

## ACADEMIC FREEDOM IN EUROPE

ANITA PAULOVITS – ZSUZSA STIPTA

Associate Professor, Head of Department of Constitutional Law – PhD student  
University of Miskolc  
anijog@freemail.hu

### I. Introduction

The first universities had been founded by noblemen who had an interest in their own education or by scholars with an interest in the education of others. In the 13th century the majority of the universities had been established by scholars or students, since the 14th century, however the universities were established by princes.

After the Middle Ages the absolutist rulers took over the governance of higher education, but the university succeeded to a certain degree in defending its feudal corporate independence. Yet the universities and later on the national systems of higher education developed as elements of a supranational order just as the absolutist states and the national states themselves. With the national state's development in the 19th and with the expansion of democracy in the 20th century universalistic principles gained authority in the political order and consequently in the higher education.

Agreeing with Lenhardt we can lay down that today universalisation of higher education is manifest in three developmental trends:

- in the expansion of higher education enrolments,
- in the expansion of the scope of teaching and research,
- in the expansion of academic freedom.<sup>1</sup>

### II. The Development of Academic Freedom

Academic freedom started in the medieval university as a feudal privilege of the professors to authoritatively teach and interpret the scholastic doctrines. In the 17th and 18th century absolutism threatened this privilege, but also enforced its liberation from the dogmatic constraints of traditionalism. The imperial state of the 19th century preserved the feudal character of academic freedom by protecting it against the emerging expectations of the democratic public. The pre-democratic character of academic freedom was manifested in many restrictions concerning the curricula and the recruitment policy. As a result the feudal absolutist autonomy of the university and the privilege of the professors and students were slowly transformed into academic freedom in the sense of civil liberty.

Since the beginning of the 20th century the university had enjoyed superior authority not only among professors and students, but also in the society at large. By Lenhardt's opinion comprehensive institutions emerge in all European countries, but proceed in different ways:

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<sup>1</sup> See in detailed Gero Lenhardt: Europe and Higher Education between Universalisation and Materialist Particularism. European Educational Research Journal, Volume 1, Number 2, 2002. 275. pp.

- New laws covering the whole of higher education were passed to submit all institutions to the same rules (Sweden and Poland).
- In Portugal common bodies for all institutional types of higher education are created for such purpose as evaluation.
- Scotland established comprehensive qualification frameworks.
- In Germany and the Netherlands the school of applied science are authorised to call themselves University of Applied Science or University of Professional Studies.<sup>2</sup>

There are international agreements on the recognition of academic degrees, which have amazing integration effect. In most countries possibilities have increased to transfer credits or to otherwise get recognition from universities for studies completed in the non-university sector.<sup>3</sup>

### **III. The meaning of Academic Freedom**

In the United Kingdom Academic Freedom has two main principles:

- academics both inside and outside the classroom, have unrestricted liberty to question and test received wisdom and to put forward controversial and unpopular opinion, whether or not these are deemed offensive, and
- academic institutions have no right to curb the exercise of this freedom by members of their staff, or to use it as ground for disciplinary action or dismissal.<sup>4</sup>

The concept of academic freedom as a right of faculty members is an established part of most legal systems. Different from the United States, where academic freedom is derived from the guarantee of free speech under the First Amendment, constitutions of other countries (and particularly of civil law jurisdictions) typically grant a separate right to free learning, teaching, and research.

The German Constitution (*Grundgesetz*) specifically grants academic freedom: "Art and science, research and teaching are free. Freedom of teaching does not absolve from loyalty to the constitution" (Art. 5, para. 3). In a tradition reaching back to the nineteenth century, jurisdiction has understood this right as one to teach (*Lehrfreiheit*), study (*Lernfreiheit*), and conduct research (*Freiheit der Wissenschaft*) freely, although the last concept has sometimes been taken as a cover term for the first two. *Lehrfreiheit* embraces the right of professors to determine the content of their lectures and to publish the results of their research without prior approval.

In the United States, academic freedom is generally taken as the notion of academic freedom defined by the "1940 Statement of Principles on Academic Freedom and Tenure,"

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<sup>2</sup> Lenhardt: uott. 278. pp.

<sup>3</sup> Haug, G.: Trends and Issues in Learning Structures in Higher Education in Europe. *Baiträge zur Hochschulpolitik* 1/2000. Edited by Hochschulrektorenkonferenz. Bonn. 24. pp.

<sup>4</sup> Quinn, Robert: Defending Dangerous Minds. Reflections on the work of the scholars at Risk Network. Social Science Research Council, Vol. 5. No. 1-2 2004 1-5. pp.

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jointly authored by the American Association of University Professors and the Association of American Colleges<sup>5</sup>.

A professor at a public French university, or a researcher in a public research laboratory, are expected, as being all civil servants, to behave in a neutral manner and to not favor any particular political or religious point of view during the course of his duties. However, the academic freedom of university professors is a fundamental principle recognized by the laws of the Republic, as defined by the Constitutional Council; furthermore, statute law declares about higher education that "teachers-researchers (university professors and assistant professors), researchers and teachers are fully independent and enjoy full freedom of speech in the course of their research and teaching activities, provided they respect, following university traditions and the dispositions of this code, principles of tolerance and objectivity."<sup>6</sup>

The nomination and promotion of professors are largely done through a process of peer review rather than through normal administrative procedures.

#### **IV. European Higher Education Policy**

The „predecessor” of the Bologna Declaration (chapter 7), the Magna Charta Universitatum, signed by the university rectors present at the 900th anniversary of the University of Bologna in 1988, emphasized that the University was an autonomous institution, where academic freedom is a key factor, and that „To preserve freedom in research and teaching, the instruments appropriate to realize that freedom must be made available to all members of the university community” (Magna Charta Universitatum 1988).<sup>7</sup>

The European Union has become active in higher education development only in the 90's. In 1993 the Member States agreed in the Treaty of Maastricht to make education its regular task. Developing the „European space of higher education” was set an official political target. Despite the fact, the new activities have to „fully respect the responsibility of the Member States for the content of teaching and the organisation of the education systems and their cultural and linguistic diversity”<sup>8</sup> Thus the educational policy of the European Union has the character of action programmes, which affect the development of higher education only in an indirect fashion.

To support the European integration of higher education an effort outside of the institutional Framework of the EU was started by the secretaries of education from 29 European Countries. Their initiative aims directly at the institutional form of the various national systems. Their efforts are manifest in different Declarations, in 1998 the Sorbonne-, in 1999 the Bologna- and in 2001 the Prague-Declaration. By these Declarations we can observe that the future European University has to be characterised by an expansion of enrolments, by an expansion of the scope of teaching and research, and by the expansion of academic freedom.

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<sup>5</sup> Now the „Association of American Colleges and Universities”

<sup>6</sup> French Educational Code, Article L952-2

<sup>7</sup> Maassen, P. – Olsen, J.: University dynamics and European Integration. 110. pp.

<sup>8</sup> Teichler, U.: The Role of the European Union in the Internationalization of Higher Education, In: P. Scott (Ed.) The Globalization of Higher Education, Lancaster, Open University Press, 88-99. pp.

Let me see this last question detailed!

The Bologna Declaration takes for granted the general consensus on the freedom of teaching, learning and research and mentions it only marginally. Its plan for a comprehensive system of higher education implies support for the secular expansion of academic freedom. The new system of higher education is to adopt the liberal structure of the modern university rather than the more bureaucratic structure of the schools of applied science. This suggestion corresponds to the educational goals of the Bologna Declaration.

This perspective is in line with an old and far reaching reform proposal of higher education, namely with the theory of higher education by Wilhelm von Humboldt.<sup>9</sup> As Lenhardt wrote, Humboldt's plan of a university for a civil society in Berlin failed under the authoritarian ancient regime in Prussia, but it has gained relevancy under democratic conditions. According to Humboldt higher education can and should produce citizens who orient their action rationally, with awareness not only of the external objective conditions of action, but also of their inner subjective conditions.<sup>10</sup> Higher education in this sense is tantamount to the education for modern citizenship. Its indispensable institutional precondition is academic freedom, or as Humboldt put it: Einsamkeit and Freiheit.

In accordance with the Declarations in 2001 the European Commission in a White Paper presented five principles that should in general underpin „good governance” in all higher education sectors:

- openness
- accountability
- effectiveness
- coherence
- participation.

In 2005 the European Commission again emphasized academic freedom as an important condition in academic work, it was argued that participation in governance structures was not, and should not be a fundamental right for researchers. The Commission stated: „Researchers should, however, recognize the limitation of academic freedom that could arise as a result of particular research circumstances (including supervision, guidance, management).” Moreover: „Researchers should be familiar with the strategic goals governing their research environment and funding mechanisms”.<sup>11</sup>

In 2006 the Parliamentary Assembly of the Council of Europe adopted a Recommendation<sup>12</sup> about academic freedom and University autonomy. In the Recommendation the Assembly reaffirms the right to academic freedom and university autonomy which comprises the following principles:

- academic freedom in research and in training should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction;

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<sup>9</sup> Lenhardt: uaz. 280. pp.

<sup>10</sup> Lenhardt: uaz. 280. pp.

<sup>11</sup> Commission 2005b: 12

<sup>12</sup> Recommendation 1762 (2006) Text adopted by the Assembly on 30 June 2006. (23rd sitting)  
<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/erec1762.htm> (2009. 10. 15.)

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- the institutional autonomy of universities should be a manifestation of an independent commitment to the traditional and still essential cultural and social mission of the university, in terms of intellectually beneficial policy, good governance and efficient management;
  - history has proven that violations of academic freedom and university autonomy have always resulted in intellectual relapse, and consequently in social and economic stagnation;
  - high costs and losses, however, could also ensue if universities moved towards the isolation of an “ivory tower” and did not react to the changing needs of societies that they should serve and help educate and develop; universities need to be close enough to society to be able to contribute to solving fundamental problems, yet sufficiently detached to maintain a critical distance and to take a longer-term view.

The academic freedom of researchers, scholars and teachers and the institutional autonomy of universities need to be readjusted to meet contemporary conditions, but these principles should also be reaffirmed and guaranteed by law, preferably in the constitution. As testified by frequent assessments and evaluations carried out internationally, the academic mission to meet the requirements and needs of the modern world and contemporary societies can be best performed when universities are morally and intellectually independent of all political or religious authority and economic power.

## **V. Legal regulation in European countries**

Within modern democratic national states the Constitution is the most important legal document. Hence, it is important to examine the legal regulations in the constitutions of the European Union’s Member States. On the other hand there is an evident linkage between academic freedom and freedom of speech — as Connolly observes „academic freedom is a kind of cousin of freedom of speech”<sup>13</sup>.

Contrary to Connolly’s opinion another scientist, Turner believes that „academic freedom is not simple freedom of speech”<sup>14</sup>. All Member States of EU, except the United Kingdom (which does not have a written constitution), have some protection for freedom of speech enshrined in their constitutional documents.

In the most EU nations academic freedom (freedom of scientific research and the arts and of teaching) is considered sufficiently important to be included in the Constitution, although in Germany and Greece this freedom has limits, in that academic freedom and the freedom to teach do not override allegiance to the Constitution. Furthermore, the Constitution in many countries guarantees the autonomy or self-governance of higher education institutions, although in some states, this autonomy is exercised within the limits prescribed by specific higher education laws. In Finland, Italy, or Portugal the Constitution guarantees both the freedom of teaching and research and also the autonomy of universities.

In those nations where the Constitution mentions both freedom of speech and academic freedom (and explicitly details the freedom for teaching and research and institutional

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<sup>13</sup> Connolly, J.: The academy's freedom, the academy's burden, *Thought and Action* . 2000. 16(1), 71. pp.

<sup>14</sup> Turner, J.: The Price of Freedom, in: M. Tight (ed.) *Academic Freedom and Responsibility*, Buckingham, 1988 SRHE/OUP Press, 106. pp.

autonomy), protection for the principle of academic freedom is likely to be stronger than in those states where limitations are imposed or where only freedom of speech is mentioned, and in which protection for academic freedom may lie by reference to the interpretation of constitutional freedom of speech protection (for example, in the USA).

Nearly half of the EU states do not have protection for academic freedom and university autonomy written in their Constitutions. However, although protection for academic freedom may not be available under constitutional law, it may still be protected in other national legislation.

All EU nations have some specific legislation relating to higher education, which refers to academic freedom and/or university autonomy. However, the coverage and the detail vary considerably. For example, legislation in the Czech Republic, Ireland, Poland, and Spain is more explicit than in other states, and specifies protection for academic freedom for teaching and research, and institutional autonomy. Legislation in Austria, France, Germany, Hungary, Italy, and Luxembourg, specifies freedom of teaching and research, but does not mention institutional autonomy.<sup>15</sup>

Majority of EU nations have both constitutional protection of freedom of speech and academic freedom, allied to protection under specific legislation for universities.

Academic freedom is in close connection with institutional autonomy and the internal governance of the university. In other words autonomy is the institutional form of academic freedom. Higher education teaching personnel should have the right and opportunity, to take part in the governing bodies and they should also have the right to elect a majority of representatives to academic bodies within the higher education institution.<sup>16</sup> On the other hand University autonomy needs to be distinguished from concepts it is often confused with, such as university self-management, collegial governance or academic freedom.<sup>17</sup>

Other authors emphasize that „institutional autonomy is not a guarantee of academic freedom”<sup>18</sup>, and „institutional autonomy is a necessary but not a sufficient condition for academic freedom”<sup>19</sup>.

Autonomy of the university generally means the ability to:

- make independent decisions on the limits of institutional commitment in certain topics and areas
- set up a value system and define forms of capital, which structure the field and allow scientists to advance

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<sup>15</sup> See in detailed Terence Karan: Academic Freedom in Europe: A preliminary comparative analysis. Higher Educational Policy, 2007, 20, 289-313. pp.

<sup>16</sup> UNESCO. (1997) Records of the General Conference, Twenty-ninth Session Paris, 21 October–12 November 1997, Volume 1 Resolutions, Austin, Paris: UNESCO, 28. pp.

<sup>17</sup> Bricall, J.: University Institutional Autonomy in Case Studies: Academic Freedom and University Institutional Responsibility in Portugal, Bologna, 2003 Bononia University Press, 59. pp.

<sup>18</sup> Rothblatt, S.: „Academic freedom and institutional autonomy in historical perspective”, *Conference Proceedings*, Association of Swedish Higher Education, Conference Akademisk Frihet -Lärosätenas Autonomi — Samhällsrelevans Karlstad University, 2 November 1999, 17. pp.

<sup>19</sup> Anderson, D. and Johnson, R.: University Autonomy in Twenty Countries Higher Education Division Evaluations and Investigations Program, Canberra, Australian Government Publishing Service, 1998, 8. pp.

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- decide on the criteria of access to the institutions, both at the level of scientists and students
  - define strategic tasks and set institutional aims
  - determine the links to other fields in society, which are seen as crucial for further development
  - assume responsibility for the decisions taken and possible effects on society<sup>20</sup>.

Where the academic staffs enjoy their maximum allocation of representatives on the governing body, they will be in a more powerful position than if they are given their minimum allocation. The UNESCO recommandation conceives the following: „Higher-education teaching personnel should have the right and opportunity, without discrimination of any kind ... to criticize the functioning of higher education institutions, including their own”<sup>21</sup>.

In connection with institutional authonomy Rochford has noted that „a traditional institutional protection for academic freedoms is through the tradition of participation by faculty members in academic governance”<sup>22</sup>.

We can lay down the conclusion, that in those countries, where the academic staffs enjoy their maximum allocation of representatives on the governing body, they will be in a more powerful position than if they are given their minimum allocation. A comparative analysis examined higher education institutions in European Union and stated, that in the half of the Member States, the system of governance offers high protection for academic freedom, in quartern of states the level of possible protection is low, and the other quartem of states in the intermediary category<sup>23</sup>.

The appointment process of Rectors in many EU nations is changing, and in the last decade has started a trend away from the traditional model of institutional governance in which the academic community elects its own officers (rector, deans, university, and faculty senates) with little or no outside interference to institutions hiring „leaders from outside the academic community, to replace the elected rector still found at the vast majority of higher education institutions”<sup>24</sup>.

Despite the detailed legal regulations Academic Freedom in practice is often limited. Analysing cases in Australia where an emeritus professor who criticized a proposed policy received a letter from the Vice Chancellor telling him to vacate his office (and position) for being discourteous.<sup>25</sup> In another case in 1991, after three philosophy lecturers at Swansea University in the UK criticized the academic standards of a new degree programme, two

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<sup>20</sup> Stichweh, Rudolf: Wissenschaft, Universität, Profession – Soziologische Analysen, Frankfurt am Main, Suhrkamp, 1994,

<sup>21</sup> UNESCO. (1997) Records of the General Conference, Twenty-ninth Session Paris, 21 October–12 November 1997, Volume 1 Resolutions, Austin, Paris: UNESCO, 30. pp.

<sup>22</sup> Rochford, F.: Academic freedom as insubordination: the legalisation of the academy, *Education and the Law*, 2003, 15(4) 252. pp.

<sup>23</sup> Terence Karran: Academic Freedom in Europe: A preliminary comparative analysis. *Higher Educational Policy*, 2007, 20, 289-313. pp.

<sup>24</sup> Nyborg, P.: Institutional autonomy and higher education governance, Council of Europe Conference *Implications of the Bologna Process in South East Europe*, 2–3 of December 2003, Strasbourg, 3. pp.

<sup>25</sup> Tierney, W.: Academic freedom and organisational identity, *Australian Universities Review*, 2001, 44(1), 4. pp.

were suspended from teaching and one resigned, leading the (then) Vice Chancellor to comment that in the business world 'those people ... would have been up the road the moment they kicked up the fuss<sup>26</sup>.

Consequently where the Rector is chosen from the Faculty, by the Faculty, for a limited period in office, he is unlikely to take decisions that undermine the academic freedom of the staff, as he knows that at the end his term of office, someone else could be elected as Rector and take retaliatory actions against him. In such situations the level of protection for academic freedom will be high. By contrast, where the Rector is chosen from outside the university, and appointed for an indefinite term by an external agency, he will be in a position to abuse academic freedom, more especially where the faculty staffs do not have the protection of tenure. In such situations the level of protection of academic freedom is low.

The UNESCO recommendations, which were designed to be internationally applicable, unequivocally state: „Tenure...constitutes one of the major procedural safeguards of academic freedom”<sup>27</sup>

Despite the UNESCO recommendation and significance of academic freedom observable a tendency that while autonomy is a key notion in debates about the reform of higher education system, academic freedom seems to be taken for granted in modern industrialised societies and is thus not very high in agenda. Generally it seems to be assumed that if autonomy is granted in whatever form to higher education institutions, academic freedom quasy-automatically come along with it<sup>28</sup>. Some authors acutely draw opinion: ”Those who are responsible leading and funding higher education are far too concerned with finance and management issues, and seem to forget about this certain aspect of academic life”<sup>29</sup>. Other authors argue on „academic capitalism”, that the increased involvement of academia in corporations and the growth of privately sponsored research are gradually transforming academic work and also have a significant impact of academic freedom”<sup>30</sup>.

An other author underlines „the notable increase in the power of administrators and other officials as distinct from the authority of professorial staff in the governance and management of academic institutions” and reaches the conclusion that this will „dramatically affect the traditional role of the academic profession – with repercussions on academic freedom as well”<sup>31</sup>.

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<sup>26</sup> Raelin, J.: Should faculty be "Managed"? *Academe*, 2003, 89 (3), 43. pp.

<sup>27</sup> UNESCO. (1997) Records of the General Conference, Twenty-ninth Session Paris, 21 October–12 November 1997, Volume 1 Resolutions, Austin, Paris: UNESCO, 32. pp.

<sup>28</sup> Felt, U.: University Autonomy in Europe: Changing Paradigms in Higher Educational Policy. University of Vienna, Proceedings of the Seminar of the Magma Charta Observatory, 17 September 2002. Bolgna, Bononia University Press, 15. pp.

<sup>29</sup> Altbach, Philip G.: Academic freedom: International realities and challenges. In: *Higher Education*, 2001, 41, 206. pp.

<sup>30</sup> Slaughter and Leslie (1997)

<sup>31</sup> Altbach, Philip G.: Academic freedom: International realities and challenges. In: *Higher Education*, 2001, 41, 216. pp.

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There is no denying to the fact that European higher educational policy has changed in the last decades. Economic, social, political cooperation and development have modulated more or less the definition of academic freedom and university autonomy in all European countries. In connection with redefinition of academic freedom and institutional autonomy the university management system has been also changed.

## **VI. Models of University Autonomy**

Theoretically two extreme models were developed: the collegial and the managerial models. The collegial university, combining a high level of professional autonomy with a high level of staff participation in management, was surely the ideal on which many of the universities were structured until the 1970's. In such a system authority was not imposed top-down by managerial hierarchies, but much more through collective agreement. The main criticism of this model were its lack of flexibility towards external change, slow adaptation to shifting demands on the part of stakeholders, and the lack of clear responsibilities for decision making.

The other model is the „managerial model” towards which many reforms in European higher education system seem to be moving. It gives a limited amount of autonomy to academics, combined with a management style, which we can find in the private corporate sector. This model is a top-down, hierarchy-oriented organisation with „the action of its corporate, financial and academic plans through executive management systems and structures”<sup>32</sup>.

Quite a number of the recently restructured universities adopt this model. It is generally not welcome by the academics as it gives less freedom to the individual and has no collegial decision-making structures. Ultimate goals are increasingly defined by external forces, academics having only the freedom to decide how to fulfil them. In this sense the meaning both of autonomy and academic freedom is considerably modified.

On the score of an other investigational method four models of university autonomy can be differentiated. These models are based on the examination of relations between the State and the higher education institutions.

The changes of achieving university autonomy in different forms of relations between the state and higher education institutions' are the focus of the following classification.

- The sovereign, rationality-bounded State model
- The institutional model
- The corporate-pluralistic model
- The Supermarket State.<sup>33</sup>

The sovereign, rationaly-bounded State controls higher education institutions, assessment based on political effectiveness, decision-making is centralized. In these states autonomy of the universities restricted, if government is overloaded then technical decisions can be left on the organisations.

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<sup>32</sup> Farnham, D.: Towards the Flexi-University? In: Farnham (ed.): Managing academic Staff in Changing University Systems. Buckingham, Open University Press, 1999 19. pp.

<sup>33</sup> Developed by Olsen Johan P.: The institutional Dinamycs of the European Universitiy. ARENA Working Paper Series, 15, 2005,

The institutional State is based on traditions, where decision-making is traditional and specialized, Policy arena dominated by institutional leaders, higher educational institutions operate under the control of legal norms.

In the corporate-pluralistic State the challenge of universities is the monopoly of power and control through the state, decision-making is negotiated and takes place after consultation, actors in policy-making pursue their institutional interest, governmental interference depends on negotiations with other forces present. In these kind of states autonomy of the university is negotiated and a result of the distribution of interests and power.

In the supermarket state, there is a minimal role of the state and other public bodies, and little direct interference of the government. Universities deliver services, and the dominant organisational form is the corporation in a competitive market. In supermarket state assessment criterias are efficiency, economic flexibility and survival. Autonomy of the university depends on institutional ability to survive.

These four models might help understand how – despite a rather homogeneous rhetoric on the role and functions of higher education – the different European countries nevertheless develop rather different models of reformed universities.

## **VII. Hungarian higher education in Bologna Process**

Hungary – as a Member State of the European Union – continuously has implemented the requirements of Bologna Process.

The credit system aligned to the European Credit Transfer System and designed to evaluate the workload and performance of the students has been in place in all higher education institutions since 2003. The workload of a student progressing at average rate is 30 credits for each term.

In November 2005 the Parliament adopted the Higher Education Act which came into force on the 1st of March, 2006. The key objectives of the Act were the following:

- to provide practicable skills and knowledge by launching the multi-cycle course structure in the entire system,
- to create an environment for the operation of the institutional system to assist co-operation and participation in the integration of Hungarian Higher Education into the European Higher Educational Area as well as to create the conditions for student-teacher mobility,
- to implement a governance, management and financial system for the institutions adapted to the changed domestic and international environment,
- to promote the involvement of private funds, supporting the right of higher educational institutions to self-government, property, independent financial management and business activities, to create the conditions to the above mentioned,
- to grant financial contribution for students starting their studies in September 2007.

In the Republic of Hungary, higher education institutions may operate as state institutions or non-state institutions recognised by the state, the latter category includes

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private and church institutions and foreign higher education institution that cannot be classified into either of the above two categories.

The Higher Education Act defined the new course structure. With the effect of September 1, 2006 the former structure, having separated the university and college levels was replaced – in an integrated form – by the successive cycles of *Bachelor and Master*, where passing the various stages ensure the qualifications required for employment.

The education of new generation of researchers closely linked to the Higher Education and Research Areas is the responsibility of the third cycle with doctoral schools in higher education institutions accredited to provide such programmes. This tendency has fit to the implementation of the Berger Declaration. In May 2005 in Bergen the European Ministers responsible for higher education adopted a Communiqué with the following title: „The European Higher Education Area – Achieving the Goals”.

The Constitution ensures the freedom of scientific activities, research and training by rules allowing for the autonomous operation of higher education institutions. Within the institutions, associations of teachers, researchers and students are entitled to such autonomy. The prime stipulations regarding the autonomous exercising of rights are set forth in the legislation, autonomy is primarily realised through the activities of the Senate, the rector and the Economic Council responsible for drafting decisions and supervision.

The cornerstones of the autonomy of higher education institutions are their acknowledgement as independent legal entities and the associated powers exercised independently: the right to establish their independent organisational and operating rules including decisions regarding personnel and economic independence also expressed in the right of disposal over their own property, and the development of their training system.

The supreme body of the institution, the Senate has the following powers: initiate the approval of the educational and research programs as the bases for the training provided in the higher education institution, the ranking of teacher, researcher and managerial applications, the establishment of the higher education institution's scientific council, standing committees and other councils, the launch or termination of a program, decision on the basic budget and raising loans, the utilisation or alienation of real property, the conclusion of a cooperation agreement.

In addition to the autonomy granted to higher education institutions, the autonomy of higher education also extends to bodies which, although they are not higher education institutions themselves, but serve to safeguard scientific life from external intervention, limit state interference when necessary and represent the special interests of higher education. The bodies set up from the representatives of scientific life including the Hungarian Higher Education Accreditation Committee, the Hungarian Rectors' Conference, the Higher Education and Scientific Council, the National Council for Doctoral Studies and the National Credit Council. For co-operation on the European level and the implementation of the tasks undertaken in the Bologna Process, the minister of education and culture has set up a National Bologna Board. The Higher Education Act also acknowledged the National Union of Students as a legal entity.

After brief presentation of legal regulation it is necessary to emphasize the activity of Hungarian Constitutional Court. The Hungarian Constitution regulates academic freedom, but does not regulate university autonomy. The Constitutional Court in several decisions interpreted the rules of Constitution, which are connected to academic freedom and higher

education. The Constitutional Court has drawn the inference, that universities has autonomy by the interpretation of constitutional regulations.

## **THE POSITION OF THE HUNGARIAN AGRICULTURAL LEGISLATION IN THE TENDENCIES OF THE LEGISLATION CONCERNING THE EUROPEAN AGRICULTURAL HOLDINGS**

JÁNOS EDE SZILÁGYI

Assistant Professor, Department of Agricultural and Labour Law

University of Miskolc

civdrede@uni-miskolc.hu

The primary aim of this paper is to deal with the general tendencies which influenced the current European and Hungarian legislation concerning agricultural holdings. The assessment of these historical tendencies is especially important in the field of agricultural law because of the special features of agriculture as one of the branches of the economy (i.e. the changes of the agricultural structure always demand more time than those of other economic branches).

The systematizing research of agricultural provisions can be pursued in several ways. The present work is based on the approach which focuses on the subjects of agricultural legislation i.e. the separate elements of the agricultural legal relations.<sup>1</sup>

The main subjects of agricultural law are the agricultural activity, the agricultural producer, the agricultural holding, the agricultural product and food as well as the rural areas.<sup>2</sup> The author of the present paper has to emphasize that he focuses on the evolvement of the legal subjects in Western European countries but these legal subjects have not been totally integrated into the Hungarian legislation yet.

The category of the *agricultural activity* is continuously expanding: at this moment it consists of four levels. The first level, as the core of the concept, includes the growing of crops and the keeping of animals. The second level is really close to the first level and means the processing and sale of the agricultural products in the primary form. The third level means the secondary activities in the frame of agricultural holdings (see the definition of agricultural holdings below); e.g. agrotourism in the rooms of a farm building. The fourth level means the secondary activities outside agricultural holdings<sup>3</sup> (see the rural development at the definition of rural area.)<sup>4</sup>

*Agricultural producer.* According to László Fodor,<sup>5</sup> the term of 'the producer' or 'the farmer' designates a profession of the civil society with the following features: the required

<sup>1</sup> See more approaches of the systematization SZILAGYI János Ede: The Dogmatics of Agricultural Law in Hungary from an Aspect of EC Law. *European Integration Studies*, 2009/1, pp. 41-55.

<sup>2</sup> See further FODOR László: *Agrárjog*. Debrecen, 2005, Publisher of the University of Debrecen, pp. 17-54.

<sup>3</sup> FODOR: *Op. cit.* pp. 23-30.

<sup>4</sup> The expansion of the definition of agricultural activity is well modelled in the 'Zwiebeltheorie' (onion theory) adopted by the German and Austrian member associations of the CEDR (*Comité Européen de Droit Rural*); GRIMM, Christian: *Agrarrecht*. München, 2004, C.H. Beck Publisher, p. 10.

<sup>5</sup> FODOR: *Op. cit.* pp. 30-35.

qualification (e.g. diploma), local residency and pursuing their activity as a way of life.<sup>6</sup> The features of the agricultural producer, created by Fodor, typically concern natural persons. Taking into consideration the Community<sup>7</sup> and the Hungarian<sup>8</sup> legislation as well as the practice of the European Court of Justice (hereinafter 'ECJ'),<sup>9</sup> the author of the present paper does not share Fodor's opinion because the definition of the agricultural producer comprises natural persons and also legal entities according to the above mentioned sources.

*Agricultural holding.* The agricultural holdings can be classified by at least than three approaches. Considering the subject of agricultural holdings, the definition includes arable lands, buildings and edifices for residential and farming purposes, machines, equipment, livestock and property rights (e.g. quotas, direct payments) according to jurisprudence. The second approach of agricultural holdings also contains the agricultural producer as the manager of the agricultural holding.<sup>10</sup> The third approach means the legal forms of agricultural holdings<sup>11</sup> (for example in Hungary family homestead, limited partnership, limited liability company).<sup>12</sup>

The definition of *agricultural product* is determinant at the Community level therefore the concept is universal in all Member States of the EU.<sup>13</sup>

The concept of *rural areas* is primary not a product of law, it is rather an economic and sociological issue. As there are numerous views based on which this concept can be determined, rural areas cannot be defined permanently and universally.<sup>14</sup>

The only international definition of the rural area was hitherto adopted by the Organisation for Economic Co-operation and Development (hereinafter referred to as 'OECD').

<sup>6</sup> The expansion of the definition of agricultural activity is well modelled in the 'Zwiebeltheorie' (onion theory) adopted by the German and Austrian member associations of the CEDR (*Comité Européen de Droit Rural*); GRIMM, Christian: *Agrarrecht*. München, 2004, C.H. Beck Publisher, p. 10.

<sup>7</sup> See for example Annex I of Commission Regulation (EC) No 1444/2002; Article 10 a) of Council Regulation (EC) No 1259/1999; Article 2 a) of Council Regulation (EC) No 1782/2003; Article 2 (2) a) of Council Regulation (EC) No 1234/2007.

<sup>8</sup> See Article 3 u) 2 of Act LV of 1994 on arable land (hereinafter referred to as 'Tft.'); Article 2 b) and Article 3 (1) of Act of XLVI of 1999.

<sup>9</sup> See the Case 152/79 Kevin Lee v Minister for Agriculture [1980] ECR 1495, the Case 312/85 SpA Villa Banfi v Regione Toscana [1986] ECR 4039, the Case C-164/96 Regione Piemonte v Saiagricola SpA [1997] ECR I-6129, the Case C-403/98 Azienda Agricola Monte Arcosu Srl v Regione Autonoma della Sardegna [2001] ECR I-103.

<sup>10</sup> FODOR: *Op. cit.* pp. 35-43.

<sup>11</sup> OLAJOS: Az agrár-üzemrendszer felépítése. In: CSÁK Csilla (ed.): *Agrárjog*. Miskolc, 2008, Novotni Publisher, pp. 189-193.

<sup>12</sup> On a contrary approach see SÜVEGES Márta: Az agrár-üzemformák jogi szabályozásának alapjai. In: HAMAR Anna (ed.): *Agrárátalakulás a '90-es években*. Volume I. Szolnok, 1999, pp. 25-112.

<sup>13</sup> According to the Article 32 of the EC Treaty 'agricultural products' means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products. See SZILAGYI: The Dogmatics of Agricultural Law in Hungary from an Aspect of EC Law. *Op. cit.* pp. 52-53.

<sup>14</sup> See KOVÁCS Teréz: *Vidékfejlesztési politika*. Budapest-Pécs, 2003, Dialóg Capus Publisher, pp. 19-31.

According to the OECD Regional Typology,<sup>15</sup> 'rural local units' means areas if their population density is below 150 inhabitants per square kilometre. A complex system of rural areas has been created by the EC legislation in force,<sup>16</sup> i.e. Regulation (EC) No 1698/2005 of the European Council. According to this regulation, the different types of the rural areas are defined depending on the distinct support provisions.

The present paper details the main tendencies of the legislation in the period from the 19<sup>th</sup> century to nowadays, it deals especially with this period according to the above definition of agricultural holdings concerning both the subject and the producer of these holdings. This concept of the agricultural holding has also direct relationship with the agricultural activity in the frame of agricultural holdings and the agricultural products created during this activity. The first theoretical problem arose in connection with the adoption of the policy of rural development at the end of the 20<sup>th</sup> century, because this policy and its activity point far beyond the classical model of agriculture.

This paper deals with this certain period in four main parts. In the first part it presents the agricultural models of the states whose economic system changed from feudalism to capitalism until the end of the 19<sup>th</sup> century. In the next part it deals with the establishment of the legislation in force particularly in Western Europe at the beginning of the 20<sup>th</sup> century as well as, in a sense, in the whole century. The provisions of the period after the second World War, which caused huge changes in both parts of Europe, compose the third part of the work. In the end of the present paper, I assess the legislation since 1990, until when the political and economic systems of all Eastern European countries collapsed. Inside the four main parts of this article, the general European tendencies and the special Hungarian features are distinguished.

## **1. The main tendencies of the agricultural development of capitalism**

### **1.1. General models**

Taking into consideration the role of these nations in the history of the European agriculture, *István Olajos* emphasizes the importance of five national models as general models of the agricultural development of capitalism.<sup>17</sup> These are the English, the French, the Prussian, the Danish and the American agricultural models. The assessment of the American model may seem illogical in a paper concerning European agricultural development, but the American model had numerous effects on the European legislation (especially in the second part of the 20<sup>th</sup> century).

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<sup>15</sup> See at (9.4.2009) <http://www.oecd.org/dataoecd/35/62/42392595.pdf>

<sup>16</sup> On the analysis of the legislation before the provisions in force, see OLAJOS: A KAP vidékfejlesztési pillére. In: CSÁK (ed.): *Agrárjog*. Miskolc, 2006, Novotni Publisher, pp. 399-416.

<sup>17</sup> OLAJOS: A földtulajdon és földhasználat történeti fejlődése az ókortól a huszadik századig. In: CSÁK (ed.): *Agrárjog*. I. volume. Miskolc, 2004, Bíbor Press, pp. 24-36; see furthermore OLAJOS: A földtulajdon és földhasználat történeti fejlődése az ókortól a huszadik századig. In: CSÁK (ed.): *Agrárjog*. Miskolc, 2006, Novotni Press, pp. 36-49, OLAJOS: A földtulajdon és földhasználat történeti fejlődése az ókortól a huszadik századig. In: CSÁK (ed.): *Agrárjog*. Miskolc, 2008, Novotni Press, pp. 41-54.

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An essential feature of the *English agricultural model* is that the serfs were free lessees of the lands on which they produced the agricultural products. They could pay the appropriate rent according to the actual production, if they could not pay, the lease expired. Due to the enclosures (i.e. fencing off land), the lessees gradually went bankrupt, therefore they became the workers of the new medium and large sized holdings. The citizenry evolved from the merger of the gentries and yeomanry, the labour class evolved from the earlier lessees. The change took place between the 16<sup>th</sup> and 18<sup>th</sup> centuries. The English model had an effect on the whole of the United Kingdom and Ireland as well.<sup>18</sup> Due to the liberal economic policy, agricultural holdings with larger land-size were more characteristic in England in comparison with other states in Europe. Owing to this feature, the legislation concerning ownership and use of the arable lands became similarly liberal (see below at the assessment of the partial regulatory system). The low-prized agricultural products from the different regions of the British Empire also affected the evolution of the English liberal legislation.

In comparison with the English organic (i.e. relatively slow) change, the French development is considered more radical. The antecedent of the *French agricultural model* is that the serfs were the hereditary lessees of the lands cultivated before the French Revolution, thus their feudal obligations remained. After the Great French Revolution the *Code Civil* (since 1804) protected the by-then-evolved ownership of lands with the announcement of the sanctity of property. The taxes of the income from agricultural activities are more advantageous and the state grants special credit for agriculture, moreover, special rules (i.e. not general provisions) concern the agricultural real properties and the rights thereof. The Mediterranean countries (e.g. Spain, Portugal, Italy) apply the methods of the French agricultural model.<sup>19</sup> In comparison with the English structure of the agricultural holdings, the important feature of the French development is the protectionism which is the effect, on the one hand of the smaller size of the agricultural holdings, and on the other hand that of the more determinant role of the agriculture in the national economy of France than in the UK.

The *Prussian agricultural model* is based on the legal tendencies of the countries situated to the East of the Elbe river. According to this model, the beneficiary of the agricultural revolution after the geographical discoveries is the nobility. Due to the increased demand the feudal production was enlarged and permanent serfdom was enforced on peasants, which serfdom was abolished only during the 19<sup>th</sup> century. The feature of this model is the concentrated structure of the agricultural holdings, i.e. less economical large-sized holdings and crumbling serf-holdings creating a special social structure. This model included the Prussian Kingdom, the Habsburg Empire and the Polish Kingdom.<sup>20</sup> In connection with the Prussian model, the necessary amendments were not adopted during the 19<sup>th</sup> century, which amendments would have been demanded by an advanced economy, therefore the solution to the emerging problems was found only by the 20<sup>th</sup> century.

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<sup>18</sup> OLAJOS: A földtulajdon és földhasználat történeti fejlődése az ókortól a huszadik századig. 2004, Op. cit. p. 30.

<sup>19</sup> Loc. cit. pp. 31-32.

<sup>20</sup> Loc. cit. pp. 34-35.

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The Danish agricultural development had numerous specialities. In this type of the capitalist agricultural change, instead of the undeveloped citizenry, the basis of the absolutist royal control was the peasants' middle-sized holdings with strong representation in the legislation; therefore that situation had an important impact on the land use. At the end of this evolution, the abolishment of the entail and the reallocation of the 30-hectares-holdings to the farmers were completed. The Danish agricultural model was applied by the whole Scandinavian peninsula.<sup>21</sup> The typical unit of the nascent Danish agricultural holding was the family farm with a size of arable land which could be cultivated by family labour-power. Besides the small and middle sized farms as well as protectionist agricultural legislation, the efficient application of the supplementary systems belonging to holdings (e.g. co-operations) became the characteristic feature of the Danish model. In this regard the family holdings were integrated into bigger units in order to gain more determinant market positions. In comparison with the French model, the additional characteristic of the Danish model is that the position of the owner of the agricultural holding was stronger than the standing of the user.

In the 18-19<sup>th</sup> centuries, without feudal antecedents, the American agricultural development began with the settlement in the new areas according to the governmental intention based on the democratic capitalism. According to the liberal economic model, the effect of the *American agricultural model* was the large-sized farm system based on journey-work and motorization.<sup>22</sup> The more competitive American model shortly defeated the European countries.

In regard to the above detailed models of the agricultural development, enormous difference appears between two models, i.e. the Danish and the American. The difference between the two models can be found on the ideological level.

Typically two approaches affect the agricultural sector (in our age also). These concepts, using the terms of the recent American literature, are 'farm romanticism' and its opposite, 'democratic capitalism'.<sup>23</sup>

The *farm romanticism* argues for the special treatment of the agriculture because of the unique features of both the agriculture and the population working in this sector. The features of the sector and its producers: 1. Other professions in the society depend on the agricultural professions. 2. If the agricultural sector can improve, the whole national economy will win. 3. The agricultural producers are better citizens and they have a higher moral standard. 4. The family farms are the elemental part of the national heritage. 5. The denomination of 'agricultural producer' includes not only a profession, but a special way of life. 6. The family holding coincides with the family unit.

The concept of *democratic capitalism* expresses an opposite view which corresponds to the model supported by *Milton Friedman*.<sup>24</sup> According to this concept: 1. An agricultural holding does not differ from holdings of the other sectors therefore the agricultural policy does not have to fulfil special goals. 2. The open market should decide on the role of the agriculture in the national economy. 3. The other, more efficient forms of holdings could be

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<sup>21</sup> Loc. cit. pp. 32-33.

<sup>22</sup> Loc. cit. p. 33.

<sup>23</sup> FERTŐ Imre: *Az agrárpolitika modelljei*. Budapest, 1999, Osiris Press, pp. 19-31.

<sup>24</sup> FRIEDMAN, Milton: *Kapitalizmus és szabadság*. Budapest, 1996, Akadémiai Press and MET Publishing Corp., pp. 25-28.

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displaced by the exaggerated protection of the family farms. 4. All professions are of equal value and the workers of certain sectors could not be regarded more estimable. 5. The taxes which intend to redistribute incomes can be considered institutionalized theft.

### **1.2. Hungarian specialities**

The Hungarian agricultural development was similar to the Prussian agricultural model, therefore its problems were also similar to those of the Prussian model. In the 19<sup>th</sup> century the primary aim of reformers (i.e. the nobility) was the abolition of the feudal bonds; this goal more or less could be fulfilled in the examined period. Taking into consideration the demand of the peasantry (i.e. they claimed the ownership of the lands cultivated by them), the other essential purpose of reformers was the abolishment of the concentrated structure of the agricultural holdings, which structure was the impact of the long-lasting feudal bonds.

The peerage with middle-sized holdings and the manumission initiated by them had a great role in the abolition of the feudal bonds. Three types of this manumission<sup>25</sup> can be distinguished in the 19<sup>th</sup> century Hungarian history, which types can be regarded as parts of the same process. In accordance with the *voluntary manumission*, the serfs and their settlements could make an agreement with their landlords about the purchase of the lands cultivated by the serfs (see the Act I of 1840). In 1848, according to the *compulsory manumission* provisions, the landlords were obliged to enter into contract, because they had to accept the proposal of their serfs for the lands used by them. According to the *general and compulsory manumission* not only the landlords were obliged to sell, but also the serfs to purchase – independently of whether they wanted it or not; the state provided a partial or absolute support in this regard (in 1851), which support had to be repaid for the state budget.<sup>26</sup>

The legal instrument of the manumission was an appropriate base to abolish the feudal bonds of the landlords, but it could not correct the concentrated structure of the agricultural holdings. The elimination of the concentrated structure waited for the society and decision-makers of the following century.

## **2. Tendencies of the first part of the 20<sup>th</sup> century**

### **2.1. General tendencies**

1. The problem of the Prussian agricultural model could not be solved by the end of the 19<sup>th</sup> century. In the first part of the 20<sup>th</sup> century, the difficulties of the concentrated structure of the agricultural holdings were solved by the civil democratic revolution. The modifications essentially affected the landlords of large-sized agricultural holdings (the

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<sup>25</sup> See OLAJOS – SZILÁGYI: *Agrárjogi alapfogalmak I.* Miskolc, 2005, University of Miskolc, p. 12; and OLAJOS: A földtulajdon és földhasználat történeti fejlődése az ókortól a huszadik századig. 2004, Op. cit. p. 35.

<sup>26</sup> OROSZ István: A jobbágysabotitás és végrehajtása. In: GUNST Péter (ed.): *A magyar agrártársadalom a jobbágyság felszabadításától napjainkig*. Budapest, 1998, Napvilág Press, pp. 55-137.

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small-sized agricultural holdings of peasants remained untouched); according to these amendments, first the property of the large-sized holdings were transferred to the state, afterwards the property of lands from these holdings were assigned to the peasants.<sup>27</sup>

There was a different solution of the problem concerning the concentrated structure in Russia which had numerous relations with the European tendencies. The evolving capitalist development was broken by the soviet takeover. The goal of the Decree of 1917 concerning the legislation of lands was 'the nationalisation of lands' which meant the acquirement of the ownership of lands by the state and the usage of these lands by the peasantry.<sup>28</sup> The elemental similarity of the Prussian and Soviet models is the radicalism of the procedure and the abolishment of the concentrated structure of the agricultural holdings.

2. In Europe, the different agricultural models were followed by the different regulatory systems of agricultural holdings. At the beginning of the 1990s, *Tamás Prugberger* divided the legislation of the Western European countries into three categories; these are the 'all-comprehensive and compulsory regulatory system', the 'all-comprehensive and permissive regulatory system', the 'partial regulatory system'.<sup>29</sup> The significant distinctions among the regulatory systems can be explained by the different measurements of agricultural holdings in the European states, the role of the agriculture in the national economy and the agricultural ideology adopted by the political decision-makers. The numerous statements of the systematization of Tamás Prugberger can be applied to the recent legislation of the Western European countries.

2.1. The all-comprehensive and compulsory regulatory system includes strict provisions concerning the ownership, usage and inheritance of agricultural holdings and the agricultural producers cultivating these agricultural holdings. Considering this regulatory system, the administrative legislation affects the general rules of civil law.

The all-comprehensive and compulsory regulatory system includes four separate groups of states: Denmark; France; Switzerland and Norway as well as the Latin countries (i.e. Portugal, Spain and Italy).<sup>30</sup>

The establishers of this regulatory system were the Danish and French agricultural models. Both countries created a comprehensive definition of the agricultural holding during the

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<sup>27</sup> CSÁK: Az 1945-ös földreformtól a hatályos magyar földtulajdoni és földhasználati viszonyok kialakulásáig. In: In: CSÁK (ed.): *Agrárjog*. I. volume. Miskolc, 2004, Bibor Press, p. 36; see furthermore CSÁK: Az 1945-ös földreformtól a hatályos magyar földtulajdoni és földhasználati viszonyok kialakulásáig. In: CSÁK (ed.): *Agrárjog*. Miskolc, 2006, Novotni Press, pp. 49-53, OLAJOS: Az 1945-ös földreformtól a hatályos magyar földtulajdoni és földhasználati viszonyok kialakulásáig. In: CSÁK (ed.): *Agrárjog*. Miskolc, 2008, Novotni Press, pp. 54-57.

<sup>28</sup> CSÁK: Az 1945-ös földreformtól a hatályos magyar földtulajdoni és földhasználati viszonyok kialakulásáig. 2004, Op. cit.

<sup>29</sup> See PRUGBERGER Tamás: Reflexiók "A termőföldről szóló 1994:LV. tv. 6. §-a a nemzetközi jog és az EU-jog fényében" c. fórumcikkhez. *Magyar Jog*. 1998/5, pp. 276-287; see furthermore PRUGBERGER: Gondolatok a magyar földtörvény-módosítási tervezethez. *Valóság*. 1997/10; OLAJOS – PRUGBERGER: Termőföldbirtoklás, hasznosítás és forgalmazás a családi gazdaság elősegítésének új jogi szabályozása tükrében. *Magyar Jog*. 2002/5, KURUCZ Mihály: *Az Európai agrárjog alapjai*. Budapest, 2003, ELTE Jogi Továbbképző Intézet, pp. 60-74.

<sup>30</sup> PRUGBERGER: A fejlett polgári államok földtulajdoni és mezőgazdasági üzemstruktúrája a XX. század agrárreformjai tükrében – az agrárjog megjelenése. In: PRUGBERGER (ed.): *Agrárjog I*. Miskolc, 1999, Bibor Press, pp. 81-116.

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20<sup>th</sup> century. At the same time there are some significant differences between the legislation of the two countries.

Taking into consideration the Danish land-policy, the small-sized agricultural holdings of families and the protection of the ownership are at the centre of the legislation. This policy is motivated by the farm romanticism. On the contrary, the French legislation primarily provides protection for the land-user. These provisions concerning the protection of the land-user serve the interest of agricultural producers because the land-users can gain an agricultural holding with the appropriate measurement and the appropriate legal protection as well as they can cultivate the land for a long time without acquiring the ownership of agricultural lands which acquirement would mean a long immobilization of the capital. The French legislation serving to increase the competitiveness bases not only on the ideology of the farm romanticism but also on numerous aims of the democratic capitalism.<sup>31</sup> In connection with the difference between the Danish and French legislation, the author of the present paper must mention that the combination of the two models can be applied (i.e. the mixture of the protection of land-users and owners); in fact, similar legislation may be found in the two mentioned states.

The differences between the instruments protecting the owner and the provisions supporting the interest of the land-user are the following:

I. Two typical features of the instruments serving the protection of the small-sized holding and the interest of the owner are on the one hand to prevent the re-establishment of the system of the large-sized holdings, and on the other hand to support the improvement of the small-sized agricultural holdings.<sup>32</sup>

The instruments serving the prevention of the re-establishment of the system of the large-sized holdings are the following: (a) the restriction of the acquirable size of agricultural holdings; (b) the determination of the number of agricultural holdings that can be possessed by an agricultural producer; (c) the restriction of the acquisition of new lands which are a long way from the centre of the existing residence of the agricultural holding; (d) the restraint on the acquisition of the ownership of arable lands by investor companies, non-agricultural persons and non-local residents; (e) the authorization of the acquirement of the possession of agricultural holdings only for the persons living and working in the area where the agricultural holding is situated.

The instruments supporting the improvement of the small-sized agricultural holdings are the following: (a) special inheritance provisions concerning arable lands, (b) the compulsory and supported formation of consolidated estates (i.e. the concentration of crumbled lands); (c) the prescription of the minimum of agricultural holdings and the restraint on the division of holdings; (d) adoption of provisions on the maintenance of the fertility of arable lands; (e) the restriction and the prohibition of the non-agricultural usage of arable lands.

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<sup>31</sup> See furthermore VARGA Gyula: Érett-e mezőgazdaságunk az integrációra? *Európai Tükör*, 2004/4-5, pp. 98-103.

<sup>32</sup> BURGERNÉ GIMES: Földhasználati és földbirtok-politika az Európai Unióban és néhány csatlakozó országban. *Közgazdasági Szemle*, 2003/September, pp. 821-822.

II. Instruments for the protection of the interest of the lessees:<sup>33</sup> (a) the determination of the minimum and maximum of the duration of the leasehold; (b) the limitation of the rescission right of the lessor (i.e. owner); (c) the determination of the amount of the rent for the leasehold; (d) the compensation to the lessee for her/his investment in the agricultural holding used by her/him; (e) assurance of the preemptive right and the right of first refusal for the lessee.

The common feature of the legislative instruments is that these instruments restrict more or less the parties' freedom of contract, moreover, they provide the opportunity of governmental intervention in social relationships, where the existence of a similar state paternalism to this degree is not necessary.

2.2. In comparison with the *ius strictum* provisions of the all-comprehensive and compulsory regulatory system, the all-comprehensive and permissive regulatory system includes more flexible *ius equitum* norms. The main rules of this system are the principles of the *pacta sunt servanda* [i.e. promises must be kept] and the freedom of contract.<sup>34</sup> This system comprises some states of the Prussian agricultural model, i.e. Germany and Austria.

2.3. In the 20<sup>th</sup> century the determinant concept of the legislation of the states following the in comparison with other European countries, due to the concentration of agricultural lands, relatively liberal English agricultural model is the partial regulatory system. The characteristic element of this regulatory system is that the states of this system, except for the provisions of inheritance, do not have special rules concerning the ownership and the use of lands.<sup>35</sup> In the case of these countries the legal situation has changed after the accession to the EC.

The author of the present paper dealt also with the details of the legislation after the Second World War in this part of the work, because after the establishment of the European integration, the determination of the fundamental provisions concerning agricultural holdings remained in the competence of the Member States of the EC. Despite this feature of the relationship between the national and Community legislation, the Community provisions had and have important effects on the national agricultural legislation.

## 2.2. Hungarian specialities

In the first part of the 20<sup>th</sup> century, the biggest challenge of the Hungarian agricultural policy was the abolition of the concentrated structure of agricultural holdings. Numerous attempts were made, but until the end of the Second World War these attempts remained unsuccessful. These attempts included the land reform of Mihály Károlyi (i.e. the Act 18 of 1919), the land policy of the soviet republic ('Republic of the Councils'), the land reform of István Nagyatádi Szabó (in 1920 and in 1924), and the land reform of Kálmán Darányi.

From these attempts the author of the present paper has to emphasize the difference between the agricultural holding policy of the Hungarian soviet republic and the Russian land decree of 1917. Instead of the Russian solution (i.e. the nationalisation of lands), the

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<sup>33</sup> Loc. cit. p. 823.

<sup>34</sup> PRUGBERGER – SZILÁGYI János Ede: Földbirtok-politika az Európai Unióban. In: CSÁK (ed.): Op. cit. 2004, pp. 80-81.

<sup>35</sup> PRUGBERGER - SZILÁGYI: Földbirtokszerkezet és szabályozás Nyugat-Európában. *Az Európai Unió Agrárgazdasága*. 2004/8-9, pp. 38-41.

Hungarian Republic of the Councils initiated a more drastic measure. This measure would have been the socialisation of lands.<sup>36</sup> The purpose of the measure was on the one hand the acquisition of the ownership of lands by the state (it is similar to the Russian nationalisation), on the other hand the usage of the lands by the collective farms (and not by the peasants). The abolition of the individual usage of lands seemed a worse alternative for the peasantry than the previous feudal legal system.

In this period the policymakers could not solve the problems derived from the Prussian agricultural model.

### **3. Tendencies of the period after the Second World War**

#### **3.1. General tendencies**

The Second World War was an important watershed in the European history and also in the field of agricultural policy. In the frame of the European integration, the Western European countries were enforced by the circumstances to create a common agricultural policy instead of separate national agricultural policies. These circumstances were the following:<sup>37</sup> (1) By that time the Western states lost the majority of their colonies, which were one of the sources providing the Western countries with agricultural products. (2) Until the iron curtain came down, the other typical source of agricultural products and food for the Western European countries was the areas situated to the East of the Elbe river; after the establishment of the new soviet block, the Western countries did not want to depend on the Eastern European states. (3) The third typical opportunity to gain food was the US, but the Western European countries had a fear of an ultra dependence on the US; therefore the Western European countries intended to solve the problem of the lack of food inside the Western part of Europe. In order to reach this purpose, the Western European countries adopted a protectionist agricultural policy based on the ideology of farm romanticism. (4) The absence of the UK, which had a more liberal agricultural policy, from the adoption of the Common Agricultural Policy (hereinafter referred to as the CAP) also supported the establishment of the CAP. (5) The French agricultural lobby also had a great role in the procedure of the adoption of the CAP, namely the French party argued for the CAP based on the principle of financial solidarity in return for the fact that the Community favours the German industrial sector. In this situation, the protectionist CAP could prefer the French agriculture as well as the French agricultural producers.<sup>38</sup>

At the beginning of the European integration, the legislation of the CAP consisted of three main parts. They could be divided by the subjects of the agricultural legislation.<sup>39</sup> The first part of the legislation of the CAP was (and is) the provisions of the Common Market Organisations (hereinafter CMO); the subject of the CMOs is the category of the agricultural product (see above). The second part was the structural policy as the second pillar of the CAP; the subject of this norm was the agricultural holding (see above). After

<sup>36</sup> CSÁK: Az 1945-ös földreformtól a hatályos magyar földtulajdoni és földhasználati viszonyok kialakulásáig. 2004, Op. cit. pp. 36-37.

<sup>37</sup> OLAJOS: A közös agrárpolitika története. In: CSÁK Csilla (ed.): Op. cit. 2004, pp. 60-68.

<sup>38</sup> HORVÁTH Zoltán: *Kézikönyv az Európai Unióról*. 1999, Hungarian Parliament, pp. 189-201.

<sup>39</sup> FODOR László: *Op. cit.* pp. 51-54.

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the adoption of the Community rural development policy (in 1997), rural development became the second pillar of the CAP. Nowadays, besides the agricultural holding, the legislation of the second pillar of the CAP includes the provisions concerning rural areas. The third part of the legislation of the CAP is the agro-quality standards. These standards cover the quality provisions of the agricultural activity concerning agricultural products and agricultural holdings. This categorisation of the provisions of the CAP may merely be imperfect, because numerous provisions of the CAP cannot be classed into one part of the legislation or the other; i.e. these three categories of the legislation are closely connected. In conclusion, the author of the present paper has to emphasize that the agricultural sector is one of the largest parts of the Community legislation: until 1994, 16191 regulations were adopted and in addition to this, a significant part of the practice of the European Court of Justice relates to the legislation of the CAP.<sup>40</sup>

The structural policy legislation (since 1997, rural development) affects agricultural holdings through the structure of agricultural supports. Besides the adoption of certain Community provisions affecting agricultural holdings, the adoption of the basic rules concerning agricultural holdings remained in the competence of the Member States. At the same time it is noticeable that the concentration of lands as well as the amendments of the national rules concerning agricultural holdings were important effects of the Community provisions concerning agricultural holdings.

Owing to the protectionist European agricultural policy, the US agricultural policy based on the ideology of democratic capitalism also applied serious supports; due to this change, the competition of agricultural products in the world market became the competition of agricultural supports. The losers of this competition were the third world producers, who produced their products cheaply but could not gain enough export refunds to compete with the economic potential of the EC or the US. Because of the growing pressure in the world market, the solution of the problems occurred in the frame of the GATT,<sup>41</sup> later World Trade Organisation (hereinafter WTO), in the next period (see below).

### **3.2. Hungarian specialities**

After the Second World War, the then existing policy could solve the problem deriving from the concentrated structure of agricultural holdings, which structure was the impact of the Prussian agricultural model. The legal basis of the political decision was Act VI of 1945. According to this act, the large-sized agricultural holdings were abolished and in addition to this, the structure of small-sized holdings was established. Despite the fact that the competitiveness of the structure of small-sized agricultural holdings is disputable, the solution of the problem resulting from the Prussian agricultural model was a good alternative at that time.

According to the legislation, the procedure of the abolition of the concentrated structure of agricultural holdings is the following (the practice later differed from the determined legal procedure): First, the (usually large-sized) lands and the titles of the acquisition (confiscation or 'commutation', which was a special title of compensation established by

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<sup>40</sup> VÁRNAY Ernő – PAPP Mónika: *Az Európai Unió jogá*. Budapest, 2004, KJK-KERSZÖV, p. 587.

<sup>41</sup> General Agreement on Tariffs and Trade.

the Act of 1945 for a legitimate damage) were determined. Afterwards, according to the Act of 1945, a governmental land fund should have been established from the occupied lands; in practice, this governmental fund was not created, because the occupied lands were directly allocated to the persons entitled under the Act of 1945. The Act determined the measurements (usually 3-15 acres) of the land parcels allocated to the entitled persons, the circle of the entitled persons, the titles under which the lands are allocated as well as the price of the allocation.<sup>42</sup>

Nevertheless, the new owners of lands could not enjoy their holdings for a long time. The communist putsch in 1948 threw the Hungarian agricultural development from the European. Despite of the communist putsch, the land reform of 1945 had a long term impact on the Hungarian agricultural development.

In comparison with the 1945 reform, which intended effects inside the structure of private properties, the 1948 putsch aimed at the abolition of the private property, and in addition to this, at the conversion of private property into social property (i.e. state or co-operation property). Nevertheless, due to the 1945 land reform, in the agricultural sector the new owners could not be deprived of the newly allocated lands (i.e. the soviet leaders were afraid of the rebellion), therefore, in comparison with the factories in the industrial sector, arable lands could not be nationalized. Therefore the first method of the soviet conversion of agricultural lands was the collectivization, which had two periods (i.e. 1951-1958 and 1958-1961). According to the collectivization, the peasants could hold the ownership of their lands, but they were obliged to transfer the right of the use of their lands to the co-operations. The co-operations were a state instrument of indirect governance. In 1967, the next step of the conversion of private property into social property was that, besides the right of use, these co-operations could also acquire the ownership of the land cultivated by them; this period was recognised as the priority of co-operations' property. At the end of the communist development, after 1976, the priority of the state property became determinant as opposed to the priority of co-operations' property.<sup>43</sup> In comparison with the system of agricultural holdings in Western Europe, the Hungarian governmental intervention in the agricultural sector was based on the negative discrimination,<sup>44</sup> moreover, the Hungarian system not only restricted the private autonomy, but abolished private autonomy as a whole.

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<sup>42</sup> See CSÁK: Az 1945-ös földreformtól a hatályos magyar földtulajdoni és földhasználati viszonyok kialakulásáig. 2004, Op. cit. pp. 37-40.

<sup>43</sup> See furthermore BOBVOS Pál: A szövetkezeti üzletrész stációi. In: CSÁK (ed.): *Ünnepi tanulmányok Prugberger Tamás professzor 70. születésnapjára*. Miskolc, 2007, Novotni Alapítvány, pp. 60-62; KURUCZ Mihály: Szubjektív gondolatok a szövetkezetek összetett természetéről a magyar mezőgazdasági termelőszövetkezetek elmúlt ötven éve alapján. In: BOBVOS Pál (ed.): *Reformator iuris cooperandi*. Szeged, 2009, Pólay Elemér Alapítvány, pp. 299-335.

<sup>44</sup> See furthermore SZILÁGYI János Ede: Gondolatok az agrárjog jogágságával kapcsolatban. *Magyar Jog*. 2004/9, pp. 535-544.

#### **4. Structure of agricultural holdings since 1990**

##### **4.1. General tendencies**

The European changes are going to be presented in two main parts. In the first part, the author of the present paper deals with the Western European integration, in the second part, the author focuses on the legislation of agricultural holdings in the countries of the Eastern part of Europe.

1. The EEC (since 1992, the EC) could not continue its support policy, because the agricultural costs added up to 2/3 of the Community budget. Therefore, the two largest parties of the world market, which became the competition of supports instead of products, summoned a conference in the frame of the GATT. On the said GATT round the parties agreed on a more liberal agricultural policy, moreover, they bound themselves to reduce the volume of agricultural supports. This agreement affected the CMOs of the CAP. Due to this influence, the reforms could not farther be postponed, therefore, instead of the definition of the agricultural product, the definition of the agricultural holding became gradually the centre of the legislation. In addition to this, environmental law was integrated into the legislation of the CAP with greater prestige.

The largest change in the 90s was the appearance of rural development. Rural development became the second pillar of the CAP. Its basis was (is) the farm romanticism, which had also been the basis of the establishment of the CAP in the 1950s.<sup>45</sup> Because of the dramatic effects of the globalisation on rural areas and in addition to this, the importance of the rural areas for the society (e.g. agricultural production, environmental protection, culture), the protection of the rural area is also an issue of the whole society; i.e. the rural areas shall be supported by financial instruments. Besides, taking into consideration of the GATT (WTO) agreements, rural areas and their population may be supported by rural development supports without the violation of the provisions of the GATT/WTO agreements. Taking into consideration the close relationship between rural development and agricultural policy, the author of the present paper has to emphasize the differences between the two institutions. Rural development law differs from agricultural law in two aspects: the first difference is the types of economic activities and the second one is the territorial scope of the provisions. Besides the agricultural activity, rural development also includes other activities like the activities of the local industry, the tourism, the infrastructure development, the conservation of the local cultural heritage as well as architectural traditions. Considering the territorial scope, agricultural law and agriculture concern both rural and urban areas. Unlike agriculture, rural development affects only rural areas.

2. After the Second World War, the Eastern European countries became part of the 'soviet block'; therefore they had a special structure of agricultural holdings. After the change of regimes in 1989 and 1990, the non-European compatible land reforms of these countries also had an important effect on the feature of their recent structure of agricultural

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<sup>45</sup> See furthermore SZILÁGYI: A magyar SAPARD Hivatal szervezésének tanulságai. In: STIPTA István (ed.): *Miskolci Egyetem Állam- és Jogtudományi Kar díjnyertes TDK dolgozatai*. Volume I. Miskolc, 2003, Bibor Press, pp. 377-446.

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holdings. Namely, these reforms have fulfilled neither the requirements of effectiveness (i.e. concentration) nor the goals of the free inflow of capital.

One type of the land reforms of the Eastern European countries was the general restitution, i.e. the primary form of the privatisation of arable lands was the return of arable lands to the original owners or the successor of the original owners. The other type of land reforms focused on the partial restitution (e.g. Hungary), moreover, in several states also people who earlier did not have any land could gain arable lands (e.g. members of co-operations).<sup>46</sup> Due to this type of land reforms, the typical feature of the land structure is the crumbling as opposed to the concentrated land structure. Besides, due to the reforms, people who do not pursue their agricultural activity as a way of life could acquire the ownership of arable lands. The determinant part of these people leased their lands out to persons who pursue their agricultural activity as a way of life; these lessees with their own and leased lands tried (and try) to compete in the more and more liberal world market. In addition to this, the legislation of the Eastern European countries served the small-sized agricultural holdings and the protection of small holders. The legal instruments of this legislation were the following:<sup>47</sup>

- (a) the restriction of the maximum of the land which can be possessed by a person (e.g. 30 hectare in Bulgaria, 50 hectare in Latvia, 100 hectare in Rumania, 300 hectare in Hungary);
- (b) the restriction of the time to sell the newly acquired land; (c) the authorisation of the leasehold of arable lands and the sale of arable lands only inside of the settlement where the land is situated; (d) the requirement of the cultivation of arable lands; (e) forbidding that legal entities (e.g. co-operations) acquire the ownership of arable lands; (f) forbidding that foreign nationals acquire the ownership of arable lands; this restriction was (is) maintained after the accession to the EU for different periods (e.g. according to the main provisions, Hungary can preserve this restriction until 2011); (g) the prohibition of the mortgage on arable lands.

Unfortunately, the legislation of these countries does not include, on the one hand provisions concerning the minimum size of arable land in the case of sale or leasehold in order to avoid the crumbling of agricultural holdings, on the other hand special rules concerning the inheritance of arable holdings. In addition to this, the deficiencies in the land registers and in the assessment of land quality are also unacceptable.<sup>48</sup>

The legislation of the new Member States (i.e. which accessed to the EU after 2004) has some additional problematic issues. The first issue is the acquisition of ownership of arable lands by foreign nationals. The basis of this problem is the difference of the prices of arable lands (agricultural holdings) in different Member States (i.e. between the old and new Member States). The new Member States could temporarily protect the market of their arable lands with the different moratoriums on the acquisition of ownership of arable lands situated in new Member States by foreign nationals, but it is disputable whether these moratoria can protect the interest of the citizens of the new Member States. In addition to this, the author of present paper can also support a reformed system of the leasehold legislation.

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<sup>46</sup> BURGERNÉ GIMES: Op. cit., pp. 823-824.

<sup>47</sup> Loc. cit.

<sup>48</sup> See OLAJOS: A pontozásos földértékelés. In: CSÁK (ed.): *Agrárjog*. 2004. op. cit. pp. 158-164.

Taking into consideration the opinion of some authors,<sup>49</sup> the second problematic issue is the goal of the CAP, which plans the creation of a new system of large-sized agricultural holdings in the new Member States. In connection with this, the author of the present paper hopes that the new Member States owning the appropriate national strategies could cooperate with each other on the adoption of a future agricultural and rural development policy (namely, earlier these new Member States could be divided by other states).

#### **4.2. Hungarian specialities**

The socialist system announcing the priority of the social property was abolished in the period between 1985 and 1990. The fundamental goal of the change of regimes was the reduction of the social property and the restoration of the private property rights protection. The main purpose of the Hungarian agricultural policy was the European integration.

1. The legal instrument of private agricultural holdings was a special compensation (hereinafter compensation). The main aim of the compensation was to transfer the ownership of agricultural lands owned by the states and socialist co-operatives to private persons. Owing to the compensation based on numerous political decisions, different land funds were created from the social property, moreover, the acts concerning compensation determined the entitled persons, the definition of the damage, the sum of the compensation as well as the form of the compensation (i.e. compensation stock). The largest defect of the provisions concerning compensation was the division of the category of the agricultural holding; i.e. the acts concerning compensation dealt separately with the arable land and with other parts of an agricultural holding (e.g. equipment), therefore the different parts of the original agricultural holding owned by one person were transferred to different persons.

2. After the compensation procedure, an inconsistent structure of agricultural holdings was established, which structure includes both competitive and uncompetitive agricultural holdings. The agriculture with the shortage of capital could not be reformed by the policy-makers until the accession of the state to the EU, in addition to this, the CAP legislation concerning rural development was not appropriately integrated into the Hungarian agricultural policy, therefore numerous people's living was put into danger.<sup>50</sup>

Taking into consideration the above notes, the challenges of the agricultural legislation are the following: (a) adoption of a single category of the agricultural holding and the adoption of an act concerning agricultural holdings instead of an act concerning arable lands; (b) development of the different legal instruments supporting the concentration of the Hungarian agricultural sector (e.g. the establishment of interprofessional organisations; the encouragement of the establishment of co-operatives,<sup>51</sup> the amendment of the agricultural

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<sup>49</sup> TANKA Endre: Uniós agrárreform és magyar jogharmonizáció. *Gazdaság és Jog*, 2004/4, pp. 3-8.

<sup>50</sup> See OLÁJOS István – RAISZ Anikó: National Report of Hungary. Commission III – Scientific and practical development of agricultural law in the EU, in countries and in the WTO. XXV European Congress and Colloquium of Agricultural Law. European Council for Agricultural Law, Cambridge 23 to 26 September 2009.

<sup>51</sup> See BEZDÁN Anikó: A szövetkezetek egyes szabályozási lehetőségeiről. In: BOBVOS (ed.): *Op. cit.* pp. 107-123; VERES József: Hogyan tovább szövetkezet? In: CSÁK (ed.): *Ünnepi tanulmányok Prugberger Tamás professzor 70. születésnapjára*. Miskolc, 2007, Novotni Alapítvány, pp. 460-466.

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financial system,<sup>52</sup> etc); (c) adoption of a rural development policy which is also supported by the local groups.

At the end of the work, the author of the present paper has to emphasize that this essay can only be schematic, and in addition to this, numerous statements may seem rough. The primary goal of the author was to present the historical development of several centuries; this intention does not allow to draw appropriate conclusions in many cases.

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<sup>52</sup> See NAGY Zoltán: *A faktoring*. Budapest, 2009, HVG-ORAC, pp. 127-161; CSÁK – NAGY: Szövetkezeti hitelintézetek a pénzügyi intézmények rendszerében. In: BOBVOS (ed.): *Op. cit.* pp. 145-153.

## **CARTELS AND THE COMISSION'S CURRENT INVESTIGATION, ENFORCEMENT AND DECISON-MAKING POWERS**

ANDRÁS HORVÁTH  
 PhD student, Department of Civil Law  
 Eötvös Lóránd University  
 horvath.andris@gmail.com

### **Introduction**

This paper examines what implications the sanctions for the infringement of EC competition rules (Article 81 and 82 of the EC Treaty) have on procedural standards according to the case-law of the European Court of Human Rights (hereafter ECHR). On the one side the amount of fines imposed by the European Commission exceed the criminal penalties applied in most of the Member States (severity). On the other side deterrence as the main purpose of the fine would also render them as criminal rather than administrative (nature). There has been a substantial change in the attitude of the Commission officials as well.<sup>1</sup> Thus the fines and the rhetoric imply a higher standard towards the procedure of the Commission.

The first part of the paper sets out what would imply the higher standards. The second part examines the preconditions of applying higher standards to the procedure of the Commission. The third part presents a few issues raised by the higher standards. The fourth part draws a conclusion upon the issues raised.

### **1. Increasing fines, more strict rhetoric**

The amount of fines imposed by the Commission in cartel proceedings are governed by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>2</sup> (hereafter Regulation 1/03) and the Commission Notice<sup>3</sup> on the details of the calculation process applied.

Binding rule on the amount of fines is Article 23 (2) Regulation 1/03, which maximises the fine in 10 % of the annual worldwide turnover of the undertaking concerned. The Commission Notice on fines elaborates the direction given by Regulation 1/03 as to how the gravity and the duration of the infringement shall be taken into account.

The statistics on the amount of fines imposed by the Commission in the last 20 years show a substantial increase. Compared to the fines imposed in the '90s the first five years of the new millennium brought a six times bigger amount which increased by another 100

<sup>1</sup> For example the speech of Neelie Kroes, European Commissioner for Competition Policy at The 10th Annual Competition Conference at the European Institute, Fiesole, Italy, 13<sup>th</sup> October 2006

<sup>2</sup> OJ L 1, 4 Jan. 2003, p.1-25

<sup>3</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. OJ C 210, 1 Sept. 2006, p. 2-5

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% in the second five years.<sup>4</sup> The fines per undertaking rose to almost 500 million € until 2007 reaching a new high in 2008 with almost a billion € for one undertaking.<sup>5</sup>

This increase can be ascribed to several factors. For example the new strategy of the Commission focusing on the international cartels with multinational companies as members having extremely high worldwide turnovers and giving priority to the aim of achieving more deterrent effect with higher fines.

The Commission's official rhetoric on the assessment of cartels also changed extremely. Mario Monti the former commissioner for competition policy described cartels as „cancer of the market economy”<sup>6</sup> and Neelie Kroes the current commissioner also speaks about „war on cartels” and „zero tolerance”<sup>7</sup> towards such infringements. This rhetoric reflects a more intensive moral condemnation of anticompetitive practices, condemnation usually only present in cases of criminal offences.

Thus the fines exceed the penalties levied in national criminal procedures, apart from that they are extremely high, they are of punitive, deterrent nature with the moral blameworthiness beside the serious harm caused, all implying a criminal nature.<sup>8</sup>

## 2. Criminal nature

According to the wording of Article 6 of the European Convention on Human Rights and Fundamental Freedoms (hereafter Convention) the scope of the provision only extends to criminal cases. Nonetheless the ECHR interpreted criminal matter extensively in several cases. In the Deweer case<sup>9</sup> the ECHR stated that the scope of Article 6 also covers such administrative procedures in or during which a sanction can be imposed. This notion was redefined in the Öztürk case<sup>10</sup> where the ECHR considered administrative cases ending with a sanction, which had preventive-repressive aims just like a criminal matter. In the Bendenoun case<sup>11</sup> the ECHR mentioned four conditions which would render a procedure or sanction criminal. The rule providing for the sanction should have general effect, the sanction should be of punitive instead of reparative nature, the aim of the sanction should be to punish and to prevent and the sanction should be substantial in its measure.<sup>12</sup>

The first case where the ECHR applied these conditions to a competition matter was the Stenuit case<sup>13</sup>. The basis of the argument why a competition procedure should be considered as a criminal matter was that the protection of competition is similar to the protection of other social interests provided for by criminal law, thus the sanction and the

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<sup>4</sup> Statistics on the Commission's website:

[http://ec.europa.eu/competition/cartels/overview/faqs\\_en.html](http://ec.europa.eu/competition/cartels/overview/faqs_en.html)

<sup>5</sup> Saint Gobain's fine in the car glass cartel was 896 million €

<sup>6</sup> XXXI Report on Competition Policy, 2001

<sup>7</sup> Speech of Neelie Kroes at the Conference of the International Bar Association and the European Commission on Anti-trust reform in Europe, Brussels, 10<sup>th</sup> March 2005

<sup>8</sup> Harding and Joshua, *Regulating cartels in Europe* (Oxford: OUP, 2003), pp. 240-241

<sup>9</sup> Deweer v Belgium, Appl. No. 6903/75, Judgment of 27 Feb. 1980

<sup>10</sup> Öztürk v Germany, Appl. No. 8544/79, Judgment of 21 Feb. 1984

<sup>11</sup> Bendenoun v. France, Appl. No. 12547/86, Judgment of 24 Feb. 1994

<sup>12</sup> Riley, The ECHR implications of the investigation provisions of the draft Competition Regulation, (2002) ICLQ 55, pp. 67-68

<sup>13</sup> Stenuit v. France, Appl. No. 11598/85, Judgment of 27 Feb. 1992

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procedure whereby they are imposed should be considered criminal.<sup>14</sup> It should be noted that the maximum fine held criminal in degree of severity in that case was only 5 % of the annual worldwide turnover of the undertaking concerned compared to the 10 % in effect in EC competition law.<sup>15</sup>

Article 23 (5) Regulation 1/03 expressly mentions that the fines imposed by the Commission are not of criminal nature, nonetheless the case-law of the ECHR is based on own interpretation. In the Engel case<sup>16</sup> the ECHR expressed that the national characterisation of institutions of law is not decisive in the assessment, two other criteria would also be indicative, the nature of the offence and the degree of severity of the penalty.<sup>17</sup> In the Hüls case<sup>18</sup> the ECJ confirmed these criteria.

Thus according to the case law of ECHR the fines imposed in competition cases can be considered as criminal in nature hence all the guarantees inherent Article 6 – like fair trial, right to a hearing, presumption of innocence, proper preparation time for the defence – should apply to the competition procedure. Apart from the rights originating from Article 6 of the Convention, all rights provided for by national law for the purposes of the protection of individual's interests should also be taken into account like privilege from self-incrimination and legal professional privilege.<sup>19</sup>

Irrespective of these considerations we have to note that the European Union itself is not a signatory to the Convention. Nonetheless when it comes to investigative powers the actual measures are conducted in the Member States, which are the signatories of the Convention. The European Court of Justice (hereafter ECJ) itself stated in the Orkem case<sup>20</sup> that the Commission is required to observe fundamental rights during its investigation. Besides the Convention the Charter of Fundamental Rights (hereafter Charter) can also be invoked in the discussion as Recital 37 of Regulation 1/03 already mentions it. For legal professional privilege Article 7 of the Charter can be invoked, for the *ne bis in idem* principle Article 50. The right to silence is protected as a part of fair trial guarantees under Article 47, while Article 7 provides for the protection of non-business premises.<sup>21</sup>

Nonetheless we have to note that Article 52 of the Charter bears a different light to the discussion since all the rights contained by the Charter shall receive the same protection as they get under the Convention. The difference between the two, apart from their effect (the Charter doesn't have any direct effects but is to be observed by the Community institutions), is that in Article 47 of the Charter provides for guarantees not just for the

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<sup>14</sup> Riley, Saunders and the power to obtain information in Community and United Kingdom competition law, (2000) ELRev 264, p. 265

<sup>15</sup> Van Overbeek, The right to remain silent in Competition investigations: The Funke decision of the Court of Human Rights makes reform of the ECJ's case law necessary, (1994) ECLR 127, p. 131

<sup>16</sup> Engel v The Netherlands, Appl. No. 5100-5102/71, 5354/72, 5370/72, Judgment of 8 June 1976

<sup>17</sup> Riley, as note 12 above, p. 67

<sup>18</sup> Hüls v Commission, C-199/92 P, 8 July 1999, (1999) ECR I-4287, para 149-150

<sup>19</sup> Schermers and Waelbroeck, Judicial protection in the European Union, 6th edition (The Hague – London – New York: Kluwer Law International, 2001), p. 581

<sup>20</sup> Orkem v Commission, 374/87, 18 Oct. 1989, (1989) ECR 3283, para 28

<sup>21</sup> Weiβ, Grundrechtsschutz im EG-Kartellverfahren nach der Verfahrensnovelle, (2006) EuZW 263, p. 265

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criminal and civil proceedings making the discussion about the nature of the proceedings and the fine unnecessary.<sup>22</sup>

The issue whether the Convention applies to the EU can be reconsidered in the light of the case-law of the ECJ and the Court of First Instance (hereafter CFI) on general principles of law. According to the ECJ in the Nold<sup>23</sup> and Wachauf<sup>24</sup> cases the protection of human rights according to the Convention, the case-law of the ECHR interpreting it and the constitutional traditions of the Member States shall apply since they form a general principle of law.<sup>25</sup> This argument has a weak point though. The standards required by general principle of law are interpreted by the ECJ itself what may differ from the case-law of the ECHR.<sup>26</sup> In the Internationale Handelsgesellschaft case<sup>27</sup> the ECJ stated that only those fundamental rights are applicable upon the basis of being a general principle of law, which are compatible with the system of EC law thereby not intervening with the efficiency of EC competition law.<sup>28</sup>

As to the question whether undertakings can invoke human rights in the Stenuit case the ECHR acknowledged the right of legal persons to invoke Article 6 of the Convention.<sup>29</sup>

### **3. Issues of the rights of the defence**

This paper takes a look at four vital fundamental rights issues: legal professional privilege, right to remain silent, protection of premises and the question of ne bis in idem. The heavy dispute about legal professional has not ceased with the adoption of Regulation 1/03 in the absence of any provisions on it, thus the issue being still on the table. The right to remain silent and the protection of premises became disputed after Regulation 1/03 conferred two new powers to the Commission, to ask oral questions during the inspections and to enter non-business premises. With the decentralised system of enforcement introduced by Regulation 1/03 the question of ne bis in idem received a new dimension.

#### **3.1. Legal privilege**

The legal professional privilege bears significant importance in competition cases prohibiting access to and use of evidence concerning documents related to the communications of a lawyer and his client.

The human rights basis of the legal privilege could be Article 6 (access to counsel as a part of fair trial) or Article 8 (protection of correspondence) of the Convention. Since the protection of correspondence is more a confidentiality issue than a privilege issue (the latter only existent during legal proceedings as an evidence rule), Article 6 is the proper basis.

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<sup>22</sup> Meyer, Kommentar zur Charta der Grundrechte der Europäischen Union, (Baden-Baden: Nomos Verlagsgesellschaft, 2003), p. 512

<sup>23</sup> Nold v Commission, 4/73, 14 May 1974, (1974) ECR 491

<sup>24</sup> Wachauf v Germany, 5/88, 13 July 1989, (1989) ECR 2609

<sup>25</sup> Van Overbeek, op. cit, p. 132

<sup>26</sup> Riley, as note 12 above, p. 56

<sup>27</sup> Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 11/70, 17 Dec. 1970, (1970) ECR 1125, para 4

<sup>28</sup> Weiß, op. cit, p. 264

<sup>29</sup> Van Overbeek, op. cit, p. 131

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According to the ECHR in the Golder case<sup>30</sup>, the access to legal advice is an inherent part of the right to fair trial. The access is impeded if the person seeking advice cannot inform its counsel of all facts what is not probable if there is an existing danger of disclosure of those facts.<sup>31</sup>

The underlying principle of the right to unimpeded access to legal advice is the special status of lawyers, participating in the administration of justice, giving advice. In the Nikula case<sup>32</sup> the ECHR considered the membership of the bar not decisive as to the special status of lawyers.<sup>33</sup>

In the Murray case<sup>34</sup> the ECHR expanded the scope of this right to the preliminary investigations. Documents drafted before the initiation of a procedure may be covered by the privilege since the privilege is a necessary requirement to assure the right not to incriminate oneself.<sup>35</sup>

In the absence of written rules on legal professional privilege in Community law, the ECJ itself established the privilege in the AM&S case<sup>36</sup> applicable to EC competition cases. Though the privilege was considered as a common principle of the Member States the ECJ established its own criteria. Thus in EC competition cases the privilege is only applicable to communications for the purposes of the rights of defence of the undertaking concerned, with independent lawyers who are not bound to the undertaking through employment and are entitled to practice in at least one Member State.

The first criterion is open to interpretation what kind of documents can be considered as serving the purposes of the rights of the defence (material scope). The second criterion is criticized upon the notion of a privilege covering communications with in-house counsel also (personal scope). The third criterion is criticized because its *prima facie* of a discriminatory nature.

Differences between the national and Community rules on legal privilege can lead to discrimination between undertakings resident in different jurisdictions since information legally gathered in one jurisdiction can be transmitted and used by other members of the European Competition Network (ECN) although evidence in the latter jurisdiction is not admissible.

#### *A. Material scope*

It is implied that the communication itself shall be of confidential or secret nature. The document wouldn't lose its confidential nature through extensive copying and distribution but if the documents concerned are in the lawful possession of third parties it cannot be considered as secret.<sup>37</sup>

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<sup>30</sup> Golder v United Kingdom, Appl. No. 4451/70, Judgment of 21 Feb. 1975

<sup>31</sup> Andreangeli, The protection of legal professional privilege, (2005) CompLRev 31, p. 33

<sup>32</sup> Nikula v Finland, Appl. No. 31611/96, Judgment of 21 March 2002

<sup>33</sup> Andreangeli, op. cit, p. 34

<sup>34</sup> John Murray v The United Kingdom, Appl. No. 18731/91, Judgment of 8 Feb. 1996

<sup>35</sup> Fournier, Legal professional privilege in competition proceedings before the European Commission: beyond the cursory glance, In: International Antitrust Law & Policy – Fordham Corporate Law, 2004, Editor: Barry Hawk, p. 36

<sup>36</sup> AM & S v Commission, 155/79, 18 May 1982, (1982) ECR 1575, para 2

<sup>37</sup> Giannakopoulos, Safeguarding companies rights in competition and anti-dumping/anti-subsidies proceedings, (The Hague – London – New York: Kluwer Law International, 2004), p. 80

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As to the nature and possession of the documents protected it should be noted that Regulation 1/03 extended the powers of inspection of the Commission to non-business premises. Although the privilege obviously only protects business documents.

The material scope was first expanded in the Hilti case<sup>38</sup>, where the CFI stated that documents reproducing the legal advice are also covered by the privilege. It was in the Akzo Nobel case<sup>39</sup> where the CFI summarized, which documents are protected.

To the drafting of the documents concerned we have to note that because the basis of the privilege is the rights of the defence only documents drafted after the initiation of the investigation are unconditionally protected. Earlier documents are protected if they are in relation with the subject matter of the procedure.<sup>40</sup>

The definition extends not only to documents prepared by the lawyer but also to documents prepared by the undertaking for the purposes of seeking external legal counsel even if they are not actually sent to an independent law.<sup>41</sup>

The communication between employees or proxies working under the supervision of an independent lawyer and an undertaking – acting for them – is also protected. Although non-written communication is not covered by the definition of the ECJ, any form of writing (paper or electronic, fax and e-mail) is protected.<sup>42</sup>

#### *B. Personal scope*

In the Opinion of AG Flynn connected the privilege not to the fact that the lawyer is employed or not, but to whether the lawyer is bound by the rules of professional ethics. An underlying argument is that the in-house lawyers could facilitate compliance with the competition rules more effectively, even more since Regulation 1/03 and the new self-assessment system.<sup>43</sup>

The Community law privilege however does not extend to the protection of communications with in-house lawyers, not even if they work for the legal department seeming to be independent. The in-house lawyer of a subsidiary can't be considered independent in relation to the parent undertaking. In the Akzo Nobel case the President of the CFI in its order<sup>44</sup> mentioned that lawyers whose independence is guaranteed by strict professional rules can be considered independent even when employed. Though in the judgment later on the issue whether communication between an in-house lawyer of one member of the cartel can be considered as independent in relation to another member of the cartel was not addressed by the CFI, assuming that it is not. In light of the definition of an independent lawyer used by the CFI it is even questionable whether a lawyer working on a permanent basis for an undertaking although being independent can be considered to be independent.

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<sup>38</sup> Hilti v Commission, T-30/89, 12 Dec. 1991, (1991) ECR II-1439, para 14

<sup>39</sup> Akzo Nobel Chemicals and Akcros Chemicals v Commission, T-125, 253/03, 17 Sept. 2007, (2007) ECR II-3523

<sup>40</sup> Ibid, para 117

<sup>41</sup> Ibid, para 123

<sup>42</sup> Giannakopoulos, op. cit, p. 90

<sup>43</sup> Andreangeli, op. cit, p. 39

<sup>44</sup> Akzo Nobel Chemicals and Akcros Chemicals v Commission, T-125, 253/03, Order of 30 Oct. 2003, (2003) ECR II-4771, para 122

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The exclusion of in-house lawyers in the ECJ's concept of legal privilege can be explained by their position. The in-house lawyers are less likely to prepare the defence of the undertaking during the procedure, they are working under the direction of the undertaking and the in-house lawyer's position unlike the independent lawyer's is not regulated with more or less common rules in all Member States thus changing the perception of responsibility.<sup>45</sup>

#### *C. Procedure*

The Commission is not obliged to observe the privilege *ex officio*, only if the undertaking itself claims that the document concerned is covered by the privilege is the Commission barred from examining the document. In case the Commission rejects the claim without reason, the undertaking can appeal for the annulment under Article 230 of the EC Treaty if there is a formal decision.

If the nature of the document is disputed the CFI is entitled to solve the issue. The undertaking has to show that the document fulfils the conditions of protection. First if the undertaking claims that the document concerned contains privileged information, the officials of the Commission have to assess whether it is so from the heading, the addressee and the addresser, the subject line or the title of the document. If the nature of the document is still disputed the officials of the Commission are still not entitled to read the document. First the Commission has to require the undertaking with an order to produce either evidence supporting the claim that the document concerned is protected or a version of the document not containing protected information. The document itself shall be maintained in a sealed envelope so it is not possible for the Commission to read it but the undertaking cannot destroy or alter it either. Only an employee of the undertaking with the power to decide on this issue or a lawyer is entitled to claim protection. If there is no such person present, the document shall be preserved in a sealed envelope.<sup>46</sup>

The main issue still remains, the differences between the national rules and the Community law concept of the privilege combined with the exchange of evidence through the ECN can amount to stripping the undertakings from an essential fair trial right.

### **3.2. Right to remain silent**

The ECJ addressed the question of right to remain silent in the Orkem case<sup>47</sup>, where undertakings claimed that being a common principle of the Member States it is a part of Community law and should apply to the proceedings of the Commission. The ECJ added to this that the Member States sustain the prohibition of self-incrimination only in criminal proceedings and only for natural persons, not for undertakings in administrative competition proceedings.<sup>48</sup> Thus in EC law the right to remain silent is not an absolute right because this would go beyond what is necessary to facilitate the rights of the defence and would hinder the Commission activities in the field of competition law enforcement. This seems to resemble the argument of AG Warner in his opinion to the AM&S case, stating

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<sup>45</sup> Fournier, op. cit, pp. 45-47

<sup>46</sup> Giannakopoulos, op. cit, p. 93

<sup>47</sup> Orkem v Commission, 374/87, 18 Oct. 1989, (1989) ECR 3283

<sup>48</sup> Ibid, para 29

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that the prohibition of self-incrimination was omitted from Regulation 17 exactly because it would have stripped the Commissions power to request information from its meaning and objectives or at least would render it ineffective.<sup>49</sup>

According to the Orkem rules established by the ECJ, only answers can be refused which would constitute a confession on committing the infringement. The undertakings cannot refuse the answer to questions of fact and the handing over of documents, since the undertakings have the opportunity to dispute the assessment of the Commission of that answer or the misinterpretation given to the document.<sup>50</sup>

The CFI also stated in the Mannesmann case<sup>51</sup> that the officials of the Commission can ask questions concerning facts with the exception that the answer to the question of fact would constitute a self-incriminatory confession, since an answer to a fact question with respect to other evidence can amount to self-incrimination.

Just like with the scope of inspections, the Commission is required to avoid fishing expeditions. Too general or wide questions and the situation where the undertaking is compelled to qualify specific facts would make it impossible for the undertakings to make their view on the facts known thus defend themselves against charges in the following formal administrative proceedings.<sup>52</sup>

The question of self-incrimination got more complex with the introduction of appealing leniency programmes, since in that case the undertakings produce evidence voluntarily. In the graphite electrode case<sup>53</sup> the undertaking concerned argued that it handed over incriminating documents for leniency, while a compelling order of the Commission to the same document was in effect. The ECJ – based on its PVC rulings – held that this act would not fall under the Orkem rules.

In the PVC case<sup>54</sup> the CFI stated that the prohibition of self-incrimination does not preclude the use of incriminating documents by the Commission emanating from the undertaking, since this would make the task of the Commission to enforce competition law impossible.<sup>55</sup>

The ECJ in the same case draw a line between oral answers and the handing over of documents, latter not covered by the right to remain silent, especially in the absence of a compelling order from the Commission to do so.<sup>56</sup> The ECJ based this on the judgment of the ECHR in the Saunders case<sup>57</sup>, establishing the right to remain silent as a right to respect the defendant's will, thus not covering the evidence existing independently from the defendant's will. The ECJ also excluded the notion to invoke Article 6 of the Convention

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<sup>49</sup> Riley, as note 14 above, p. 268

<sup>50</sup> Soyez, Das EuGH-Urteil SGL Carbon – eine Niederlage für die Verteidigungsrechte im EG-Kartellbußgeldverfahren, (2006) EWS 389, p. 390

<sup>51</sup> Mannesmannröhren-Werke v Commission, T-112/98, 2 Feb. 2001, (2001) ECR II-729, para 71

<sup>52</sup> Giannakopoulos, op. cit. p. 101

<sup>53</sup> Commission v SGL Carbon AG, C-301/04 P, 29 June 2006, (2006) ECR I-5915

<sup>54</sup> LVM v Commission, T-305-307, 313-316, 318, 325, 328-329, 335/94, 20 April 1999, (1999) ECR II-931, para 447

<sup>55</sup> Schermers and Waelbroeck, op. cit. p. 62

<sup>56</sup> Limburgse Vinyl Maatschappij and others v Commission, C-238, 244-245, 250, 252, 254/99 P, 15 Oct. 2002, (2002) ECR I-8375, para 275

<sup>57</sup> Saunders v The United Kingdom, Appl. No. 19187/91, Judgment of 17. Dec. 1996

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because the prohibition of self-incrimination in competition proceedings would not form a part of it according to the case law of the ECHR.<sup>58</sup>

The latter notion was received with heavy criticism since the ECJ omitted to consider the judgments of the ECHR in the Funke<sup>59</sup> and Murray cases. In the former, the ECHR stated that the wording of the Convention on criminal matters should be interpreted in an extensive way covering competition procedures as well. In the latter the ECHR clearly established the right to remain silent as an element of the right to a fair trial in criminal matters. The ECHR also ruled that right to remain silent is an element of the guarantees under Article 6 of the Convention. Since the two main arguments of the ECJ in the Orkem case were that the competition procedure is not a criminal matter and the ECHR does not have any case law on self-incrimination anyhow, these judgments adopted prior to the other cases of the ECJ cited on self-incrimination issues, should have made the use of the Orkem rules obsolete.<sup>60</sup>

In the Saunders case the ECHR even went further and ruled that in a criminal procedure any testimony obtained under compulsion can run against the right not to incriminate oneself not just the direct admission. The CFI's judgment in the Mannesmann case already reflects this interpretation.<sup>61</sup>

Thus the prohibition of self-incrimination should apply to all active incriminating cooperation, including the handing over of incriminating documents, the situation being different if the Commission adopts a compelling decision on the handing over of the documents.<sup>62</sup>

#### **4. Protection of premises**

The ECJ considered in the National Panasonic case<sup>63</sup> whether the protection of home and correspondence provided for in Article 8 of the Convention is applicable to the investigative procedure of the Commission. The ECJ concluded that the Commission is entitled to conduct an inspection on the business premises of legal entities and that this power of investigation is not in conflict with the Convention since according to Article 8 (2) of the Convention the authorities can interfere with the rights expressed in Article 8 (1) if there is a legal basis for the interference and it is necessary in a democratic society for the economic welfare which the ECJ considered to be the case. The powers of investigation were conferred upon the Commission by Regulation 1/03 (and its predecessor Regulation 17) and the interference is necessary for the legitimate aim of undistorted competition.

The ECJ omitted to discuss the issue whether Article 8 of the Convention would apply to legal entities. Apart from the guarantees of the Convention the ECJ acknowledged that the protection of one's home is a common constitutional tradition thus forming a part of Community law with respect to the fact that this protection is different in its nature and width in different Member States especially on the issue whether it is applicable to business

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<sup>58</sup> Orkem, para 30

<sup>59</sup> Funke v. France, Appl. No. 10828/84, Judgment of 25 Feb. 1993

<sup>60</sup> Van Overbeek, op. cit, p. 129

<sup>61</sup> Waelbroeck, *Twelve feet all dangling down and six necks exceeding long: The EU network of competition authorities and the European Convention on Human Rights*, (2002) EUI Workshop, p. 11

<sup>62</sup> Soyez, op. cit, pp. 391-393

<sup>63</sup> National Panasonic v Commission, 136/79, 26 June 1980, (1980) ECR 2033, para 11

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premises. To the latter issue the ECJ noted in the Hoechst case<sup>64</sup> that the rights in the Convention serve ones personal freedom and not business objectives.<sup>65</sup>

The ECHR addressed the same question in the Niemietz case<sup>66</sup> establishing the definitions of private life and home according to the Convention. According to the ECHR the extensive interpretation of private life and home, including professional or business activities and premises would be in line with the aims of Article 8 of the Convention, protecting individuals against the intervention of authorities into these areas. Nonetheless even according to the ECHR the signatories still retain the possibility emanating from Article 8 (2) enabling a wider intervention from the side of the authorities concerning professional or business activities and premises compared to intervention concerning private activities and premises. In the specific case the intervention was disproportionate because the order which was the basis of the inspection had a general wording and was not accompanied by such guarantees as impartial observers present at the inspection. Since the officials of the NCA's are not considered to be impartial observers this could also apply to the orders of the Commission.<sup>67</sup>

In the Colas case<sup>68</sup> however the ECHR found that inspections carried out without prior judicial warrant, where the authority in question has a wide discretion as to the duration and scope of the inspection are disproportionate. The Commission enjoys the same discretion with the safeguards not being sufficient. As mentioned earlier there are no impartial observers present, the possible review of the order on inspection by the CFI is a posteriori, hardly an effective remedy for the undertakings with the harm already done and if the officials carrying out the inspection with or on the behalf of the Commission ask for a judicial warrant the national courts are confined to decide whether the order is authentic, not arbitrary or excessive without examining the legality or having access to the Commission's file.<sup>69</sup>

## 5. Ne bis in idem

The introduction of decentralised enforcement of the EC competition rules and the ECN caused two main problems. First, since the Convention applies only to the Member States and there are differences between the Member States in the level of protection, the case allocation can lead to different treatment, even to a lower level of protection. Not just the bringing of proceedings is of importance, but the collection of evidence. Second, there is a possibility of double jeopardy in the absence of a binding rule (apart from the rules on the investigation by the Commission).<sup>70</sup>

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<sup>64</sup> Hoechst v Commission, 46/87, 227/88, 21 Sept 1989, (1989) ECR 2859

<sup>65</sup> Riley, as note 12 above, p. 65

<sup>66</sup> Niemietz v. Germany, Appl. No. 13710/88, Judgment of 16 Dec. 1992

<sup>67</sup> Giannakopoulos, op. cit. p. 100

<sup>68</sup> Ste Colas Est v France, Appl. No. 37971/97, Judgment of 16 April 2002

<sup>69</sup> Rizza and Temple Lang, Case Comment, Ste Colas Est v France (37971/97) (Unreported, April 16, 2002) (ECHR), (2002) ECLR 413, p. 417

<sup>70</sup> Wils, The EU network of competition authorities, the European Convention on Human Rights and the Charter of Fundamental Rights of the EU, (2002) EUI Workshop, p. 15

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The case allocation is governed by the Commission Notice on cooperation within the Network of Competition Authorities<sup>71</sup>, apart from Article 16 of Regulation 1/03 excluding proceedings if the Commission itself investigates, there is no binding rule on the issue. The Notice gives only indicators how the NCA's shall cooperate with the only clear rule that the Commission shall be in charge if more than 3 Member States are concerned.<sup>72</sup>

The collection of evidence is ruled by national laws reflecting different levels of protection of the undertakings' rights. Thus it is possible to gather evidence in one jurisdiction, transfer and use them in another jurisdiction where its collection is prohibited.<sup>73</sup>

*Ne bis in idem* is a general principle of Community law thus applicable to competition proceedings without regulation in place being necessary. There is a possibility that undertakings receive fines for the same conduct under national competition law and EC competition law. The ECJ acknowledged this possibility in the *Walt Wilhelm* case<sup>74</sup> although not all conditions of the same offence (same person, same conduct, same protected interests) are satisfied in the case of parallel application of national and EC competition law, since the former only protects undistorted competition whereas the latter also protects the single market. Thus parallel proceedings are not prohibited but the NCAs have to take into account the fine imposed by other NCA's and the Commission, hardly satisfying the *ne bis in idem* principle.<sup>75</sup>

### Conclusion

According to the arguments presented the fines and the attitude towards cartels it gives a criminal taint supported by the case-law of the ECHR considering the competition procedure to be of criminal in nature. This has implications towards the procedure when it comes to rights of the defence. The problematic issues presented in the paper suggest that the investigative powers of the Commission and the decision-making procedure do not reconcile the criminal nature implied.

The standards would require an independent and impartial tribunal deciding on the matter, dividing the powers of investigation and decision-making, the former staying in the competence of the Commission, the latter conferred to an adjudicator fulfilling the requirements.

This could be a judicial panel like the Civil Service Tribunal conceived under Article 225a of the EC Treaty. The solution suggested is also supported by the fact that several other problems (deciding on whether a disputed document is covered by legal privilege, judicial warrants for surprise inspections, involvement of a court in the procedure would also change the issue on the right to remain silent) can also be solved through a judicial body specialised to competition cases.<sup>76</sup>

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<sup>71</sup> OJ C 101, 27 April 2004, p. 43-53

<sup>72</sup> Waelbroeck, op. cit, p. 3

<sup>73</sup> Wils, op. cit, p. 24

<sup>74</sup> *Walt Wilhelm and others v Bundeskartellamt*, 14/68, 13 Feb. 1969, (1969) ECR 1, para 3

<sup>75</sup> Wils, op. cit, pp. 16-17

<sup>76</sup> The political issues bound to the actual implementation of this solution far exceed the possibilities of this paper.

The disadvantage of this solution is evidently the conflict with the decentralised system of enforcement. Although it would be possible to go before a national court if an NCA is in charge of the investigation.

The only issue probably not resolved through a judicial panel would be the *ne bis in idem* question, which would make two changes necessary. First the harmonised or in other way uniform procedural rules<sup>77</sup> (the application of Regulation 1/03 by the NCAs) when EC competition rules are enforced, second a more stringent clear-cut binding rule on case allocation to avoid parallel procedures in every case.

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<sup>77</sup> The question of procedural autonomy of the Member states also exceed the space given. However the ECJ in the Otto v Postbank case [C-60/92, (1993) ECR I-5683] only excluded this opportunity where the proceedings only consider private relations between individuals.

## GOOD FAITH AND LEGAL UNIFICATION

IMRE MÁTYÁS

Assistant Professor, Department of European Law and Private International Law  
University of Miskolc  
dr.matyas@freemail.hu

### 1. Introduction

One of the main questions of the unification of European Contract Law is the problem of Good Faith. In the Continental legal systems it is quite obvious handling the principle of good faith as the most important element of the contractual relations, the legal order and the structure of the law. On contrary, this is not so evident on the other side of the channel. In England and the so called Common Law regimes the good faith is some kind of strange idol, which is not to be accepted and not to be recognized as one of the most necessary element of the legal system. That kind of antagonism has led to a number of serious debates regarding the unification process and the formation of the different point of views about the future shape and outlines of the European private law including the unified contract law. The process of unification of laws in Europe has been carried out for decades and has not been finished yet.

For a long time the European Institutions – mostly the Commission and the Council – only made a piecemeal harmonization of the contract laws of the European Union. The situation, however, changed after the meeting of the European Council in Tampere in 1999, namely, the Commission started to act.<sup>1</sup>

In the recent years an enormous activity has been carried out on the field of European contract law. Since 2001 not only the official organs of the European Union but also private initiatives have shown particular interest in the topic, namely how and by what means the fragmented European legal regulations can be harmonized, why it shall be actually done and how the desired outcome can be reached.

The current and dominant point of view of the European organs is behind an optional, harmonizing instrument of soft law character, which can be accepted by all the Member States (that means the politics) and the representatives of the economic sectors, respectively. This is a frequently disputed concept since the major part of the science is not convinced of the usefulness of a mere optional instrument.<sup>2</sup>

The debates will last long; consequently, no compromise might be reached in the near future. The main aspects of the present paper are the meaning of good faith, its application in the different legal systems and its possible regulation by the expected compilations.

### 2. The Concept of Good Faith

The concept of good faith, rooted in Greek and Roman legal tradition, has developed into a fundamental principle of contract law and the whole legal system, not only in

<sup>1</sup> Ole Lando: The Structure and Legal Values of the Common Frame of Reference in: European Review of Contract Law (ERCL) 2007, p. 245.

<sup>2</sup> See i.e. Lando, von Bar, Kötz, Basedow, Drobina etc...

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Continental European legal systems, especially in Germany, where the doctrine of Treu und Glauben has been widely accepted and applied, but also, although in a much narrower sense, in the Anglo-American world and in the legal thinking of the European and international law.<sup>3</sup>

Most European Civil codes contain a general good faith provision<sup>4</sup> of principle character. This regulation is regularly applied to secure the legal relations between the actors in the field of law and to create the legal security among them. In addition, in some codes there can be found specific rules, in which reference is also made to the concept of good faith, what is more, many specific rules in the codes are to be understood as special applications of good faith. It is, consequently, clear that the concept of good faith has extraordinary importance within the European legal systems.

Private law in Europe is in the process of reacquiring a genuinely European character. What does it mean exactly? The Council of the European Communities enacts directives deeply affecting core areas of the national legal systems of the Member States.<sup>5</sup> The European Court of Justice develops rules and concepts, mostly in accordance with securing the proper functioning of the Single European Market, transcending national legal borders and constituting an embryonic general part of the European contract and liability law. Thus, the new *Ius Commune* seems to be realized with the help of several legal initiatives that, from the early eighties, focus on one single achievement: the unification of European private law. The reasons for this aim have already been enumerated, it is not necessary to take them again one after the other.

It is much more interesting to concentrate on the meaning of the unified law, if there is any. How can the principles be unified? Are there any fundamental differences between the basic rules of different legal systems? If there are, how can they be bridged? Is it really a serious obstacle in the way of the unification?

Good faith<sup>6</sup> is not usually understood as a simple legal rule of a certain conduct, its meaning is much more complex. When the legal systems of the western world are examined, distinction can be made between the ‘common law’ and the ‘civil law’ countries. This distinction is of great importance regarding the handling of the phenomenon good faith. Most legal systems have a meaningful distinction between two variants of good faith. These are subjective good faith on one hand and objective good faith on the other. The first one is generally defined as a subjective state of mind. That means not knowing or having to know of a certain fact or event.<sup>7</sup> It is of great importance mostly in property law. The second one, the objective good faith is the concept that the general good faith clauses

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<sup>3</sup> Marietta Auer: Good faith: A semiotic Approach in: European Review of Private Law 2002 p. 279

<sup>4</sup> Martijn W. Hesselink: The new European Private Law 195. o. For the sources of the single regulations see Art. 1134, Section 3 French Civil Code, § 242 German Civil Code, Art 2 Swiss Civil Code, arts. 1175 and 1375 Italian Civil Code, Art 288. Greek Civil Code, Art 762, Section 2, Portuguese Civil Code, arts. 6:2 and 6:248 Dutch Civil Code, 4. § (1) Hungarian Civil Code, and PECL see below.

<sup>5</sup> Simon Whitaker – Reinhard Zimmermann (eds.): Good Faith in European Contract Law, Cambridge University Press, 2000 p. 8.

<sup>6</sup> Treu und Glauben, correttezza, redelijkheid en billijkheid, bonne foi

<sup>7</sup> In classical way it is called: bona fide acquisition.

usually refer to.<sup>8</sup> It is generally regarded as a norm for the conduct of the contracting parties: ‘acting in accordance with or contrary to good faith’.

The basic work of the comparative legal studies, Zweigert – Kötz: *Einführung in die Rechtsvergleichung* does not have a chapter on Good Faith. The same is true in connection with Kötz’s *Europäisches Vertragsrecht*, although both books were written by continental scientists. On the contrary, the so called Lando Commission<sup>9</sup> emphasized the meaning of good faith in its enormous, three band restatement.<sup>10</sup> As far as the general obligations are concerned, it is underlined that parties should act in accordance with good faith and fair dealing and this duty shall not be excluded or limited. This rule of continental origin clearly shows that a higher level of cooperation is required when one decides to get in legal relations. Although the concept of good faith is not uncontroversial even on the Continent,<sup>11</sup> the difference is much bigger related to the systems of Common Law countries, where the implication of good faith is still a highly controversial topic, and is far from settled.

### 3. The Common Law Problem

The common law countries (England, Wales, Ireland, most of the USA, Australia and approximately 50 former dominions of Great Britain), roughly speaking, rely on judge made law and precedents that means earlier decisions of law court in comparable cases.<sup>12</sup>

<sup>8</sup> Hesselink: The new European Private law p. 195

<sup>9</sup> CECL – Commission on European Contract Law

<sup>10</sup> Ole Lando – Hugh Beale (eds.): Principles of European Contract Law Part I and II Kluwer Law International, 2000

Ole Lando - Eric Clive – Andre Prüm – Reinhard Zimmermann (eds.): Principles of European Contract Law Part III. Kluwer Law International 2002

Some examples for the role of good faith and fair dealing in the PECL:

*Article 1:102: Freedom of contract*  
(1) Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles.

*Article 1:106 (ex art. 1.104): Interpretation and Supplementation*

(1) These Principles should be interpreted and developed in accordance with their purposes. In particular, regard should be had to the need to promote good faith and fair dealing, certainty in contractual relationships and uniformity of application.

*Section 2: General Obligations*

*Article 1:201 (ex art. 1.106): Good Faith and Fair Dealing*

(1) Each party must act in accordance with good faith and fair dealing.

(2) The parties may not exclude or limit this duty.

*Article 1:202 (ex art. 1.107): Duty to Co-operate*

Each party owes to the other a duty to co-operate in order to give full effect to the contract.

*Article 1:305 (ex art. 1.109): Imputed Knowledge and Intention*

If any person who with a party's assent was involved in making a contract, or who was entrusted with performance by a party or performed with its assent:

(a) knew or foresaw a fact, or ought to have known or foreseen it; or

(b) acted intentionally or with gross negligence, or not in accordance with good faith and fair dealing, this knowledge, foresight or behaviour is imputed to the party itself.

<sup>11</sup> see e.g. France, where no distinction between subjective and objective good faith is made.

<sup>12</sup> Peter van Schilfgaarde: System, good faith and equity in the New Dutch Civil Code in: European Review of Private Law 1997, p. 2.

Stare decisis, adherence to earlier decisions has always been an important rule in common law countries. The common law countries, nevertheless, also have statutes, enacted by parliament or other law making bodies. These are, however, regarded with certain distrust by the real common law specialists. This kind of distrust may be stronger if the statutory rule has a foreign (civil law) or even EC origin.<sup>13</sup> The same can be observed in connection with the institution of good faith.

In the Common Law tradition there is hardly any regulation regarding the obligations of good faith or similar institutions. It is interesting to observe how the concept of good faith is used in England. Many English lawyers speak ‘acting in bad faith’ when referring to the conduct of contracting parties, instead of using the expressions of Continental lawyers ‘acting contrary to good faith’. Thus, a fundamental antagonism exists between the two main legal families, which is difficult to solve.

However, in Common Law systems there is a special application of good faith, namely the implied duty of good faith. This is true both for English, American and Australian law, and can be deducted from a famous case *Renard Constructions (ME) Pty Ltd v Minister for Public Works*.<sup>14</sup> In the case, after an arbitration process, the Court of New South Wales, Australia found that the previous decision should be set aside because several new techniques had been developed in order to settle contractual relationships in a reasonable manner. His Honour Priestley JA went into great depth on the development of an implied duty of good faith in performance of contracts under Australian law and found that an implied duty of good faith can be seen in the contract and this is to be considered.<sup>15</sup>

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<sup>13</sup> Peter van Schilfgaarde: System, good faith and equity in the New Dutch Civil Code in: European Review of Private Law 1997, p. 2.

<sup>14</sup> *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234  
Court: New South Wales Court of Appeal, Judges: Priestley JA, Meagher JA and Handley JA, Date decided: 12 March 1992

<sup>15</sup> His Honour considered that:

*„Although this implication has not yet been accepted to the same extent in Australia as part of judge-made Australian contract law, there are many indications that the time may be fast approaching when the idea, long recognised as implicit in many of the orthodox techniques of solving contractual disputes, will gain explicit recognition in the same way as it has in Europe and in the United States.“* (263-4.)

His Honour noted the development of the US common law to include a general duty of good faith,(265.) concluding:

*„The importance of these developments in the United States for Australian purposes is the cumulative effect of the following: (i) they grew out of the same common law background as that of Australian law; (ii) under the stimulus first of academic systematisation of the accumulation of good faith cases and second the interaction of that with the Uniform Commercial Code, general contract law came quickly to recognise (or reinstate) the pervasive principle of the good faith obligation; (iii) despite the difficulties in precise statement of the obligation its use seems to have been generally accepted in a highly commercial country – throughout the period of the modern revival of the obligation the business of America has largely been business – and (iv) there has been little if anything to indicate that recognition of the obligation has caused any significant difficulty in the operation of contract law in the United States. When the broad similarity of economic and social conditions in Australia and the United States is taken into account the foregoing matters all seem to me to argue strongly for recognition in Australia of the obligation similar to that in the United States.“* (267-8)

Priestley JA also considered that the increased legislative interference with freedom to contract had the result:

As it can be seen from the explanation of the Court, two main question have arisen in connection with good faith in the Common Law system: the one is, what are the social requirements regarding both the application of law and the contractual relationships. The latter, however, focuses on the freedom of contract and tries to clear: to what extent the courts are entitled to interfere in the contractual bargains of parties, by imposing terms that the courts think necessary in accordance with their legal thinking and the social expectations. These are the real concerns that Common Law lawyers are afraid of. The freedom of contract has always been an untouchable idol for Anglo-Saxon lawyers that can only be restricted after due consideration.

#### 4. Is there a Chance for Unification?

After this little excursion let me return to the legal unification issue flagged in the Introduction. If I may say so, I think that there is much to be said in this context.

As it was said and showed above, the Principles of European Contract Law contain general provisions in connection with god faith. The same is true regarding the UNIDROIT Principles of International Commercial Contracts, where “*in exercising his rights and performing his duties each party must act in accordance with good faith and fair dealing.*”<sup>16</sup> These two fundamental compilations of legal unification show that it is hardly possible to create widely accepted unified law without making these questions of essential importance clear.<sup>17</sup> One of the most important instruments on legal unification is, doubtless, the Vienna Convention (CISG)<sup>18</sup> the uniform international sales law of countries that account nowadays for three-quarters of all world trade. The CISG has 74 participating countries at present emphasizing the world wide uniformity and applicability of the Convention. For the CISG to be universally accepted, uniformity is essential and good faith is applied to secure that uniformity. The Convention formulates the principle of good faith that was common practice in *Lex Mercatoria* and recognized in most other legal systems.<sup>19</sup> Whether or not effective international standards of good faith can actually be determined must be left to the studies of comparative law. The principle has affected a large number of provisions in CISG...the function of such a general clause can probably be fulfilled by the rule that the parties must conduct themselves according to the standard of the ‘reasonable person’ which is expressly described in a number of provisions for example in Article 25

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“...that people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations.” (268.)

<sup>16</sup> Art. 1.7 Principles of International Commercial Contracts.

<sup>17</sup> The problem of good faith in contractual relations seems to be global as an African initiative that aims at the legal unification also stresses out the meaning of the question. See Upholding of the principles of good faith and fair dealing by Kalongo Mbikayi <http://www.unidroit.org/english/legalcooperation/abstracts/mbikayi.pdf> 04/11/2009

<sup>18</sup> United Nations Convention on Contracts for the International Sale

<sup>19</sup> <http://209.85.129.132/search?q=cache:7ECvZrnmu7sJ:www.business.vu.edu.au/cisg/student.doc+Renard+Constructions+%28ME%29+Pty+Ltd+v+Minister+for+Public+Works&cd=9&hl=hu&ct=clnk&gl=de> 04/11/ 2009

for fundamental breach of contract and, therefore, according to Article 7(2), must be regarded as a general principle of the Convention'.<sup>20</sup>

Plenty of examples emphasize the extraordinary meaning of good faith and, moreover, it is also included by the most important regulations of legal unifying character.

The main problem that was underlined above, as well, can be defined whether good faith constitutes or represents part of the common core of European contract law,<sup>21</sup> or it is a simple and rather isolated notion to be found in one or several legal systems and artificially imposed on others.<sup>22</sup> As it was emphasized above, the common law lawyers, including colleagues also from the United States and Australia, might be inclined to agree with the latter proposition. Inconsequently, the situation in Scotland is even more difficult: 'Scots law based in its system of consensual contracts on the *ius commune* but... it has not accepted the civilian doctrine that the exercise of contractual rights is subject to the principles of good faith. The better view is that like English law it requires strict adherence to contracts.'<sup>23</sup>

The situation seems to be, nevertheless, quite ambiguous as no proper solutions can be obtained for the enumerated questions. In Europe, thus, there are legal systems, where good faith is accepted and required when entering into contractual relations, in other countries good faith is not really necessary and even territories with mixed legal systems can not create a generally applicable method to distinguish between the two forms. The roots of this uncertainty may origin from the dogmatic variety regarding this legal institution. Hence, the theoretical status of good faith can seem quite unclear to an outsider as the terminology used by legal authors is far from unitary.<sup>24</sup> As I also used the different expressions, good faith is usually described as a norm, a (very important) principle, a rule, a maxim, a duty, a rule or standard for conduct, a source of unwritten law, a general clause etc. This enumeration shows why it is actually so difficult to find the lowest common denominator regarding this question. And this goes for only the problem of terminology which has (hardly) anything to do with the legal unification and the relating concerns. Good faith is a special phenomenon, something else than other legal institutions or solutions. It is generally agreed that a general good faith clause does not contain a rule at least, not one like most other rules. It is, therefore, usually said to be an open norm, a norm the content of which cannot be established in an abstract way but which depends on the circumstances of the case in which it must be applied, and which must be established through concretization.<sup>25</sup> Consequently, good faith is something abstract that has to be concretized in order to be applied. Needles to say, at this point, that this kind of intricacy does not serve the uniform application of good faith. The above mentioned concretization is the task of the court where

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<sup>20</sup> Schlechtriem P, *Uniform Sales Law-The UN-Convention on Contracts for the International Sale of Goods* (1986) CISG Database, Pace, <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem.html> 04/11/2009

<sup>21</sup> See in this context: Mario Bussani - Ugo Mattei (eds.): *The Common Core of European Private Law* Kluwer Law International, 2002

<sup>22</sup> Simon Whitaker – Reinhard Zimmermann (eds.): *Good Faith in European Contract Law*, Cambridge University Press, 2000 p. 14.

<sup>23</sup> Niall Whitty: A Scottish celebration of the European Legal Tradition in: Carey Miller/Zimmermann (n.15) 45.

<sup>24</sup> Martijn W. Hesselink: *The New European Private Law* p. 197.

<sup>25</sup> Martijn W. Hesselink: *The New European Private Law* p. 198.

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the judges have to determine the requirements of good faith in such an objective way as possible. These may be the features because of which common law lawyers are not really fond of the institution of good faith. The unified European contract law, however, has to be created in the long run and, although the topic is hotly debated, the author has got no doubts about the final outcome of the dispute.

### **5. Conclusions**

The solution can hide in somewhat closer agreements as offered by Lando and others. The principle of good faith and fair dealing also covers situations where a party without any good reason stands on ceremony.<sup>26</sup> What is more, the principle covers a party's dishonest behavior, too. In the work of the CECL where, consequently, the common law traditions are also appreciated a fine balance has been established in order to create such a legal compilation that can be widely used and applied in Europe, regardless, if the origin of the contracting parties are different or not, if they are representatives of different legal systems or not. The main point of the unification is exactly the shaping of such a legal environment, which is favorable to conclude trans-border transactions and to reduce transaction costs where the different legal solutions are not to be intended as barriers and obstacles for international business.

In such a new Europe the fundamental problem is not the exact meaning of good faith but the lack of intention of the cooperation between the main legal families. This cooperation could make it possible to avoid legal traps and make scholars to be familiar with the legal system of other countries. If good faith could be principally included in both the Principles of European Contract Law and the UNIDROIT Principles of International Commercial Contracts, not to mention at this point the massive regulation of CISG there is hope to conclude an agreement at European level with help of which the regulation of good faith can also be harmonized. As it could be seen in the Australian example, the law is continually changing just as the circumstances are. It shows that law is an ordinary, though sophisticated human product.<sup>27</sup> The problem is one of the most debated matters and plenty of articles will be published until its settlement. In my opinion it is the task of the lawyers – scholars, attorneys and judges – to contribute to this process and to find the answers of the questions. Hopefully, this is going to happen in the near future.

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<sup>26</sup> Ole Lando – Hugh Beale (eds.): *Principles of European Contract Law Part I and II* Kluwer Law International, 2000 p. 114. As an example, Lando shows the following illustration: *In its offer to B, A specifies that in order for B's acceptance to be effective B must send it directly to A's business headquarters where it must be received within 8 days. An employee of B overlooks this statement and sends the acceptance to A's local agent who immediately transmits it to A's headquarters where it is received 4 days later. A cannot avoid the contract.*

<sup>27</sup> Peter van Schilfgaarde: System, good faith and equity in the New Dutch Civil Code in: *European Review of Private Law* 1997, p. 9



## **SOCIAL INSURANCE RULES IN THE CASE OF POSTING**

ZOLTÁN NAGY – ZOLTÁN VARGA  
 Associate Professor – Assistant Professor  
 Department of Financial Law  
 University of Miskolc  
 jogdrnz@uni-miskolc.hu, civdrvz@uni-miskolc.hu

### **Introduction**

#### *Significant changes to EC Social Security Regulations*

New EC Regulations predicts a number of changes by which the social security contribution position of an internationally mobile worker within the EU will be determined.

The social security contribution position of internationally mobile workers within the 27 countries of the European Union (EU), Iceland, Liechtenstein and Norway (together comprising the European Economic Area (EEA)), and Switzerland is currently determined by EC Regulation 1408/71. In addition, this regulation currently determines the eligibility of such individuals and their families for State benefits entitlement. EC Regulation 1408/71 (and its Implementation Regulation 574/72) is to be replaced by EC Regulation 883/2004 (and its Implementation Regulation) with respect of all internationally mobile workers within the EU who fall within the personal scope of the new Regulation.

It is expected that Regulation 883/2004 should enter into force on 1<sup>st</sup> May, 2010. However, Regulation 1408/71 will initially continue to apply to the EEA countries of Iceland, Liechtenstein and Norway as well as to Switzerland until the new Regulation is adopted by these countries.

The main purpose of the new Regulation is to modernize, simplify and clarify existing rules. However, Regulation 883/2004 makes a number of changes to the way an internationally mobile worker's social security contribution position within the EU will be determined.

There are new requirements for remaining insured in the home country for social security purposes, notably when an individual works simultaneously in two or more Member States.

There is also a new electronic administrative process being introduced, which will ultimately replace the existing system of E101 certificates (certificates of coverage).

#### *Technical Changes*

The new Regulations, as currently drafted, do not apply to non-EEA (third country) nationals working cross-border within the EU. In the interim, the current rules under Regulations 1408/71 and 859/2003 will continue to apply to this population.

Individuals posted to another EU Member State for a period not exceeding 24 months shall continue to remain insured in their home social security scheme provided they do not replace another worker. Currently this only applies for a period of up to 12 months.

However, as it is the case currently, it is expected that posted workers may remain insured in their home country social security scheme for up to 5 years (depending on the

practice of the countries involved) under a special exception, provided both the home and host authorities agree.

Multi-State workers are insured in the social security scheme of the Member State in which they are habitually resident under Regulation 1408/71, provided they perform regular employment duties there. The new Regulations introduce a requirement for substantial employment duties in the home country if this social security contribution position is to be maintained. Substantial is defined as being no less than 25 percent of time and/or remuneration, or turnover.

The new Regulations also seek to strengthen the principle of unity of applicable legislation; in other words there should be no exceptions that would allow an individual to be insured in more than one Member State at the same time. In particular, this change may affect individuals who are simultaneously employed in one EU Member State and self-employed in another EU Member State.

For the first time EU Member States will have the power to enforce social security liabilities, debts against individuals and employers in other Member States.

#### *Administrative Changes*

Employees currently engaged in cross-border assignments will continue to be subject to the processes specified under the existing Regulation 1408/71 for a transitional period. Parallel compliance and tracking systems may be required during the transitional phase.

E101 certificates will not be issued under the new Regulations. These will eventually be replaced by an electronic system of “attestations”.

A provisional system of paper attestations will be in place until the electronic system is introduced.

#### *The Bottom Line*

The new Regulations will provide both challenges and opportunities.

Employers with cross-border employee populations should consider:

- how the changes to social security contribution positions will impact assignment structures and how assignments may be designed to benefit from reduced social security liabilities.
- How the changes will impact the current and future assignee populations in terms of contributions and benefits.
- Whether any modifications to employer compliance and tracking procedures are required given old and new regimes will exist in parallel.
- Any tax implications arising from changes to fact patterns that employees may wish to implement as a result of these changes should also be assessed.

#### **Social insurance rules in the case of delegation abroad in detail**

The state insurance systems of the EU countries have shown different rules on the Member State level, which are very important during entering employment abroad. The right of the employees to enter employment and the differing Member States' regulations necessitated the co-ordination of the state insurance regulations, which is materialised by the order 1408/71/ECC. (Order of 574/72/ECC regulates its enforcement.)

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However the Hungarian regulation made a progress on an international law level towards the co-ordination before joining the European Union.

The convention with Germany is a good example for this<sup>1</sup>. The survey of the rules of the agreement is important as they helped the European norms entering the Hungarian law. The law holds together the fields of regulations by the way of general, extraordinary and mixed orders and contains orders for the interpretation and fulfilment of the agreement.

Among the general rules we can find the personal and objective effect and also the orders for the insurance obligations. The extraordinary orders deal with the questions of health and accident insurance and retirement pension, while the mixed orders regulate legal aid, claim validation, and enact about the range of problems in legal debates.

The general rules contain the orders concerning the insurance obligations of the employee<sup>2</sup>. As a main principle the law declares those laws of the contracting state should apply for the insurance obligations of the employee where the employment is carried out. This is so if the employer sits on the territory of the other contracting state.

At the same time the legislator makes some exceptions regarding some persons and creates separate rules for the posted employees, sailors, and for the members and personnel of foreign agencies<sup>3</sup>.

From the point of view of the current essay the main important orders are those concerning the social insurance of the workers in the case of posting abroad. The legislator defines the concept of posting in a regulation. Posting takes place when the employer delegates his employee for labour from one of the contracting state into the other contracting state. For the first 24 months of the employment by posting only the regulations of the insurance obligations of the first contracting state are valid as if the employee were employed on this territory. For example this means that in the case of posting of a Hungarian employee to Germany the Hungarian regulations of social insurance are valid as long as the employment takes place in Hungary.

We can meet the same regulations in the orders of the European Union. The above mentioned social insurance rule settles down the legal relations of the employee within the Community<sup>4</sup>. The order contains general rules and extraordinary regulations about the application of the social safety systems for the physical persons undertaking job within the Community. The regulation declares that for a person employed on the territory of a Member State the law of this state is valid, even if this person has a residence on the territory of another state, either the seat of the enterprise or the individual's residence is in another Member State. We can find extraordinary rules regarding work in the case of posting. The person delegated by an enterprise of one of the Member States to an other Member State with the aim of performing work for this enterprise belongs to the effect of the law of the mentioned state supposing that the period of the job will not last longer then twelve months or this person was not sent to take turns if one's posting is expired.

The regulation permits the prolongation of the posting period once maximum to 12 months. The condition for this is the permission of the competent authorities of the Member

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<sup>1</sup> Act XXX of 2000 on annunciation of agreement signed on 2 May 1998 in Budapest between Hungary and Federal Republic of Germany about social insurance

<sup>2</sup> Act XXX of 2000, Article 6

<sup>3</sup> Act XXX of 2000, Article 7-11

<sup>4</sup> 1408/71/ECC order, Article 13-17

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State. In this case the employee is insured in the Member State by which he was posted and he is free from the payment of incidental expenses in the employing state.

On 1<sup>st</sup> of March 2010 the new 883/2004/EK order will come into effect replacing order of 1408/71/ECC (announced on 29<sup>th</sup> of April 2004). The elementary rules will be not changed but the regulations concerning posting will be altered<sup>5</sup>.

It is an elementary principle that expenses should be paid in the state where the work is done, and it will remain valid. Contrary regulations will apply to posting in the future. On the base of the new regulation it will be obligatory for the posted employee to stay insured in the state of origin during 24 months for which only the permission of the authorities of the state of origin is necessary. There is a possibility to prolong posting with the agreement of the competent authorities. However, the new rules do not contain information regarding the duration of the prolongation of the delegation period.

According to this the rules of the posting country's social insurance apply to employees, i.e. the Hungarian law is applicable in the case of Hungarian employees' posting and the payment of contribution is to make according to domestic rules.

However, it remains a question what constitutes a contribution basis. It happens sometimes that the employee receives salary and the posting fee in Hungary for its work performed in another Member State. The Hungarian regulation raises a number of shortcomings and problems of interpretation of the posting fee in connection with the obligation of payment of contribution.

The first important problem is whether the posting fee is to be considered wages. The Labour Code (Act XXII of 1992) does not define wage and therefore, considering all the circumstances it might be decided that the fee paid for posting constitutes wage. (For instance, if the employee receives benefits from employment for performing work, the income may be considered as wage.)

This legal point of view, however, is not supported fully by the primary rules of law relative to the findings of fact.

The broad concept of Article 79, paragraph 2 in the Act C of 2000 on accounting (hereinafter regarding the Hungarian abbreviation of the Act "Szmt.") defines the costs of labour. According to this, wages and salaries shall include all payments related to the financial year as remuneration paid to employees, workers and members in compliance with the legal regulations; including the amount withdrawn and considered as the personal contribution, the sum paid and accounted during the financial year for work to persons in any form of employment relationship (i.e. premiums, bonuses and extra monthly salaries paid and accounted after the financial year), moreover all constituents, which can be considered as wages according to statistical accounts, regardless of whether or not personal income tax is due on such payments, and whether or not they form basis of social security payments.

This concept might be considered wide. It is necessary to emphasise two important substantive elements regarding the definition.

First, we may talk about the wage costs only, if it is equal to the concept of the earnings according to the statistical settlements conceptual, which is referred by Szmt. as an underlying measure.

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<sup>5</sup> Deloitte Hungary: New Coordination rules in social insurance of European Union, Hír-Adó, issue on 14 July 2009, page 3 ([www.deloitte.com](http://www.deloitte.com))

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Second, the legal definition indicates, that wage costs don't constitute basis for personal income tax or the social security tax by all means. It is possibly a sort of wage-like payment, which does not apply to social security taxes. According to the legal formulation not all income paid with regard to work performance is wage. It does not automatically constitute an obligation to pay social security and other contribution after all income of a work character.

(The statistical rules constitute the underlying rule of Szmt.'s definitions with a general character. The Guide to Labour Statistical Information, which is a communication of the Central Statistical Office (hereinafter regarding the Hungarian abbreviation "KSH"), divides the payments with a personal character onto two categories, i.e. the concept of the earnings and the other working income.

(The explanation of the Labour Code (hereinafter regarding the Hungarian abbreviation of the Act "Mt.") indicates in his commentary to the COMPLEX Legal collection 141-142.§ – that KSH guide added to labour statistical questionnaires may help to identify what earnings means.)

The personal basic wage belongs to the concept of earnings, the definition can be found in Supreme Court's College Opinion. No 83. (in Hungarian MK 83.)

#### Personal basic wage

- a) at the time-worker employees (all performance-related pays, all in case of the application of a hourly wage) the assessed personal hourly rate,
- b) at day's wage employees the assessed daily wage (shift wage),
- c) at the monthly wage employees – if the rule concerning the employment does not take action differently – the assessed monthly wage,
- d) at the disabled miners – for them assessed – so-called disabled miner wage.

Any other kind of wages can not be qualified as a basic wage, except extra wages of basic wage character, unless the agreement of the parties or the rule concerning the employment determine different.

The category of the other working incomes constitutes the other part of the working income. The other working incomes include all the payments paid by the employer voluntarily or according to the regulation in force.

KSH defines the sum as working income paid to Hungarian or non-Hungarian employee employed on the abroad registered seat of the employer registered in Hungary. It is based upon the exceeding sum of the wage calculated by the Hungarian average earnings (as wage costs) and upon the taxable part of the posting allowance not including not taxable posting fees. To define domestic average earnings primarily the typical earning income standard is used, which is characteristic to employees employed by the same employer within the same scope of work; if there is not such a measure, the KSH published average earnings measured in the employer's branch shall apply.

In my opinion posting allowance paid to the employees does not belong to one of the groups of the work expenses, since this implies a daily allowance to the posting's time and other reimbursement of costs. The agreement with the employee may indicate reimbursement of costs. For example dining and travel cost should be covered with the posting allowance and reimbursement. The Hungarian Central Tax Office's guide

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(hereinafter regarding the Hungarian abbreviation “APEH”)<sup>6</sup> indicates the specific legal status of posting daily allowance. Though APEH gives its opinion regarding the contribution of the employer and employee paid after posting abroad, but points out and interprets the problems of posting.

The guide uses the definition of working laid down in Szmt. In order to support its point of view according to the KSH’s guide it differentiates between two working incomes: earnings and working incomes support. It explains that there is not any paying obligation on behalf of the employer and employee in connection with the other working income, and incomes not being qualified as earnings.

According to APEH the daily allowance paid in the course of the inland or abroad posting, and other reimbursement of costs do not belong to one of the groups of work expense (ie. not earnings and part of the working income).

Because the employee and employers are obliged to pay contribution after the earnings, the employer’s and employee’s obligation to pay contribution does not come with the other incomes and incomes not being qualified as the earnings above. So the daily allowance paid in the course of the inland or abroad posting (independently from the fact, that it forms part of the tax base or not). Moreover, the employer and the employee are not obliged to pay any contributions after other reimbursement of costs.

In an opposite case, if these incomes are part of the earnings, it is necessary to pay the employers and employee contribution according to the general rules.

The information points out that § 40 and 41 of Act IV of 1991. about employment uses the earnings concept and considers the earnings as basis of the employers and employees contribution.

We obtain similar result in the course of the analysis of the rules of the social insurance. § 4. 2. point of the Act about the supplies of the social insurance and about private pensions (Act. LXXX. of 1997. hereinafter regarding the Hungarian abbreviation “Tbj”. ) defines earnings, which are the basis of the contribution.

The 1. point of 4§ Tbj. defines the incomes falling under the effect of the personal income tax (Act CXVII. of 1995. about the personal income tax.) as a basis of contribution. Incomes originating from foreign countries however are subject to a specific regulation since the conventions about the avoidance of the double taxation, and international law provisions concern them.

The 2.§(5) of the Act about the personal income tax. indicates, that it is necessary to apply the regulation of the international contract, if an international contract proclaimed with an act or a decree implies a regulation differing from the act about personal income tax.

It follows from the provision that it is necessary to use his rules, first, when a convention like this exists and the application of the domestic regulation may happen then only, if the place of the domestic taxation of the incomes is from the convention thus.

Be an example the treaty in force between Germany and Hungary about the avoidance of double taxation (No. 27. decree with legal force of 1979.), because the employees pay their personal income tax in Germany after the posting allowance.

The Tbj k., 2. points out, that if there isn’t income falling under the effect of the personal income tax, the basis of contribution shall be the personal basic wage defined in the labour

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<sup>6</sup> APEH Central Office Information Department, Information No.8692090082, 24.04.2009.

contract. If the work is not performed within the frame employment, the bases will be the amount laid down in the agreement

The government decree of 195/1997. (5. XI.) about the execution of the Act LXXX. of 1997. interprets in details and regulates the issues related to the basis of contribution. Recitals (1) and (2) of §1. deal with the procedure in the case of incomes obtained inland and abroad and interprets the concept of personal basic wage too.

Recital (2) of the order declares, that personal basic wage defined in the 2. sub point of § 4 of the Tbj. paid according to the labour contract, is the yearly/ monthly average basic wage paid before posting. If there is not such, the contribution is based upon the personal basic wage of the month.

(Government decree of 333/2008. (30.XII.) amended (2) of the order, that came into force on 1. January 2009. The closing provisions of the order indicate that it is necessary to apply the provisions in the cases in process, except, if this resulted in the increase of the obligation to pay contribution.)

It is apparent from the provision, that posting is a problematic field in the regulation of the European Union and also in the domestic regulation. New regulations of the European Union specify the supplies and the contributions of the posted workers.

There are many interpretation problems in the domestic law. But, correcting the social security rules would be expedient by posting abroad, because it may occur that single working incomes do not constitute grounds for the social security tax.



## HOW WILL CHANGE THE ROLE OF THE NATIONAL PARLIAMENTS IN THE EUROPEAN UNION WITH THE ENTRY INTO FORCE OF THE LISBON TREATY?

RITA RÁCZ

PhD student, Department of European Law and Private International Law  
University of Miskolc  
r.ritalia@yahoo.com

### **1. Introduction**

This paper deals with the provisions on the national parliaments in the Lisbon Treaty<sup>1</sup>, which after a highly drawn out ratification process finally entered into force on 1 December 2009. These provisions of the Lisbon Treaty are of major importance for the national parliaments of the Member States since for the first time<sup>2</sup> in the European integration they give the national parliaments direct role in the legislative procedure of the European Union. The provisions are intended to ‘encourage greater involvement of national parliaments in the activities of the European Union and to enhance their ability to express their views on draft legislative acts of the Union as well as on other matters which may be of particular interest to them’.<sup>3</sup>

Before analysing and evaluating these new provisions, it is necessary to refer to the recent judgement of the German Constitutional Court which laid down a number of conditions that had to be fulfilled in order to the German President signs the instruments of ratification of the Lisbon Treaty.

### **2. A national constitutional precondition to the entry into force of the Lisbon Treaty: the judgement of the German Constitutional Court**

On 30 June 2009 the German Constitutional Court (hereinafter the GCC) handed down its judgement<sup>4</sup> concerning the conformity of the Lisbon Treaty with the German Constitution. This judgement is very important not only because besides the Czech

<sup>1</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (OJ 2008/C 115/01)

<sup>2</sup> As things stand, the national parliaments of the EU do not have any direct role in the legislative process, their role is only indirect under the *Declaration on the role of national parliaments in the European Union* appended to the Maastricht Treaty and the *Protocol (No. 9) on the role of national parliaments* attached to the Amsterdam Treaty. Certainly the way in which national parliaments scrutinise their governments in relation to the activities of the EU also with the entry into force of the Lisbon Treaty remains to be a matter for the particular constitutional organisation and practice of each Member State.

<sup>3</sup> Preamble of Protocol No. 1 to the Lisbon Treaty

<sup>4</sup> See the preliminary version of the English translation of the judgement: [http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html) (22.11.2009)

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Constitutional Court<sup>5</sup>, it was only in Germany where the conformity of the Lisbon Treaty with the national constitution was examined by the constitutional court. The judgement was crucial especially from the point of view of the rights of the national parliaments since while on the one hand the GCC has, in principle, stated that the Treaty is in conformity with the constitution, on the other hand, it set forth as a prerequisite that the accompanying Act Extending and Strengthening the Rights of the *Bundestag* and *Bundesrat* in European Union Matters must be modified so as to strengthen the role of the two chambers of the German parliament with regard to the simplified Treaty revision procedure<sup>6</sup>, the general and special ‘bridging clauses’ (*passerelle*)<sup>7</sup> and some other important issues because the act infringes the constitution insofar as the participation of the two chambers in matters of European integration have not been elaborated to the extent constitutionally required. The judgement emphasizes the importance of democratic legitimization in the further process of integration and calls for the strengthening of the role of the *Bundestag* and the *Bundesrat* with regard to the important decisions taken in the Council.<sup>8</sup> Therefore on the basis of the judgement the act had to be modified to guarantee this strengthened participation. The most important features laid down by the GCC to this end were the following.<sup>9</sup>

Under Article 23.1, third sentence of the German constitution an approving vote by the German representative in the Council with regard to the amendment of the Treaty in the simplified revision procedure needs an ex ante approval by the legislative bodies on the basis of a two-thirds majority in both chambers. The same constitutional requirement applies to the ‘bridging clauses’ with regard to replacing unanimity by qualified majority voting in the Council because the right granted under Articles 48.7 (3) TEU and 81.3(3) TFEU to the national parliaments to make known their opposition is not a sufficient equivalent to the requirement of ratification. It is therefore necessary that the representative of the German government in the European Council or in the Council may only approve the draft resolution if empowered to do so by the *Bundestag* and the *Bundesrat*.

According to the GCC the newly worded flexibility clause under Article 352 TFEU<sup>10</sup> – since it has been broadly extended to nearly all EU policies – meets with constitutional objections, as the provision comes close to a blanket empowerment. The duty to inform the national parliaments set out in Article 352.2 TFEU does not alter this as the Commission needs only draw the national parliaments’ attention to such a lawmaking proposal. With a view to the undetermined nature of future cases of application of the flexibility clause, its use constitutionally requires ratification by the *Bundestag* and the *Bundesrat* on the basis of Article 23.1 sentences 2 and 3 of the constitution. The German representative in the Council may not declare the formal approval of a corresponding lawmaking proposal of the

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<sup>5</sup> See the judgements of 26 November 2008 and 3 November 2009 of the Czech Constitutional Court on the conformity of the Lisbon Treaty with the Czech constitution. These judgement do not explicitly deal with the question of the role of the Czech national parliament.

<sup>6</sup> Article 48.6 TEU

<sup>7</sup> See the general bridging clause in Article 48.7 TEU, and the special bridging clauses in Article 31.3 TEU and Articles 81.3(3), 153.2(4), 192.2(2), 312.2(2), 333.1, 333.2 TFEU.

<sup>8</sup> Editorial Comments: Karlsruhe has spoken: „Yes” to the Lisbon Treaty, but... (Common Market Law Review, 2009, 46., p. 1029)

<sup>9</sup> For further details see paras 411–419 of the judgement.

<sup>10</sup> Ex Article 308 EC

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Commission on behalf of the Federal Republic of Germany as long as these constitutionally required preconditions are not fulfilled.<sup>11</sup>

Furthermore, the GCC came to the conclusion that with regard to Article 43(2) TEU, empowering missions with military means, the German representative in the Council is regarded as obliged to deny approval to any decision which would violate or bypass the constitutionally prescribed necessity of parliamentary approval of any defence action.<sup>12</sup> In addition, with regard to the common defence policy, Germany is regarded as constitutionally prohibited from taking part in any ordinary Treaty amendment procedure<sup>13</sup> which aims to abolish the principle of unanimity in favour of qualified majority voting.<sup>14</sup> Since the German parliament (the *Bundestag* on 8 September 2009 and the *Bundesrat* on 18 September 2009) has adopted the required acts and modifications<sup>15</sup>, the German Federal President signed the instruments of ratification of the Lisbon Treaty on 23 September 2009.

### **3. Provisions of the Lisbon Treaty concerning the role of national parliaments**

After these considerations I summarize the provisions of the Lisbon Treaty that concern the national parliaments. Firstly I deal with the provisions on the application of the principles of subsidiarity and proportionality (the so-called subsidiarity check) laid down in Protocols No. 1 and 2 to the Lisbon Treaty and then I briefly mention the other rights of and provisions on the national parliaments enumerated in Article 12 TEU.

#### **3.1. Application of the principles of subsidiarity and proportionality (subsidiarity check)**

The first subparagraph of Article 5(3) of the Lisbon Treaty states that ‘the institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.’ Concerning the substance of the principles of subsidiarity and proportionality laid down in the Lisbon Treaty it can be stated that with the exception of the first subparagraph, Article 5(3) and 5(4) is identical to the provisions in the EC Treaty. However, it is not clear for the moment whether the new provision is intended to be descriptive or if it imposes an explicit duty on national parliaments. Similarly, Article 12 of TEU is unprecedented since – among the other provisions on democratic principles in Title II – it gives a list of the rights of the national parliaments granted for them by the Lisbon Treaty. Article 12(a) and 12(b) declares that national parliaments contribute to the good functioning of the EU through being informed by the institutions of the EU and having draft legislative acts of the EU forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union (hereinafter Protocol No.1) and by

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<sup>11</sup> See para 328 of the judgement.

<sup>12</sup> See para 388 of the judgement.

<sup>13</sup> Article 48(2)–48(5) TEU.

<sup>14</sup> See para 391 of the judgement.

<sup>15</sup> For the five newly adopted or amended German acts see e.g. [http://www.bundestag.de/dokumente/analysen/2009/begleitgesetzgebung\\_engl\\_uebersetzung.pdf](http://www.bundestag.de/dokumente/analysen/2009/begleitgesetzgebung_engl_uebersetzung.pdf) (28.11.2009)

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seeing to it that the principle of subsidiarity is respected in accordance with the procedure provided for in the Protocol on the application of the principles of subsidiarity and proportionality (hereinafter Protocol No. 2).

The provisions on the application of the principles of subsidiarity and proportionality by the national parliaments, laid down in the Protocols No. 1 and No. 2 to the Lisbon Treaty, can be summarised as follows.

First of all, protocol No. 1 defines the scope of *information that the Commission has to send for national parliaments*. According to it the Commission shall directly forward to the national parliaments its consultation documents (green papers, white papers and Commission communications) upon their publication; its annual legislative programme and any other instruments of legislative planning or policy, as well as the draft legislative acts at the same time as to the European Parliament and the Council. The Protocol also states that national parliaments should be sent the proposals for legislation originating from the European Parliament, a group of Member States, the European Court of Justice, the European Central Bank and the European Investment Bank; the agendas for and the outcome of the Council meetings, including the minutes of meetings where the Council is deliberating on draft legislative acts; and the annual report of the European Court of Auditors. In addition, under the TEU national parliaments should be given advance notice of any intention of the European Council to amend the Treaties.<sup>16</sup>

All draft legislative acts shall contain a *detailed statement* explaining why the proposal is compliant with the principle of subsidiarity and proportionality. According to Article 5 of Protocol No. 2 this statement shall contain some assessment of the draft's financial impact and, in the case of directive, even of its implications for the implementing rules in the Member States, including, where necessary, the regional legislation. The reasons for the justification for the respect for the principles shall be substantiated by qualitative and, wherever possible, quantitative indicators in the statement. Thus, a kind of purely formal statement with no specific details on the draft legislative act in question cannot be deemed to be appropriate.

Within eight weeks<sup>17</sup> from the date of transmission of a proposal for legislation to national parliaments, any national parliament or any chamber of a national parliament has the right to send to the Presidents of the Council, the European Parliament and the Commission<sup>18</sup> a *reasoned opinion* saying why it considers that the draft legislative act does not comply with the principle of subsidiarity. However, the wording of the Protocol is not entirely clear on whether this eight-week timeframe only begins with the availability of the draft legislative act in all official languages of the EU.<sup>19</sup> In this respect the Protocol

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<sup>16</sup> Article 48(2) and 48(7) of the TEU and Article 6 of Protocol No 1.

<sup>17</sup> The Constitutional Treaty allowed national parliaments only six weeks in which to present a reasoned opinion, this timeframe has been extended to eight weeks in the Lisbon Treaty.

<sup>18</sup> For this purpose, the following e-mail addresses shall be used by the national parliaments:

European Commission: sg-national-parliaments@ec.europa.eu

European Parliament: ep-np@europarl.europa.eu

Council: sgc.cosac@consilium.europa.eu

Moreover, national parliaments are asked to transmit their findings to the COSAC Secretariat, as well: secretariat@cosac.eu

<sup>19</sup> See e.g. a document prepared by the COSAC Secretariat (Testing the subsidiarity check mechanism of the Lisbon Treaty: The Framework Decision on Combating Terrorism, November 2007)

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mentions that it is for each national parliament to consult, where appropriate, regional parliaments with legislative powers. Under the Protocol each national parliament has two votes: one for each chamber in a bicameral parliament and two for the only chamber in unicameral parliaments.<sup>20</sup>

The Lisbon Treaty sets up a certain *threshold of the votes* for the national parliaments in order to the reasoned opinions have any effect. The so-called early warning system exercised by the national parliaments, with regard to the required threshold of the votes and the consequences, can be divided into two cases:

i) On the one hand, where reasoned opinions stating that the draft legislative act is not compliant with the principle of subsidiarity represent *one third* of all the votes allocated to the national parliaments, the Council, the European Parliament and the Commission (and any other institution which has proposed the legislation) is required to review the draft. However, the required number of votes is *a quarter* of the total votes where the proposed legislation concerns police and judicial cooperation in criminal matters. Thus, in this first case – provided that the condition for the threshold described above is fulfilled – the legal consequence is that the draft must be reviewed. Although, after such review, the EU institution which originated the proposal is free to decide on whether to maintain, amend or withdraw the proposal. The only requirement in this respect is that the institution concerned must give reasons for its decision. This procedure is commonly known as the ‘yellow card’ procedure.

ii) On the other hand, if the proposal is originated from the Commission and is subject to the ordinary legislative procedure, and provided that (not only one third but at least) *a simple majority* of national parliaments gave reasoned opinions explaining why they believed that the draft legislative act is not compliant, likewise in the above-mentioned case, the consequence is that the proposal must be reviewed. After such review, also in this case, the Commission is free to decide on whether to maintain, amend or withdraw its proposal. But if the Commission decides to maintain the proposal, it has to precisely justify in a reasoned opinion why it considers that the proposal complies with the principle of subsidiarity, and is required to refer its own and the national parliaments’ reasoned opinions to the Union legislator. Under the Protocol No. 2 in these cases the Union legislator shall, before concluding the first reading, consider whether the proposal is compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national parliaments as well as the reasoned opinion of the Commission. If 55% of the members of the Council or the majority of the European Parliament is of the opinion that the proposal does not comply with the principle of subsidiarity, the draft legislation falls. This procedure is commonly known as the ‘orange card’ procedure.

The Lisbon Treaty introduces an additional procedural right for the national parliaments concerning their role in assuring the compliance of EU legislative acts with the principle of subsidiarity when it states that the European Court of Justice has jurisdiction to decide cases brought by a Member State on behalf of its national parliament or a chamber of it on the grounds that an EU legislative act infringes the principle of subsidiarity.<sup>21</sup>

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<sup>20</sup> Article 7(1) of Protocol No. 2, first subparagraph.

<sup>21</sup> Article 8 of Protocol No. 2, first subparagraph

### **3.2. Other provisions on the national parliaments in the Lisbon Treaty**

Besides point (a) and (b), Article 12 of the TEU specifies the other new rights provided for the national parliaments.<sup>22</sup> Under these provisions national parliaments contribute actively to the good functioning of the Union:

- by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 TFEU, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85. However, it can be mentioned that actually this provision raises many questions since the Lisbon Treaty does not define the meaning of the 'political monitoring' of Europol and the 'evaluation' of Eurojust. Presumably the two process differ but how is still uncertain. And this is not the only question that remains unanswered by Articles 85 and 88 TFEU. Other questions concern e.g. the purpose for the evaluation or scrutiny and the form of action that could be taken on the findings of the national parliaments and the constitutional implication if the European Court of Justice is given jurisdiction over the compliance of national parliaments with the regulations.
- by taking part in the revision procedures of the Treaties, in accordance with Article 48 TEU<sup>23</sup>;
- by being notified of applications for accession to the EU, in accordance with Article 49 TEU;
- by taking part in the inter-parliamentary cooperation between national parliaments and with the European Parliament, in accordance with the Protocol No. 1.

### **4. Evaluation of the provisions of Protocols No. 1 and 2**

First of all, as regards the information that shall be forwarded to the national parliaments, it must be reminded that there is little new in this since a Protocol to the Amsterdam Treaty has required the Commission not only to send all consultation documents to national parliaments but also to make legislative proposals 'available in good time so that the government of each Member State may ensure that its own national parliament receives them'.<sup>24</sup> Moreover, since May 2006 the Commission has voluntarily transmitted directly to the national parliaments all its proposals for legislation and consultation papers and invited the national parliaments to react so as to improve the

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<sup>22</sup> For the other specific provisions, not enumerated in Article 12 TEU, see: Articles 69, 70, 71, Article 81(3), third subparagraph and Article 352(2) TFEU.

<sup>23</sup> Article 48(2) TEU states that in the course of the ordinary revision procedure proposals for the amendment of the Treaties shall be submitted to the European Council by the Council and the national Parliaments shall be notified, while under Article 48(7), in the case of exercising the simplified revision procedure, any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national parliaments. If in this latter case a national parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted, thus the European Council may adopt the decision only in the absence of opposition.

<sup>24</sup> Article 2 of Protocol No. 9 to the EC Treaty.

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process of policy formulation.<sup>25</sup> The transmission of documents has already started from the beginning of September 2006 and the documents to be forwarded are all legislative proposals and consultation documents, including the soft law (reports and Commission communications). In practice it means all official documents to be transmitted to the European Parliament (except for classified documents).<sup>26</sup> These documents were to be transmitted in the linguistic versions chosen by the national parliaments as soon as they are available. And another important fact is that as from September 2006 there was no deadline for giving a feedback on the part of the national parliaments (it was six weeks in the Constitutional Treaty and it is eight weeks in the Lisbon Treaty). Nevertheless certainly the sooner the EU institutions received these feedbacks the better, the more time they had to take them into account. The Commission says that it automatically consulted both with the Commission General Secretariat and the Legal Service, in this way it could be ensured that not only the comments of the national parliaments reach the persons and departments concerned within the EU decision-making process, but also that national parliaments got an expert reply as much as possible.<sup>27</sup> For this purpose in 2006 the Commission has introduced a new internal procedure for taking action to respond to the feedbacks from the national parliaments.<sup>28</sup>

Although it can be concluded that the clear requirements established in the Protocol No. 1 for the transmission of documents to national parliaments are really important and welcomed because with the entry into force of the Lisbon Treaty it serve as an explicit legal basis.

As a preliminary conclusion that can already be drawn at the time of writing (in the first days of December 2009, at the time of the entry into force of the Lisbon Treaty) thus in lack of any experience on the basis of the new provisions thereof, it can be observed that EU institutions often stress and many experts think and expect that the early warning mechanism will significantly enhance the role of national parliaments in the EU decision-making machine. Others disagree and do not think that the early warning system will be extensively used by the national parliaments. The experience of the Finnish Parliament can be cited in this respect: it has had a subsidiarity control mechanism since its accession to the EU in 1995 and in that time it has hardly ever found a case where it felt that a draft of the Commission violated the principle of subsidiarity.<sup>29</sup> In this respect one may argue that it is not likely that national parliaments often use the early warning mechanism since the principle of subsidiarity is taken seriously by the EU institutions itself. On the contrary, others say that there is a danger that, in assessing the Treaty of Lisbon, national parliaments

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<sup>25</sup> Communication from the Commission to the European Council: A Citizens' Agenda – Delivering Results for Europe, COM(2006)211 final, 10.5.2006., p. 9.

<sup>26</sup> European Commission Secretariat-General: 2006 Annual Report on relations between the Commission and the national parliaments, SP(2007) 2202/4, 8 May 2007, p. 3.

<sup>27</sup> COSAC Chairpersons Meeting: 'Cooperation of the Commission and National Parliaments', 11 September 2006, Helsinki (available: [http://ec.europa.eu/commission\\_barroso/wallstrom/pdf/speech\\_20060911\\_en](http://ec.europa.eu/commission_barroso/wallstrom/pdf/speech_20060911_en), 27.11.2009)

<sup>28</sup> European Commission Secretariat-General: 2006 Annual Report on relations between the Commission and the national parliaments, SP(2007) 2202/4, 8 May 2007, p. 3.

<sup>29</sup> Report of the European Scrutiny Committee of the House of Commons on Subsidiarity, National Parliaments and the Lisbon Treaty (Thirty-third Report of Session 2007-2008, HC 563, 21 October 2008, p. 7)

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become obsessed by the early warning mechanism and the whole mechanism can easily become a Trojan horse within the EU institutions, taking the legislative procedures even more complex and time-consuming.

After these considerations, however, it must be noted that even if national parliaments reach the required threshold of votes, and thus use the early warning mechanism, the decision on whether a draft legislative act is compatible with the principle of subsidiarity will continue to rest with the EU institutions and not with the national parliaments. Moreover, in any case, the national parliaments cannot object to the substance of the specific provisions of the documents and draft legislative acts forwarded to them, they can only scrutiny the documents and drafts with regard to the compliance with the principle of subsidiarity. In addition, it can already be foreseen, that it will be very rare for the entirety of a proposal for legislation to be inconsistent with the principle of subsidiarity, it is more probable that one or a limited number of provisions do not comply. Another concern that arises is that parliaments seem to interpret the principles of subsidiarity and proportionality in very different ways. Naturally the national parliaments' assessment whether new European legislation would bring added value is based on historical, political and social experience at home. Whether a proposal does or does not comply is a matter of political judgement and is unlikely to be capable of an entirely objective assessment.

As it can be seen, many experts have doubts about the future effect of the early warning mechanism but, on the other hand, they also see some potential benefits. To give another example here, some interested people are sceptical that the mechanism would make any real political difference in parliamentary systems where the government have a substantial majority and so the extent to which national parliaments can actually constrain what their government are doing at EU level is limited, nevertheless these people emphasize that there will be major benefits if use of the mechanism leads to an increase in transparency about what happens in the Council. Furthermore, it can be mentioned that there were many discussions about the thresholds of the votes (i.e. the one-third, quarter simple majority) since many people think that they are too high. This can be contrasted with the actual practice of the Council, where it is rather rare that legislation gets passed by the Council with more than three Member States opposed. However, it must be emphasized that Commissioner Margot Wallström has stated that the Commission should listen to the views of national parliaments even if the numbers of votes do not reach the threshold.<sup>30</sup>

## **5. An option for the future: making use of the IPEX**

The website and database of the Interparliamentary EU Information Exchange (IPEX)<sup>31</sup>, created by the national parliaments of the European Union in cooperation with the European Parliament, provides national parliaments with a platform for the electronic exchange of EU documents and information. As from 2006 all Commission documents are available on this website in English and in French, with links to other language versions. In order to enhance the exchange of information between the national parliaments during the subsidiarity check, national parliaments are invited to share information making use of the website. Availability of timely and precise information from national parliaments in the

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<sup>30</sup> See above.

<sup>31</sup> <http://www.ipex.eu/ipex/> (29.11.2009)

IPEX database and website would allow national parliaments drawing conclusions from the results of the scrutiny, for example for the use of the ‘yellow card’ and ‘orange card’ procedure.<sup>32</sup>

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<sup>32</sup> COSAC Secretariat: Testing the subsidiarity check mechanism of the Lisbon Treaty: The Framework Decision on Combating Terrorism, November 2007