87.
55 For example, in French law, according to art. L.262-14 C. com., the articles of incorporation may provide for the inalienability of all shares or part of them for a period of 10 years at the most.
56 To that effect, also P. de Wolf; G. Stevens, *op. cit.*, p. 9, for Belgian law which also lacks a special regulation of the stipulation of inalienability.
interest of company, that the lawmaker realized the futility of assigning it an unequivocal definition and maintained its "open" character. Its content is thus to be established according to an assessment on a case by case basis.

What is important for us to note is that the prohibition of alienation must observe the interests of the company throughout the duration of the clause. Otherwise, according to the provisions of art. 627 (2) of the new Civil Code, "a person whose property is inalienable may be authorized by the court to dispose of the property if the interest that had justified the stipulation of inalienability has disappeared or where a greater interest comes to require it". In other words, as it was shown in legal literature, the clause could lapse with the evolution of the circumstances of corporate life.

5. Elements of reflection on the national recodification and European harmonisation

The regulation of the stipulation of inalienability and the “fiducia” shows that globalisation and Europeanization are means to make codes “live in the present”.

But then, assumedly giving satisfaction to those suspecting beneath a discussion on a European code an “intention of iconoclasm”, why should we not ask ourselves if a national code can be an instrument of harmonisation?

This problem has already been tackled in legal literature, and we agree with those emphasizing that harmonization and codification are two absolutely incompatible notions. While codification is, by definition, static, harmonization is dynamic. At the same time, a code cannot dispel cultural confusion, which certainly hinders exchanges occurring on the market.

And still, one cannot conceive a market without an agreement on a minimal set of principles, relating to ownership and its transfer. As this certainly concerns contracts, we consider that this preoccupation may very well become part of the European Draft Common Frame of Reference in, as it was suggested, an exercise of “pre-harmonization of private laws”.

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65 F. Zenati-Castaing, *op. cit.*, p. 211.
Deliberative Supranationalism as a New Guarantor for European Rechtsstaat

Tanel Kerikmäe*

1. Introduction

Relationship and communication between national and supranational European Union (“EU”) law, including implementation and collision issues have been discussed intensively. Theoretical approaches can be divided on two main categories. From supranational level, the concepts of increasing differentiation have been criticized. The main forms of differentiation discussed are:

- Multi-speed. All member states are moving in the same direction but, for reasons either of choice or capacity, are doing so at different speeds;
- À la carte. All states participate in core policies, but outside the core choose the extent and nature of their involvement;
- Overlapping circles. States group together in different combinations in different policy areas, with overlappings occurring between the groupings;
- Concentric circles. All states participate in core policies, but some states (the inner circle) also participate in a wider range of integration policies while the other states (the outer circle(s)) are less integrationist.

From national level, the approaches are concentrated to the question, how to adjust member states legal orders with developing EU legal system. The supremacy of EU law has been separately discussed through the jurisprudence of European Court of Justice (“ECJ”) but also as reflected by the national jurisprudence (see Coles). Beside of the papers of the authors mentioned in the theoretical part of the current paper (especially those who are reflected by the table of diametric measurement of constitutional doctrine), there are several attempts to analyze the legal problems of concrete jurisdictions, related to single member states and/or to legitimacy-building of the European constitutional law. Majority of these researchers, representing academic approaches from the point of view of concrete member state, are

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5 Junge, K. Differentiated integration: European Union Politics
directly or indirectly related to the concept of *Rechtsstaat* as a common determinator of the discussion\(^6,7,8\).

As to the implementation and techniques of interpretation of EU law, there are numerous approaches explaining and analyzing the EU legal norms and judicial practice to clarify the concept of direct effect, unconditionality, clearness, etc (for example, EU law to be capable for judicial enforcement in national courts\(^9\)). Collision between national and supranational law can be avoided by the rules commonly understood from national and supranational levels\(^10,11\). Therefore, the constitutional dialogue can be seen as a device to achieve the best possible level of *Rechtsstaat*.

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2. Deliberative Supranationalism

The membership in the European Union is an impulse for several reforms for member states in the context of rethinking their constitutionalism and legal reasoning. "Many of the vital problems that society is trying to deal with are multidimensional, complex and to some extent, transnational – in their origin, their causes and the problem solving stage. All these three qualities represent substantial challenges to our present political and legal decision-making systems\(^12\)."

European (legal) identity cannot be seen as final but as an ongoing process. The European Union is not just post-national union, but it is rather a problem solving and value based construct. Habermas conceives the EU as a vehicle to preserve and further pursue the liberal and democratic achievements of the European nation-state\(^13\). On another hand, contributing to the establishment of European values that are common to the EU and member states can be seen as a primary task for any member state, including Estonia. The general recognition of a need for legitimacy as a component of the rule of law for the European project does not need another apologism and a shared (European) collective identity "would seem to be good means to the end envisaged\(^14\)."

Primacy of EU law over member states constitutions has always been controversial as the national constitutions are the source of allowing the EU law to enter to the national legal system. Verhoeven proposes constitutional homogeneity to be a precondition for loyalty to European Union. The author

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\(^9\) Deards, E., Hargreaves, S. *EU Law* Oxford University Press 2007, p.77–90


agrees that multiple masters (EU law and national constitution) are *per se* a source of conflict but also states that “that conflict cannot be properly resolved *ex ante*, say, making the European law automatically “trump” national constitutions”\(^{15}\). This kind of homogeneity cannot be (legally) framed, but must be seen as a process where the values emerge and develop through the communications between the two levels. To assume that supranationalism is a dogma and the competence of the EU cannot be influenced by the member states is misleading, taking into account the principle of Maastricht treaty, art 6 (1):

> “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”

A rather radical view is that supremacy (of EU law) can be conceived as a conflict rule, entailing, in the first place, the “obligation to disapply”\(^{16,17,18}\). The very idea is still not to deny the supremacy of EU law in general but to urge the national legislator to interpret, think and consult. Even if the hierarchical relationship between national and supranational legal systems can be assumed, the automatic hierarchical relationship of the legal norms in the implementation process cannot be presumed. As Prechal suggests: “Despite some scholarly efforts, this conclusion cannot be drawn from the case law of the European Court of Justice which, moreover, leaves the necessary space to the national legal systems to accommodate Community law provisions”\(^{19}\).

There are also critical approaches to the well-known concept of the autonomy of European Union law. Under the rule of law, the absolute autonomy of European law cannot be presumed, even if the EU legal system is often declared to be *sui generis*. Barents warns, “that in such an approach Community law is in danger of being conceived in a visionary way, strongly influenced by ideology and idealism”\(^{20}\). However, the author does not agree with this kind of purely formalistic approach which prevailed decades ago to guarantee the sustainability of EU legal system.

In order to protect the rule of law, a legal judgement should be based on deliberations. The modern theories concerning the EU legal system and primacy of the supranational law are leading to the interpretation that takes into account arguments both from national and EU level. The so called “deliberative supranationalism” (deriving from the ideas of Habermas, Weiler, Haltern, Mayer and Koh) is concluded by Zürn, by whom, it must guarantee:

a) that in the deliberations surrounding the enactment of a particular regulation the grounds brought forward for and against it are acceptable to all the parties involved;
b) that it requires “arguing” about relevant problems;
c) that the general public is given the chance to articulate its opinions on matters\(^{21}\).

In general, deliberative supranationalism seems to be a modified version of Habermas theory of “deliberative democracy” by which democracy is seen essentially as a process of institutionalized public

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15 Verhoeven, A. *The European Union in Search of a Democratic and Constitutional Theory*, p.319
deliberation on matters of common concern\textsuperscript{22}. It follows, that real constitutions are never static or complete but are constantly open to critique and review. What the constitution is must rather be sought in the living and evolving "aquis" of constitutional rules and principles of a particular community\textsuperscript{23}.

Walker’s proposal to build a meta-constitutional frame with the cosmopolitan nature, “which lacks tradition, well-defined and well-respected rules of amendment, and live in the shadow of a pluralist conception of authority which shares and challenges their jurisdiction...”\textsuperscript{24} is a utopian and vague concept. Deliberativist ideas are closer to, what can be called “common constitutionalism, by which “a constitution should be seen as a form of activity, an intercultural dialogue in which culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time...”\textsuperscript{25}.

Non-dependency from direct political pressure is expressed by another aspect of deliberativism as a modern approach. The European Union supranational character can be seen as universal authority, described by Raadschelders, by whom “when the universal authority crumbles..., horizontal integration becomes the need to establish an absolute independence from neighbors\textsuperscript{26}. On the one hand, there is a contradiction – the EU is a combination of values (and norms reflecting them) that derive from systems of different cultures. However, the most influential member states are not changing their state functions and legal reasoning as dramatically as members that joined later, under the conditions, elaborated before their accession. On the other hand, there is no contradiction with the idea of reciprocity and deliberative supranationalism, as the EU authority should be autonomous or non-independent from any member-state. The naïve question of “bottom-up or bottom down?” could be rejected. The solution seeker could, instead rely to the concept of “societal constitutionalism” (which is an alternative to the normative, state-linked constitutionalism). The EU legal system (including the legal systems of member states) must be based unconditionally on the rule of law, not economic and political influences of different interest groups.

Joerges, concluding and promoting Teubner’s concept of societal constitutionalism, is giving a definition: “Societal is autonomous, self-creating and self-legitimating: globalization is not just about economy, but is driven by many more social sub-systems which create a new global pluralism which exerts (self-)control through a “decentralized multiplicity of spontaneous communication processes\textsuperscript{27}.” This is a combination of, what can be described as “the ideal constitution” which self-constitutes in the form of ideas, and “the real constitution\textsuperscript{28}” which self-constitutes through the everyday willing and acting of society members. This approach leads to the dialogue as an essential element included to the pro-active EU member states constitutional doctrine.

\textsuperscript{22} Verhoeven, A. The European Union in Search of a Democratic and Constitutional Theory, p. 39–50
\textsuperscript{23} Ibid., p.53
\textsuperscript{24} Walker, N. Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe, in: Constitutional Change in the EU. From Uniformity to Flexibility Eds. Gráinne de Búrca, Joanne Scott, Oxford, Portland Oregon: Hart Publishing 2001, p.29
\textsuperscript{25} Shaw, J. Relating Constitutionalism and Flexibility in the European Union, in: Constitutional Change in the EU. From Uniformity to Flexibility, p.347–351
\textsuperscript{26} Raadschelders, J.C.N. Handbook of Administrative History (New Brunswick and London: Transaction Publishers 2000, p.217
\textsuperscript{28} Allott, P. The Concept of International Law, in: The Role of Law in International Politics. Essays in International Relations and International Law Ed. Michael Byers, Oxford University Press 2001, p.69
3. Dialogue as an element of modern constitutional doctrine

In recent years, the metaphor of “dialogue” has become increasingly ubiquitous within constitutional theory as a way of describing the nature of interactions in the area of constitutional decision-making. In general, the greatest potential for achieving a normatively satisfying understanding of constitutional dialogue emerges when the contributions of equilibrium and partnership theories of dialogue are synthesized\textsuperscript{29,30}. This indicates that a member state must be able to construct constitutional doctrine to avoid the problems in implementing EU law. The term “constitutional doctrine” can be defined as “the currency of the law\textsuperscript{31}” the set of principles and techniques, legal reasoning used in the process of implementation of law through the test that derives from the interpretation of the constitution.

The vital idea of EU modern constitutional doctrine is to establish a ground for constitutional dialogue between supranational and national levels. The decisive comparatists and tools for effective reciprocity are primarily the judiciary in both levels of EU legal system, including the European Court of Justice. In its daily activities it is permeated with the values of the legal systems of the constituent countries\textsuperscript{32}.

The constitutional dialogue could be instrumentalized by using the system of EU general principles\textsuperscript{33}, by which the need for deliberativism can be tested. Before applying a European Union legal norm, the professional should test it by the system of principles:

- a) substantial premise (justified by fundamental human rights, the principle of legitimate expectations)
- b) formal premise (cannot contradict the principles clearly formulated, such as proportionality, legal certainty, non-retroactivity, equality, subsidiarity)
- c) procedural premise (must be recognized)

Only after successfully examining the legal norm through the above mentioned test, the argument of praxeological necessity i.e. supremacy and direct effect can be assumed. The examining process should take into account the legal reasoning both from national and supranational levels.

EU law is not only about written norms, it is in large part related to and derived from the jurisprudence of European Court of Justice (ECJ) which reflects the implementation issues. Beside that, there exists a kind of European legal argumentative dualism, as the opinions of Advocate Generals (suggestions to the judiciary of ECJ) have at least the same relevance, operating in the field of “the discourse of the personal and subjective construction of purposive judicial solutions\textsuperscript{34}”.

The problems in positioning the EU law into the domestic legal system are even more evident in the cases where the EU rule or precedent is not commonly understood or is differently interpreted. By


\textsuperscript{30} The concept of constitutional dialogue has a discourse on participatory democracy i.e. the dialogue is open to the direction of civil society. The current paper is framed to discuss the techniques of constitutional dialogue between EU and (member) state levels.

\textsuperscript{31} Tiller, E. H., Cross, F. B. \textit{What is Legal Doctrine?} Northwestern University Law Review. Vol 100, No. 1, 2006, p.517

\textsuperscript{32} Lenaerts, K. \textit{Interlocking Legal Orders in the EU and Comparative Law. International and Comparative law Quarterly} 905, 2003


Williams: “Identifying a central principle is an essential step in the process of judgment. But it is not enough. A mere rhetorical observation…. is patently insufficient. We need to look further for guidance. What concerns us is how the principle is or not fulfilled. In other words, the principle is not the last word in values. We must also consider the means by which it is brought into effect. Only then can effective evaluation be made as to the extent to which the principle has been and is realized35.

Clarity of conception, capacity for evolution and enforcement, transparency36,37, certainty and foreseeability, analysis of cost-benefit balance, cultural dimension and preconditions are the keywords that must establish EU related (legal) policy by the member state. Professionals should be aware of borderlines of competences and be able to use effectively different techniques and levels in making strategies that are working for Estonian welfare such as infranationalism38,39, intergovernmental negotiations and so called “forum shopping”, a term that indicates seeking the consensus among professionals of several other member states before presenting a legal argument against the possible violation of the rule of law caused by the EU legislature40 that can be explained through Fuller’s definition of rule of law. It seems quite expected that in a multilevel system, there must be certain coordination between national and supranational orders. There are several synonyms to “constitutional dialogue”, the term that reflects reciprocal and interactive relations between national and supranational legal societies. The authors are using phrases like “constitutional tolerance” and “cosmopolitan communitarism41” inspired by Weiler42 and Bellamy43. Other authors are using the term “interpretative pluralism”. Stihl argues that legal professionals believe less and less that law is science rather than politics but proposes that interpretative pluralism (or pluralist interpretation) can be used as “the absence of a single binding or authoritative interpretation44”. The interpretative pluralism is a method of comparative law. Accordingly, Stihl is concluding his discussion with a more profound criticism posing the question “whether final interpretation is united in a single court or divided among many institutions, the rest of us are left subject not to the law itself but to the interpretations of the law handed down by fallible human beings, interpretations that may over time distance themselves greatly from the original legal sources45. By Martinico, there must be judicial dialogue that represents a privileged perspective for

36 Ibid. p.87–107
37 Williams is using the concept particularly in context of protecting human rights, however, it can be and must be used in broader terms.
39 Such as infranationalism: opportunities in lobbying at forums related to comitology, as stated by Weiler: “comitology is responsible directly for fundamental societal decisions on the allocation of risk and its costs and indirectly for significant decisions on the allocation of resources and redistribution”.
40 In general, European Union case law includes numerous examples where the secondary legislation (regulations, directives, decisions) are adopted in violating principles embodied to the primary legislation (founding treaty and amending treaties). Also the problem of “deficit of democracy” (still unbalanced legislative power) and misinterpretation of new EU legislation may create the violation of legal certainty and rule of law in general.
43 Bellamy, R., Warleigh, R. Cementing the Union: The Role of European Citizenship in: “A Soul of Europe” I, eds. F. Cerutti and E. Rudolph, Peeters 2001, p.55–72
44 Stihl, R. Securing the Rule of Law through Interpretive Pluralism: An Argument from Comparative Law. Jean Monnet working paper 01/07, 2007
45 Ibid.

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studying the relations between interacting legal orders, especially looking at the multilevel and pluralistic structure of the European constitutional legal order. Martinico calls it “techniques of hidden dialogue” between the ECJ and the national Constitutional Courts (see also: Weiler and Bellamy, Warleigh).

The modern approach in multilevel governance is to secure the equilibrium and balance between national and supranational interests with having constitutional dialogue. In general, states with Supreme courts (Ireland, Greece, Denmark and Finland) have been innovative in keeping the dialogue as the member states with Constitutional Courts have avoided it as a rule.

In general, the process of ascertaining conformity of national rules implementing EU norms to the constitution is not carried out through a strict application of the unassailable rule of EU law primacy over the whole domestic law, nor by assuming unconditioned supremacy of the constitution over any other source of law, but rather with the objective of identifying the best solution to fulfil the ideals underlying legal practice in the European Union and its Member States. Today more than ever, the courts (especially, in relation to the national legal orders, the constitutional courts) are the institutions which, in their respective legal orders, occupy a privileged position to forge closer ties between different but interacting legal regimes.

Analyzing the EU–member state relations from the perspective of legal communication, the Lisbon treaty cannot be ignored. The rejection of the Constitutional treaty was a kind of shock. Nevertheless, as Barnard points out, at least some of the opposition used the referenda (where available) "as an opportunity to give bloody nose to the incumbent national governments" to revenge for their ignorance or non-transparency in European affairs. In the context of the current thesis, the author agrees with Weiler who remarked that “What Europe needs…. Is not a constitution but an ethos and telos to justify, if they can, the constitutional order it has already embraced.” There are many academic contributions about the “Constitution of Europe”, “Constitutional Treaty for Europe”, “Reform Treaty” or “Lisbon Treaty” to demonstrate the inevitable interlink between EU and member states constitutional law. There are only some researchers who see the problem in creating common European constitutional space because of, for example, diffusion of responsibility and leadership. It seems, however, that the success of

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46 Martinico, G. *A Matter of Coherence in the Multilevel Legal System: Are the “Lions” Still “Under the Throne”?*
47 Weiler, J.H.H. “The Constitution of Europe. Do the New Clothes have an Emperor?” and other essays on European integration, p. 33–54
48 Bellamy, R., Warleigh, R. *Cementing the Union: The Role of European Citizenship in: “A Soul of Europe”*
50 Pollicino, O. *New Emerging Judicial Dynamics of the Relationship Between National and the European Courts after the Enlargement of Europe, Jean Monnet Working Paper 14/08 NYU School of Law 2008*
constitutionalization of the European Union is depending on willingness of the member states to participate in constitutional dialogue.

The issue of how to interpret constitutional law is common to many legal societies. Trying to find an answer to the question, whether a specialized methodology is needed for European constitutional law we may assume that “the systematic and pan-European comparison of constitutional methodologies and its reflection onto issues facing Europe, as a whole, are still desiderata”\(^{56}\). Even if Dann is not sure that habeas corpus of existing constitutional practices of member states is able to compose the methodology of European Constitution, “the cognitive interests of academia (in contrast of those of courts)\(^{57}\)” may have relevant influence to the process. Legal experts of member states should become encouraged and supported by the state authorities\(^ {58}\).

As it is noticed by Kowalski, “…respect for various European identities, cultures, traditions should not be destroyed or hindered by European integration”\(^ {59}\). The interdependence of EU and its member states are demonstrated by several researches\(^ {60}\). The following five indicators included are used further to measure and identify the positions of member states of EU.


\(^{57}\) Ibid. p.46


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Table 1: Diametric measurement of constitutional doctrine. Source: author.

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<th>INDICATORS (and authors whose contributions have been the basis in ascertaining the indicators)</th>
<th>A. RIGID APPROACH (traditional supranationalism)</th>
<th>B. DYNAMIC APPROACH (deliberative supranationalism)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Relationship and communication between national and supranational (EU) law</td>
<td>Passive positioning. Communication is unilateral (ex parte). Supremacy and primacy are synonyms. Supranational character of EU law is sufficient basis for validating legal norms in domestic legal system. Interaction of national and supranational legal systems is not supported. Member state is acting under the principle of constitutional loyalty assuming that supranational interests take account the national interests</td>
<td>Pro-active positioning. “Primacy” (distinction between the scopes of application) is distinguished from “supremacy” as a general principle. Legitimacy of EU norm is analyzed by a test composed of the constitutional principles and substantial, formal and procedural premises (see Kordela’s test in section 3.2). Member state attempts to generate an interactive dialogue (based on equilibrium and balanced interests) between domain reserved of national and supranational levels (reciprocity)</td>
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61 Pollicino, O. New Emerging Judicial Dynamics of the Relationship Between National and the European Courts after the Enlargement of Europe  
64 Martinico, G. A Matter of Coherence in the Multilevel Legal System: Are the “Lions” Still “Under the Throne”?  
65 Kowalski, M. Comment on Daniel Thym: United in Diversity or Diversified in the Union, in: The Unity of the European Constitution  
66 Zürn, M. Law and compliance at different levels, in: Law and Governance in Postnational Europe. Compliance beyond the Nation-State  
67 Walker, N. Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe, in: Constitutional Change in the EU. From Uniformity to Flexibility  
68 Shaw, J. Relating Constitutionalism and Flexibility in the European Union, in: Constitutional Change in the EU. From Uniformity to Flexibility  
69 Bellamy, R., Warleigh, R. Cementing the Union: The Role of European Citizenship in: “A Soul of Europe
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<tr>
<td>2 Implementation and techniques of interpretation of EU law</td>
<td>Implementation is automatic, based on technical-grammatical interpretation and rhetorical observations. Subsidiary sources (court decisions, opinions of Advocate Generals and academia) are often rejected. Only European Court of Justice (ECJ) can interpret EU legal norms and analyze the compliance of domestic law with supranational law</td>
<td>Implementation is based on deliberative observations, teleological interpretation and the doctrine of effet utile. Subsidiary sources are having great relevance. Interpretative pluralism prevails, skills of legal reasoning of the public officials are relevant determinators of the member state’s capacity</td>
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<td>3 Collision between national and supranational law</td>
<td>Conflict is eliminated ex ante by disapplication of domestic legal norm. Exceptions and deviations (margin of appreciation) from EU rule must be prescribed by the EU legal norm</td>
<td>Conflict is possible or even assumed. Domestic legal norm is not applied until the just argument is adopted through interpretative techniques. Margin of appreciation is deriving from common European constitutional values reflected by the member state’s constitution</td>
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70 Bateup, C., The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue Brooklyn Law Review
72 Stihl, R. Securing the Rule of Law through Interpretive Pluralism: An Argument from Comparative Law.
74 Lenaerts, K. Interlocking Legal Orders in the EU and Comparative Law. International and Comparative law Quarterly 905, 2003
76 Aragão, A. European Governance in the Treaty of Lisbon and the European Paradox, in: Temas de Integração, 1 semestre de 2008 n 25. After Fifty Years: The Coming Challenges/Governance and Sustainable Challenges
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### INDICATORS
(and authors whose contributions have been the basis in ascertaining the indicators)

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### A. RIGID APPROACH
(traditional supranationalism)

Constitution is seen as a text to acknowledge of the supreme position of the EU law in general. EU law determines the validity and content of the constitution of the member state. The scope of legal bindingness of the constitution as independent legal text remains unframed. The continuous dynamics of EU legal environment is not taken into account due to the principle of absolute autonomy of EU law. Amendments in interpretation of EU law can be initiated only from supranational level.

### B. DYNAMIC APPROACH
(deliberative supranationalism)

Constitution is seen as a living instrument that safeguards the position of member state in the EU. The content and bindingness of the constitution is not formally dependent from EU law. The constitution can be interpreted through "common constitutionalism" and "constitutional dialogue". Changing legal environment is taken into account by analyzing EU developments, using constitutional dialogue and interpretative pluralism.

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77 Grossi, P. Historical Models and Present Plans in the formation of a future European Law, in: Towards a New European Ius Commune
79 Sorensen, G. The transformation of the State, in: The State. Theories and Issues
85 Van Roosebeke, B. State Liability for Breaches of European Law. An Economic Analysis.
86 Zürn, M. Law and compliance at different levels, in: Law and Governance in Postnational Europe. Compliance beyond the Nation-State
88 Joerges, C. Constitutionalism and Transnational Governance: Exploring a Magic Triangle in: Transnational Governance and Constitutionalism
**INDICATORS**
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**A. RIGID APPROACH**
(traditional supranationalism)

Rule of law is determined by the EU exclusively. For state authorities, it becomes an apologist construct in justifying interference of political and economic influences that prevail over the legal framework. The dependence from other member states is significant. Rule of law is endangered because of recognition of only one interpreter of EU law (ECJ).

**B. DYNAMIC APPROACH**
(deliberative supranationalism)

Rule of law remains to be the most important criteria, which can be analyzed independently from socio-economic and political environment. The impact of other member states in domestic decision-making and implementation of EU law is minimized as much as possible.

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92 Verhoeven. A. *The European Union in Search of a Democratic and Constitutional Theory*


94 Markensis, B., Fedtke, J. *Judicial Recourse to Foreign Law. A New Source of Inspiration?*


96 Weiler, J.H.H. “The Constitution of Europe. Do the New Clothes have an Emperor?” and other essays on European integration

97 Weiler, J.H.H. *European neo-constitutionalism: in search of the foundations of the European constitutional order*
4. Conclusion

The author suggests that the primacy of EU law cannot be taken as dogma and supranational should not be taken as meaning suprarational. European Union and its legal system are dynamic and could, therefore, be tested by constitutional values. According to the reciprocity as a principle in multi-level governance arrangement such as the European Union, the interpretation of these values could be combined with the emerging European constitutional principles. Rule of law can be guaranteed only if the rigid approach prevailing today would be replaced with interpretative pluralism.

A constructive relationship with the EU on the basis of certainty and stability provided by the rule of law and constitutionalism would be a basis for pro-active positioning. The complexity of the issues involved requires the further focusing of the research to rule of law and developing the methods for ensuring it in the context of EU membership. The author finds that the arguments based on rule of law may efficiently change the nature of the political process that are often presented as excuses to abandon legitimacy.

Even if the legal systems, backgrounds and legal practice related to constitutional law(s) differ by member states, the criteria elaborated by the author can be commonly used. Furthermore, using the methodology of diametric measurement of constitutional doctrine comparatively would clarify the problems in multilevel legal system and help to find solutions that respect the dialogue between EU and member state.

However, the author is aware of the need to further develop the framework both in aspects revealed by comparative research and in terms of the development of EU legal space both in terms of union and member state level legislation and doctrine. The constitutional dialogue is suggested to be led by rule of law as a central principle and the mechanisms of ensuring the effective operation of the rule of law will constantly be adjusted as the legal space changes. However, as stated before, the principle of rule of law must remain the basis for the legal society and state activities also in the context of European Union membership and the constitution should become a tool that achieves equiprobable harmony of the national and supranational interests.
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