FONTES IURIS

Special Edition of the periodical published by Ministry of Justice

"And we find justice not as much by way of nature but by knowledge, namely the knowledge given to us by law and jurisprudence."

István Werbőczy

Government Decree 152/2014 (06 June) on the Functions and Powers of the Members of the Government

*"**Section 82** (1) Under his/her responsibility for justice, the minister is responsible for developing the justice policy of the Government and for its implementation in cooperation with the constitutional bodies."*

The Fundamental Law of Hungary Article R

„(1) The Funtamental Law shall be the foundation of the legal system of Hungary."

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Ministerial Welcome

It is with great pleasure that I hand over to the Dear Reader the special issue of *Fontes Iuris* issued on the occasion of the next congress of FIDE, to be held in Budapest on 18–21 May upon the invitation of Pázmány Péter Catholic University, the professional host of the event. FIDE is a French abbreviation: *Fédération Internationale pour le Droit Européen* that is International Federation for European Law. The abbreviation covers a not-for-profit organisation founded in Belgium long ago, in 1961, at a time when French had priority over all other languages in the conference halls and corridors of European institutions. An old-school, Francophile lawyer like me, who has always been interested in international perspectives, feels somewhat nostalgic about that age. That period was not only the heyday of the hegemony of French language but perhaps, along with it, also of the common European development of law, of the formation of the law of the European integration, the acquis communautaire. *Pour*, that is *for* something: the relationship of the organisation to European law is not neutral. The objective of its members is not only the research of this law, but, in the end, the improvement of European legislation, the promotion of harmony between the law of the Union and those of the member states. The hallmark of the Hungarian member organisation of FIDE, registered in 2004, is a number of extraordinary personalities of the Hungarian legal community. Related to its foundation, one must highlight Jenő Czuczai, visiting professor of the Collège d'Europe in Bruges, currently a legal adviser to the Legal Service of the Council of the EU, who is, as a founder, a permanent member of the governing council of FIDE; László Kecskés, the Jean Monnet professor of European Law; professor János Martonyi, Head of Department, former Foreign Minister; whereas professors Ernő Várnai and Miklós Király were presidents of the Hungarian association in the last years. The current President of the Hungarian association, Péter Darák, is the President of the Curia; its Vice President is András Varga Zs., a Constitutional Court Justice, Dean of the Faculty of Law and Political Sciences of Pázmány Péter Catholic University.

The development of European Union law is not simply the ever-growing *corpus* of the *acquis communautaire*. The point is not that European Union law must extend its force to ever larger areas of more and more branches of law. It is an important question, with regard to European Union law and, in general, the development and the future of European legal systems, how the legal systems of the member states, the law of the Union and international law harmonize. The papers appearing in this special issue search for an answer, in different special areas of the law, to the question of what perspectives and limits constitutional law, the law of contracts (civil law), criminal law, the law of criminal procedure and the acquis have on sustainable development. The article by András Varga Zs. entitled *Final Conferral of Sovereignty or Limited Power-Transfer?,* and that by Tamás Sulyok, *'Erga omnes Effect of Member States' Constitutions and Composite Constitutionality,* are looking for an answer to the ultimate question, the issue of sovereignty. Tamás Sulyok recognises the supremacy of Union law to those of the member states but offers, in lieu of an absolute interpretation thereof, a relative interpretation of the thesis: in case of a collision of the constitution of a member state with the law of the European Union, the constitutional courts of member states and the Court of Justice of the European Union should clarify, in a dialogue on the merits of the issue, which law and which judicial forum has the last say in any given case. The conclusions of András Varga Zs. are in harmony with this. The member states do not transfer their sovereignty to the European Union, but only certain scopes of competence, and that transfer is neither unconditional, nor final. Although the Union law has primacy, this principle is limited by those laws of the member states which form the core of constitutional identity, as clarified in the judgements of the Constitutional Court of Germany. According to the author, this limitation should also be carried out in the near future by the Constitutional Court of Hungary.

In her article, *Division of Competences between Member States and the European Union in Criminal Procedural Law*, Krisztina Karsai analyses the system of Union law authorisations in the areas of the law of criminal procedure, criminal law enforcement and, partly, substantive criminal law. She states that thematic authorisations are broad, which generally allows the conclusion that the EU policies of an area based on freedom, security and justice have gained considerable ground in the past twenty years.

The article Miklós Király contributed to this issue bears the humble title *Some Remarks on the Limits of Harmonisation of Contract Law in the European Union.* In reality, the author, himself a former president of the Hungarian Association for European Law, offers the Reader a deep and thorough assessment of the plans the European Union has worked out for the harmonisation of private law, and, in particular, contract law. In ultimate analysis, he seeks answers to the question of how to create a sui generis European legal regime in certain fields *parallel* to national laws, and how this could pave the way towards the adoption of a future Common European Sales Law.

Whereas in issues that touch the core of the constitutional identity of the member states, further integration attempts or an affirmative and expansive attitude on the part of the Court of Justice of the European Union are likely to provoke controversy nowadays, there are fields where the value added by further integration is universally recognized. A case in point is environmental protection and sustainable development. In his study, *From Sustainability to Circular Economy – Development of EU Strategies and Its Legal Consequences* Gyula Bándi develops his argument departing from a brief reflection on some of the thoughts included in the Encyclical Letter of Pope Francis *Laudato si', On Care for our Common Home.* The result is a fascinating intellectual exercise in translating the pope's vision into the technical language of legal instruments and other measures the EU can dispose of.

Finally, let me call the attention of the Reader to a few thoughts of Péter Darák, President of the Curia, shared with the professional audience in an interview prepared with him. He said: "When European lawyers discuss current problems of European law, they actually participate in an intellectual dialogue of member states." I am convinced that the future of European integration depends, to a large extent, on the quality of the dialogue at different levels among all the participants. In this, however, lawyers, and among them, judges, have a special position: we are commencing to rediscover this aspect nowadays. The European Union was born as a community of markets, but from the beginning this community had law as its language, just like mathematics is a language usable for describing physical reality. Péter Darák further added: "I could not be an administrative court judge in any other country because, in my opinion, only those can be good judges, […] who know what the people are like in a given country, and this presupposes a deep understanding." These words express well that law cannot ultimately be interpreted as an abstract idea or a collection of rules. His ideas, on the other hand, make me reflect on the natural limits of European integration and legal harmonisation: law really exists within a given national and historical framework. It is, however, also true that in our age we must strive with all our powers for the harmony and balance between the global and the local.

László Trócsányi

An Interview with Dr. Péter Darák, President of the Hungarian Association of FIDE and the President of the Curia of Hungary

„When European jurists are talking about topical European legal problems, they are in actual fact involved in an intellectual dialogue between Member States"

An interview with Dr. Péter Darák, President of the Curia of Hungary and the Hungarian Association of the International Federation for European Law (Fédération Internationale pour le Droit Européen, FIDE) on the FIDE Congress to be held in Budapest between 18-21 May 2016 and the impact it has on the prestige of the Hungarian society of jurists and justice.

FIDE at its Madrid Congress in 2010 approved of Hungary's application to host the World Congress to be held in 2016. At the Copenhagen FIDE Congress in 2014 Mr. President and Professor Dr. András Varga Zs., Vice-President of the Hungarian FIDE Association with all due solemnity took over the Presidency of the International Federation for the then forthcoming two years. What is the relevance of Hungary's membership in the International Federation for European Law?

FIDE is one of the most significant federations of lawyers established by professors specialised in European law in Brussels, in 1961. The objective of FIDE is to provide support for national lawyers' associations dealing with international, European law, and enhance the exchange of information between them, thereby connect lawyers interested and specialised in European law, furthermore try and find solutions to problems relating the European Community in terms of organisation and legal institutions. To this end, European conferences are held every two years to discuss topical issues of European law. Walter Hallstein, elected to be the President of the European Commission in 1958 said that the dominance of law would replace violence and political pressure, this would determine the relationship of Member States. This frequently cited thought is what the Congress also reminds me of, since when European lawyers are talking about topical European legal problems, they are in actual fact involved in an intellectual dialogue between Member States.

The coming Congress will be hosted by Hungary, for the first time in the history of FIDE. Based on the decision taken by the Hungarian FIDE Association the event will be organised by Pázmány Péter Catholic University, Faculty of Law and Political Sciences in collaboration with the Curia. How was the conference brought to Hungary?

National associations compete to win the right to organise this conference, which is a highly prestigious event in European circles of lawyers. It is attended by 400-500 professors, and they indeed conduct extremely lively discussions on current issues. It is due to the efforts made by Professor Jenő Czuczai and Professor Miklós Király that Budapest was chosen as the host of the 2016 conference, and the Hungarian FIDE Association has been making preparations since 2010 to ensure proper conditions for this prominent event. Unimaginable amount of work needs to be done in the background for the conference to take place, whose lion's share is done by Pázmány Péter Catholic University. Let me say special thanks to Professor Gyula Bándi, Head of the Organising Committee, and we must also extend our gratitude to the Rector and Dean of the University, as well as personally to the Minister of Justice, whom are whole-heartedly committed to the successful organisation of the event.

The issues to be dealt with by the Congress are identified by the national association of the host country, in cooperation with the FIDE Steering Committee, which is an excellent opportunity for Hungarian jurists to join in the scientific study of EU law and at the same time thematize that. To what extent did the Hungarian organisers have room for manoeuvring when selecting the subjects for discussion, did they manage to get their ideas accepted?

We are expecting these three days to be very exciting. Of the three main issues on the agenda the first one is the question of the banking union. As regards this one, a priority aspect to be emphasized is how the institutions involved in the newly established Single Supervisory Mechanism, the Single Resolution Mechanism and the single rules and regulations fit into the traditional organisational structure of the European Union. The activities and scopes go far beyond

the traditional organisational conditions. The economic and financial crisis of 2008 put the question of the euro's survival in the limelight. The situation of the single currency and the existence of national fiscal policies at the same time, which essentially impacts on the exchange rate, is quite paradoxical. This is the problem that the notion of 'banking union' attempts to manage. Currently, Hungary's acceptance of and the degree of its joining the banking union is subject to discussions.

The other topic, gaining more and more public attention over the past few years in Hungary as well, is the division of competences between the European Union and the Member States. We no longer talk about the future exclusive competences of the EU and issues remaining in MS competence, but we also talk about co-decision and ancillary competences. Science has already elaborated these concepts in detail, however, their functioning in practice takes place in a complex system, with varying focuses in the decision making process in individual subject matters. This system has not been subjected to a relevant, profound analysis as yet. One of the major objectives and endeavours of the Congress is to find directions in this labyrinth. Specifically Hungarian added value is the proposal to discuss the administration of Structural Funds under the agenda point on the division of competences between the EU and Member States. Central and Eastern European countries are directly affected by the granting and disbursement of Structural Funds, therefore we are glad to see this point integrated into the agenda following our proposal.

Traditionally, the third topic is one of economic law, given that the European Union is also an economic union, in spite of the fact that we, legal scholars and practitioners attribute great importance to legal regulatory systems. Efficient competition is a prerequisite for the useful functioning of the single market, whose establishment clearly benefits from the possibility to detect, explore and properly sanction the breach of competition law by the European Union and the Member States alike. Let me underline the problem studied by Mr. Peter-Christian Müller-Graff, prominent professor of the University of Heidelberg, namely, how the breach of Community law and the mechanism of its sanctioning is linked to the enforcement of private claims arising from the breach of competition law, i.e. whether an act of breach of Community law is a legal basis for enforcing a private claim before a national court or not, how evidence can be presented to a national court, whether there is a possibility for collective action/redress in national legal systems or not, all these questions need to be clarified at the conference.

Well, the issues to be discussed seem to come from three different areas, in line with the traditions of FIDE: one is related to the single market, one to EU institutions and constitutional law, and the third one is that of competition law. All of them are potentially interesting for legal scholars and practitioners, as well. In addition to selecting the topics for the conference, what other preparatory work is yet to be done?

FIDE is famous for processing the topics selected in a system of accurately elaborated, unwritten rules. As part of this process, a questionnaire is drawn up with respect to each issue. These questionnaires are jointly managed by an institutional and a professional rapporteur, the former usually a rapporteur of an organ of the European Commission, whereas the latter is an academic authority on the subject. The questionnaire is filled in by the national associations of all FIDE member states, which means that more than twenty countries send in their questionnaires relating to each topic. The rapporteurs summarise these reports and publish them in a book with the contributions, observations made at the conference.

The significance of the conference is also demonstrated by the act that the Court of Justice of the European Union and the European Commission contribute to its success by making their interpreters available for the discussions (in three languages: French, English, German).

In addition to organising the Congress, in what other ways does the Hungarian society of jurists benefit from holding the Presidency of FIDE?

Since the Copenhagen conference, the Doctoral Student Conference has become a standard preliminary event of the Congress, which now will be organised by Pázmány Péter University of Sciences. By organising the conference we provide an opportunity for young scholars to express their opinions on these serious issues affecting the fate of countries, what is more, they can also participate in the Congress, where they gain first-hand experience of the international culture of debate. Mr. Koen Lenaerts, President of the Court of Justice of the European Union, who delivers the keynote address at the Congress, has been kind enough to participate at the preliminary event in an informal discussion. So the event, beside being attended by the most outstanding figures of legal science, will also be a splendid opportunity for young scholars.

The prestigious Congress is recognised and supported by the European Union as well, with a large number of judges and Advocates General of the Court of Justice of the European Union attending it. As the President of the Curia, what do you think of the impact on Hungarian jurisprudence of the decisions handed down by the European Court of Justice?

The professional orientation of the Curia has undergone a lot of changes, it has become more open to both the EU and the Strasbourg jurisprudence, which the now multi-layered law forces national courts to do. However, this transition is not smooth, let us think of the reasoning of the German Constitutional Court on the level of legal protection of human rights, in respect of which it was not willing to allow international fora to do the final constitutionality test. It goes without saying that we also have professional dilemmas, but I am of the opinion that we have managed these successfully over the past years. We have turned to the Court of Justice of the European Union when it was necessary, e.g. in cases of loans denominated in foreign exchange, where the decision of the Court of Justice of the EU facilitated the solution of the Hungarian problem of FX-denominated loans, and for the colleagues the task to interpret an EU legal

provision is no longer strange, should any doubt arise, they have no difficulty writing a reference addressed to the Court of Justice of the EU, furthermore we have learnt how to analyse the jurisprudence of the Court of Justice of the EU. To this end, we have a European advisor in every area of law, who are appointed from among judges with special interest in EU law. I think we can witness a long but by all means positive process, which can only be strengthened by an event such as this one.

How active are Hungarian judges in the preliminary ruling procedures in a European comparison?

There is no indicator accurately reflecting the rate of activity, since not every case with a need to provide interpretation should be referred to the Court of Justice of the EU. Interpretation can also be provided by the national court, still it is a widely-held view that the EU-preparedness of a court can be measured by the number of references for preliminary rulings. In terms of this indicator, relative to the population, we take the first place in Central Europe, in absolute figures Poland is ahead of us.

Mr. President, as a legal scholar and administrative court judge, in which areas of the Hungarian administrative procedural law, rules of procedure do you think we have to make progress in order to meet the EU requirements, and to what extent does the ongoing procedural law codification process help this?

I would mention two things in this respect. Some years ago I was in Paris at a conference, where the first stage of working out European administrative procedural model rules took place. In my contribution I underlined that a common European model for administrative procedures without the involvement of national courts implies major risks, because the subject and scope of administrative procedures in the EU and in national legal systems are different, and by defining general principles we risk undermining the effectiveness of the system. I mentioned as an example that in the European Union there are no procedures for issuing building permits or for social benefits, on the other hand, there are procedures to oversee competition or review financial support. Thus, the orientation, the subject matters, scope of procedures are completely different. In the course of adopting the Convention, this observation, shared by other presidents of national courts, was taken into account.

The other example I can give in response to this question draws attention to the fact that in the Hungarian system of administrative procedures there is a respect for traditions, but in the bad sense of the word. When selecting the basic model of the procedure, we do not exploit various options. We always go for the "submitting the application – issuing the permit" set-up. I suggested a year ago, at the conference held at Pázmány Péter University, that we should make it possible for certain activities to be launched after notification only, without any interference on the part of the authority. On the other hand, I also suggested that certain activities should be free to launch, with the authority checking or supervising it later, ex officio, so we should break with the tradition of this one-track model of official authorisation. As far as I can see, by amending the Ket. (Act on General Rules of Administrative Proceedings and Services), and from the news I have heard, through the codification of the new Act on the General Rules of Administrative Proceedings, a multi-layered model will take shape.

Please, allow me to ask you a more personal question. If you could not be an administrative court judge in Hungary, in which other EU Member State would you work?

I would not make a good administrative court judge in any other country, because in my opinion, good is the judge – and let's disregard the adjective "administrative" now – who knows his fellow citizens well, which presupposes a profound knowledge. If I wish to talk somebody out of launching court proceedings that are only a waste of money, or I want to discreetly indicate to someone that they should go into this or that direction if they want to be successful, I can only do it if these people and I have something in common, whom I know as well as I know myself. In a German administrative court these attempts of mine would probably be doomed to failure.

The interview was conducted by: M.A.
31 March 2016

András Varga Zs.*

Final Conferral of Sovereignty or Limited Power-transfer?

According to its most simple definition, sovereignty is power actually and in principle exclusively exercised within a territory and over a certain people (i.e. supreme power), which is acknowledged by other those exercising power in similar position. The external aspect of sovereignty is constituted by independence, autonomy and the competence for making decisions without any external control, while its internal aspect is constituted by the entity having the supreme power and the rules created by this entity. Resulting from the foregoing are the so-called sovereignty-based (internal) sovereign rights, the right to command and the obligation for subjection (obedience). The forms of exercise of sovereignty are, as it is well-known, legislation, exercise of executive powers and jurisdiction.[1] If national sovereignty is deemed as a necessary element of constitutionality, which it definitely is, then the nation framing a constitution is the bearer of sovereignty. Therefore, we cannot speak of statehood without a people/nation[2] in terms of content, and without a constitution in terms of public law (in a formal sense).

1. SOVEREIGNTY – THE EUROPEAN UNION – HUNGARY

The European Union is not a state. It does not have an own nation framing a constitution, a constitution, therefore it does not have an own (original) sovereignty. It exists by the will of its members – the sovereign Member States –, which have conferred only certain itemized competences deriving from their sovereignty, and not their sovereignty itself.[3] Article 1 of the Treaty on European Union (hereinafter referred to as: TEU) explains this issue clearly and unequivocally ("By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common.") as does Article E of the Fundamental Law of Hungary ("(2) With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences set out in the Fundamental Law jointly with other Member States, through the institutions of the European Union"). Competences not conferred upon the Union in the Treaties remain with the Member States, the Union shall respect their national identities and their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security (Article 4 of TEU). Regarding competences, as it follows from the principle of conferral, the principles of subsidiarity and proportionality prevail, and no measures of the Union shall exceed the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein – neither in content nor in form. This is provided by Subsection (4) of Article E of the Fundamental Law of Hungary, according to which for the authorisation to recognise the binding force of an international treaty on conferring of competences, the votes of two-thirds of the Members of the National Assembly shall be required.

The Union is, therefore, not a sovereign entity[4], the sovereignty was retained by the Member States for themselves, and on the other hand, due to the conferral of competences, the sovereign rights originating from

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1 Dezső, Márta: A szuverenitás, in: Kukorelli, István (edit.): *Alkotmánytan I.* Osiris, Budapest, 2002. pp. 121–122 and 136–138. Hercegh, Géza (edit.): *Nemzetközi jog.* Alkotmánytan I. Osiris, Budapest, 1989. pp. 38–40. Gombár, Csaba: Mire ölünkbe hullott, anakronisztikussá lett. Magyarország szuverenitásáról and Nagy, Boldizsár: Az abszolútum vágyáról és a törékeny szuverenitásról. In: Gombár, Csaba–Hankiss, Elemér–Lengyel, László–Várnai, Györgyi (edit.): *A szuverenitás káprázata.* Korridor Politikai Kutatások Központja, Budapest, 1996. pp. 13–45, 7–8 and 227–233. VILD, Éva: *A Szentszék és a magyar állam viszonyáról.* In: IURA, 13. évfolyam, 2007. 1. szám. pp. (158–175) 158.

2 For the sake of simplicity we use these two concepts as synonyms, bearing in mind that they are not identical. L. Zlinszky, János: *Az Alkotmány értéktartalma és a mai politika.* Szent István Társulat, Budapest, 2005. Kenneth Janda–Jeffrey M. Berry–Jerry Goldman: *Az amerikai demokrácia.* Budapest, Osiris, 1996.

3 Szabó, Marcel–Láncos, Petra Lea–Gyeney, Laura: *Az Európai Unió jogi fundamentumai.* Budapest, Szent István Társulat, 2014. 45, 61, 77. Kecskés, László: *EU-jog és jogharmonizáció.* Budapest, hvgorac, 2011. 289, 291, 619, 629–631.

4 Note that the attempt of establishing a constitution, which was vetoed by the French and Dutch referendum (Treaty establishing a Constitution for Europe, published in the Official Journal of the European Union, C 310 1., Luxembourg, Office for Official Publications of the European Communities) would not have changed this situation either, for its Article I-1. would have required the confer of competences and not the sovereignty of the Member States. Despite this, the Member States retained their sovereignty. See: Kaarlo Tuori: *European Constitutionalism.* Cambridge University Press, 2015, 345.

sovereignty – notably: legislation – are divided among the Member States and the Union.[5] Article 16 of TEU vests legislative functions in the Council, while Subsection (3) of Article E of the Fundamental Law recognises these as general mandatory rules of conduct (in addition to the Fundamental Law of Hungary and Hungarian legal regulations). Despite the sovereignty due to and retained by Hungary as a Member State, with regard to the actual exercise of sovereignty, Hungary is bound, on the one hand, by the international treaty establishing the Union, and on the other hand – in terms of the conferred competences and to the extent necessary for their implementation – the legal acts created by the institutions of the EU.

2. THE LIMITATIONS IN PRINCIPLE OF DELEGATED COMPETENCES AND THEIR EXERCISE

In the case of a conflict between EU law and the law of a Member State, the supremacy of EU law is a binding principle for all Member States – and thus for Hungary. This means that EU law is superior in the hierarchy of sources of law to the internal (domestic) legal order, so in case of a conflict of law EU law shall prevail. This is stated regarding its own legal order by the European Union (more precisely: the European Court of Justice stated this in the *Van Gend en Loos* case[6]). However, the actual situation is even more complex.

Firstly, a part of the secondary sources of law – namely directives – expressly require domestic legislation. In this case the constructed domestic law gains its validity from two other sources of law: on one hand, from the superior domestic law (the Fundamental Law of Hungary), and on the other hand, from the specific directive of the European Union. Therefore, the two legal orders are interconnected in such cases. Secondly, the touchstone of the full autonomy of the two legal orders is the Fundamental Law, situated at the top of the internal legal hierarchy. But is the legal order of the European Union superior to the Fundamental Law? Many think, on the basis of the *Van Gend en Loos* case, that the answer is a simple 'yes'. But, if the case was so, the Fundamental Law would lose its characteristic of being a positive constitutional law, and we could not talk about sovereignty of Member States anymore. The question can be precisely answered – with a 'no' – on the basis of Article E of the Fundamental Law of Hungary. Based on this provision, the Fundamental Law of Hungary (just as earlier the Constitution) elevated the legal order of the European Union "above itself" in relation to some of its provisions, but the same cannot be said about the Fundamental Law of Hungary as a whole. There has to be a constitutional minimum that shall be superior to the legal order of the European Union for as long as Hungary possesses sovereignty as a Member State.[7]

In essence, the Fundamental Law of Hungary reflects the theory of the "integration-resistant constitutional core" elaborated in German law. Nonetheless, the bounds of the supremacy of European Union *vis-á-vis* the domestic law are not clear. From the perspective of sovereignty and procedural resolution of the conflict of laws only the possible directions for solution have crystallized. The most important of these are: the possible decisions of the Constitutional Court in case of a conflict of laws between domestic and EU law, the advisory opinions, annulment, call for harmonisation of laws, the establishment of legislative omission, the adjudication of a constitutional complaint[8], and the correlations of supremacy and sovereignty, the supremacy of sovereignty and self-identity[9], the compromise solutions based on the sovereignty of the individual states, and attempts to find a new concept of sovereignty.[10] Ultimately, this question depends on the actual and legal identity of the European Union (integration/confederation/federation) and its developments.[11]

The occurring debatable situations can be categorized into three domains pursuant to TEU and the provisions of the Treaty on the Functioning of the European Union (hereinafter referred to as: TFEU). The first category includes the exclusive competences conferred to the Union (Article 3 of TFEU), regarding which only the Union has exclusive competence to draft and adopt binding legal acts, while the Member States have competence only as far as they are authorized by the Union (mainly in the form of directives), or if the aim of these legal acts is the implementation of legal acts adopted by the Union (Subsection (1) of Article 2 of TFEU).[12] In this category, the latitude of the Member States is highly limited until TEU and TFEU are in effect, in case of a legal dispute the supremacy of EU law and the decision of the Court of Justice of the European Union (hereinafter referred to as: CJEU) is, in essence, indisputable. The second category includes the shared competences (Article 4 of TFEU). Regarding these competences both the Union and the Member States may create and adopt binding legal acts, however, the Member States may exercise this competence only to the extent that the Union has not exercised or has disclaimed its right of exercising its competence (Subsection (2) of Article 2 of TFEU).[13]

5 Touri ibid. 347.

6 Kende, Tamás–Szűcs, Tamás (szerk.): *Európai közjog és politika*. Budapest, Osiris, 2002. p. 559.

7 András Jakab doubts that this approach would be enforceable. See: Jakab, András: *A magyar jogrendszer szerkezete*. Budapest–Pécs, Dialóg-Campus, 2007. pp. 111-112 and 184-188. Furthermore, the concept of the untouchable "core" is disputed by: Vörös, Imre: *Csoportkép Laokónnal. A magyar jog és az alkotmánybíráskodás vívódása az európai joggal*. HVGORAC, Budapest. 2012. pp. 106-109. See also: Blutman, László–Chronowski, Nóra: *Az Alkotmánybíróság és a közösségi jog: alkotmányjogi paradoxon csapdájában (I.)*, Európai Jog, 2007. 2. (3–16.), p. 10.

8 See: Chronowski, Nóra: *„Integrálódó" alkotmányjog*. Budapest–Pécs, Dialóg-Campus, 2005. 265. Blutman–Chronowski ibid. pp. 10–14.

9 Blutman–Chronowski ibid. pp. 3–4, 10 and 12. Trócsányi, László: *Az alkotmányozás dilemmái. Alkotmányos identitás és európai integráció.* Budapest, HVGORAC, 2014.

10 L. Jakab, András: A szuverenitás fogalmához kapcsolódó kompromisszumos stratégiák, különös tekintettel az európai integrációra. In: *Európai Jog,* 2006/2., pp. 3–14.

11 L. Szuper, József: *Föderalizmus-dilemmák az európai alkotmányozásokban*. In: Európai Jog, 2006/6. pp. 9-17.

12 Szabó–Láncos–Gyeney: *Az Európai Unió*... ibid. pp. 78.

13 Szabó–Láncos–Gyeney: *Az Európai Unió*... ibid. pp. 78–79.

This category is supplemented by competences that are retained by the Member States, nevertheless, regarding which the Union is entitled to take measures which support, harmonize or supplement the competences of the Member States (Subsections (4)–(6) of Article 2 and Article 6 of TFEU), and for which TFEU applies further detailed rules. In case of the latter competences even a Member State may dispute according to its own legislation (that is before its own Constitutional Court) the compliance of the supportive, harmonizing or supplementary measures of the Union with its own legal acts, as the competence relevant to these is retained by the Member State.

And finally, there is a third category as well, namely the competences that are not vested in the Union in any way. Due to the formulations of TEU and TFEU which allow for a flexible interpretation, this category is actually very limited, for most of the competences of Member States constitute a part of at least the conferred competences or the competences supported by supportive, harmonizing or supplementary measures. Probably the best example for this flexible formulation is the shared competence for the area of freedom, security and justice (Paragraph (j) of Subsection (2) of Article 4 of TFEU). The scope of competence, which have a seemingly theoretical nature, is particularised by detailed policies, such as the issues regulated in Articles 67-89 of TFEU: the absence of internal border controls for persons, asylum and immigration, external border controls, prevention of racism and xenophobia, the coordination among police and judicial authorities and other competent authorities, cooperation in penal and civil law, and access to justice.[14] In fact the competence of the EU covers many areas related to the essence of classical sovereignty.

However, in the light of the foregoing – for as long as sovereignty is possessed by a Member State, and the Union exists by the will of the Member States – the competence of the Member States relevant to this subject matter cannot be fully deprived of their substance. The margin of the Member States is also guaranteed by the circumstance that formally the Member States did not waive the primacy of their own legal order in favour of the Union, this is an essential difference between TEU-TFEU and the failed Agreement on the Constitution containing a legal waiver formula.[15] Thus the primacy of EU law continues to be based on the decision of the CJEU, which – in case of a legal dispute – can attempt to enforce it, but the Member States have the possibility of serious resistance.

In defining the retained competences it can be assumed that the Member States did not confer their constitutional identity to the Union.[16] Although a solemn-looking formula that still conferred the control over their constitutional order and its elements to the institutions of the Union was adopted in Article 2 of TEU, in case of a legal dispute, this identity can be argued.

It has to be noted that CJEU refrains from acknowledging even the smallest margin of the Member States, which, for Hungary, is sufficiently illustrated by the judgment in the *Jóri* case[17]. According to the facts of the case detailed in the judgement, András Jóri was appointed as commissioner for data protection for a term of six years on 29 September 2008 by the National Assembly of Hungary pursuant to Act LXIII of 1992 on the Protection of Personal Data and on the Publication of Data of Public Interest. Based on Article 16 of the Transitional Provisions of the Fundamental Law his mandate was terminated on 31 December 2011. His functions were taken over by the Hungarian National Authority for Data Protection and Freedom of Information. The European Commission – with the support of the European Data Protection Supervisor – launched an action for failure to fulfil an obligation against Hungary. In the procedure Hungary presented the following argument in its defence: "Hungary states, first of all, that the decision to replace the Commissioner with a body which operates as an authority and, accordingly, to terminate the mandate of the Commissioner was adopted by the constitutional authority, and that the new legislation relating to the Authority is based on the Fundamental Law." By contrast, the CJEU held that as the Commissioner had been elected based on the 1992 act on data protection, therefore the termination of the Commissioner's mandate should have been based also on the 1992 act, consequently Hungary has violated Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[18] By this, the CJEU did not simply state that EU law is superior to a constitution of a Member State (which undoubtedly is the case in respect of the conferred competences), but questioned the constitutional quality of the Fundamental Law of Hungary. The judgment can only be interpreted as one that suggests that the Fundamental Law as a new constitution should have been in conformity with Act LXIII of 1992 on data protection, and the constituent power should have aligned itself to the legislative power. Nobody has ever authorised the CJEU to question a constitutional quality of a source of law (even if it occurred by simple disregard), still it so decided.

3. THE LATITUDE OF CONSTITUTIONAL COURTS OF MEMBER STATES

Despite the activity of the CJEU, which defends and expands EU law, it cannot be stated that the Member States and courts intended to defend their own constitution (hereinafter referred to as: constitutional courts) should surrender in each

14 Szabó, Marcel–Láncos, Petra Lea–Gyeney Laura: *Uniós szakpolitikák*. Budapest, Szent István Társulat, 2014. pp. 176–220.
15 Szabó–Láncos–Gyeney: *Az Európai Unió*... ibid. p. 95.
16 Trócsányi ibid.
17 JUDGMENT OF THE COURT (Grand Chamber) 8 April 2014 (...) in Case C-288/12.
18 JUDGMENT OF THE COURT (Grand Chamber) 8 April 2014 (...) in Case C-288/12, sections 40, 57, 59, 61–62.

case. Naturally, the margin of the constitutional courts depends on the debated competence; the possibility for intervention by the constitutional courts is inversely proportional to the intensity of the transfer. The margin determined by the present legislation can be summarized in a simplified manner as follows.

A constitutional revision by Member States of legal acts included in exclusive competences is essentially not possible, it may only occur to review the formal adequateness of an implementing legal act delegated to the Member State. The constitutional court of the Member State enforces EU law in this case as well (which means that it cannot dispute the essence of the competence conferred under an international treaty). The starting point is largely similar to this regarding the shared competences, although it has to be noted that the detailed rules of TFEU still provide opportunity for material interaction by the Member States in the process of legislation or interpretation of the law. In the case of the shared competence related to the area of freedom, security and justice (the already referenced example) we find multiple important detailed rules. In this manner the fundamental rights, the different legal orders and legal traditions (that is to say the constitutional identities of the Member States) are respected in the course of the exercise of the shared competences within the area pursuant to Subsection (1) of Section 67 of TFEU. Based on Article 72, the shared competences (that is their detailed rules) are not relevant for the exercise of Member States' competences in connection with the maintenance of public order and safeguarding national security. Article 73 leaves the competence relevant to the coordination of public administration on the level of the Member States with the Member States. As regards the competence shared among Member States in the case of immigration policy, Article 79 expressly stipulates that it shall be open to Member States to determine the number of third-country nationals seeking job opportunities as employees or independent entrepreneurs they admit to their territories.[19]

Obviously, the largest margin for legislative acts (the adoption of laws in the first place) and the interpretation of law (eventually by the constitutional courts) is available for the Member States in the case of retained powers. The issues covered here are those that constitute an indisputable part of the constitutional identity of the Member States. Any issue which is a *sine qua non* condition of statehood and – if we take into consideration the source of statehood – of national self-identity shall be deemed part of this. Without the need for exclusivity, such elements are the self-definition of the state and of the nation, the historical, national and legal traditions, and the fundamental constitutional values, especially those which do not fall under common values pursuant to Article 2 of TEU. Naturally, these cannot be interpreted completely independently from the legal foundations of the EU; however, their interpretation certainly cannot be transferred to the CJEU. To provide a domestic example: in each case where there is a dispute regarding the above, the decision shall be made by the Hungarian National Assembly (as a constituent and legislative power) or the Constitutional Court (as institutions authorized for the *erga omnes* interpretation of the Fundamental Law of Hungary) based on the interpretation of the Fundamental Law of Hungary, in particular of Article E thereof.

It is worth to collect the most important arguments for the maintenance of the opportunity for interpretation by Member States presented by constitutional courts. The Constitutional Court of the Czech Republic found by conceptualizing sovereignty as a totality of powers – and not as the absolute criterion of a state – that due to the rule of subsidiarity the EU did not become a federal state, because it "does not dispose of a power to establish powers".[20] In other words, it means that in principle the EU may only expand its existing competences, and it is not authorized to establish new competences for itself, this is reserved for the totality of its Member States. According to the standpoint of the German Constitutional Court, the Member States remain sovereign states even after the Treaty of Lisbon, democratic legitimacy is possessed by the Member States, and by this legitimacy they transfer competences to the Union. "The European unity based on the *contractual union of sovereign states* cannot be realized without the *required* margin for the political shaping of economic, cultural and social living conditions (...). It applies furthermore to those political decisions which are particularly related to cultural, historical and linguistic aspects."[21] Based on this, the German Constitutional Court – in a sense surpassing the well-known Solange I and Solange II decisions – upholds the right for the revision of the efficient operation of subsidiarity, that is the revision of EU-decisions in defence of the Basic Law of Germany and constitutional identity.[22]

The Constitutional Court of Hungary has not made a decision like the latter one; however, it declared that in terms of the competence of the Constitutional Court, the legal acts of the Union are not deemed as international treaties – not even the primary sources of law embodied within treaties. It was therefore possible to hold a referendum on the Treaty of Accession.[23] Sooner or later the formulation of a clear standpoint cannot be avoided. This is indicated by the growing interest of Member States for the issues of constitutional identity,[24] which is increased by the preemption of the European Union to limit the exercise of the sovereignty of the Member States, and the Union's practices based on it.[25]

19 Szabó–Láncos–Gyeney: Uniós szakpolitikák... ibid. pp. 177, 191, 214.

20 Vörös ibid. p. 32, E.g.: ÚS,19/08., Pl. ÚS. 29/09.

21 Vörös ibid. p. 35.

22 Vörös ibid. p. 35, 2 BVR 1010/08., BverfGE 123.

23 Vörös ibid. pp. 22–26, Decision 58/2004 (XII. 14.) of the Constitutional Court of Hungary, Decision 1053/E/2005 of the Constitutional Court of Hungary, Decision 72/2006 (XII. 15.) of the Constitutional Court of Hungary.

24 Tuori ibid. pp. 338, 351. In the latter place Tuori implies that the constitutional courts of the Member States will be involved in a dispute not only with the CJEU, but with the European Court of Human Rights (ECtHR) as well.

25 Tuori ibid. pp. 343, 353.

4. ARGUMENTS AVAILABLE FOR THE HUNGARIAN CONSTITUTIONAL COURT

In the event that a conflict presents itself between Hungarian constitutional identity and the supremacy of EU law – and it certainly will –, the above described facts may serve as the starting point for the Constitutional Court. First, we need to point out from the outset that *Hungary has only transferred the right to exercise some of its competences derived from its sovereignty to the EU, and not its sovereignty itself.* As a result, in case of a legal dispute the supremacy of the interpretation of EU law belongs to the CJEU, nevertheless, making a decision about the question whether the exercise of one competence in a specific situation – in particular the expansion of the competence – would mean the take-over of sovereignty, belongs under the jurisdiction of the Constitutional Court. In order to protect constitutional identity, the Constitutional Court has to proceed from the *presumption of the maintenance of sovereignty*. In a methodological sense it means that in the event of doubt if there are certain arguments that support the retention of the exercise of a certain competence within the sovereignty of the Member State's level, it shall be presumed that this competence was not transferred to the Union – even if there are arguments that support the transfer as well.[26] The applicability of this presumption clearly depends on the rules of TEU-TFEU on competences: the probability is low in the case of exclusive, higher in the case of shared and very high in the case of retained competences.

Another argument for the application of the sumption of retention in a specific case presents itself if there is reasonable ground to assume that at the time of the transfer of a competence the Member State was not able to consider an important, but at the time unknown circumstance. In such a case the Constitutional Court must expressly presume that we did not transfer the competence (parallel to the presumption, this is backed by the principle of *clausula rebus sic stantibus*). This argument may lead to the conclusion that the National Assembly shall adopt a two-thirds majority decision by applying Subsection (4) of Article E of the Fundamental Law of Hungary on whether it deems a specific competence as one that is subject to TEU-TFEU. Considering, however, that it was a referendum that decided on the Accession Treaty, in case of doubt, the option for a repeated referendum – as a constitutional requirement – relating to the foundations of sovereignty shall not be excluded.

Regarding the question whether we can talk about a fundamental question of sovereignty that requires a referendum (on the integration-resistant core of the constitution) the general considerations shall be observed. It is very useful to take into consideration the above presented arguments of the German Constitutional Court: the question would affect the foundations of sovereignty (constitutional identity) if political a decision needs to be made that is particularly related to cultural, historical and linguistic aspects. This needs to be pronounced in the first place by the National Assembly and ultimately by the Constitutional Court.

The presumption of retained sovereignty can also be applied in the case of shared, and even in the case of exclusive competences as well if the institutions of the EU are clearly and evidently unable to exercise them. An extreme case of this is when there are well-founded arguments that the EU will put itself into a state of violation of law, but the consequences of such infringement shall be borne by the Member State. In such a case, the Member State has a legitimate self-defence position: no infringement on part of the EU may result in an irreparable consequence in a Member State. If its threat can be clearly established, then the Member State may (or, as the case may be, must) take back the exercise of the transferred competence until the state of infringement by omission ceases to exist.

A further argument in favour for the freedom of action based on the presumption of retained sovereignty is a situation where fundamental rights are violated or seriously endangered. In such cases the above referenced arguments presented by the German Constitutional Court in the Solange decisions[27] can be applied. It may be a particularly strong argument that the EU is currently in the state of continuous infringement.

According to Subsection (2) of Article 6 of TEU, "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties." The TEU is clear on this point: the Union "shall accede". As the modal verb "shall" denotes the binding nature of the event discussed, it obviously prescribes mandatory accession. Still, the Commission has sought the opinion of the CJEU on the draft version of the Accession Treaty that the Commission has prepared. By contrast, Opinion[28] 2/13 of the Court of Justice of the European Union (Full Court) issued on 18 December 2014 took the view that the EU has a new kind of legal order that is supreme to the legal orders of the Member States; it protects the fundamental rights recognised by the Charter, and this protection (the content-based interpretation of rights) shall remain within the autonomy of EU law; the European Court of Human Rights (ECtHR) could undermine the autonomy of EU law, and therefore the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms does not comply with Article 6(2) TEU.[29] This can hardly be taken other than as an action by which the CJEU has

26 This argument is the application of the doctrine of *probabilism,* – a medieval concept, which encompasses the presumption in favour of liberty – to the relation of Hungary and the European Union. L. James M. Joyce: *A Nonpragmatic Vindication of Probabilism*. In: Chicago Journals. http://www.jstor.org/stable/188574 (downloaded on 18 March 2012), A. Fleming, Julia: Defending Probabilism. Washington, Georgetown University Press, 2006.,

27 Blutman, László: *Az Európai Unió joga a gyakorlatban*. Budapest, HVGORAC, 2010, pp. 97, 295–297, 341, 422, 477. Várnay, Ernő–Papp, Mónika: *Az Európai Unió joga*. Budapest, KJK-Kerszöv, 2002., 238. Kecskés ibid. p. 615.

28 Avis 2/13 - Avis au titre de l'article 218, paragraphe 11, TFUE.

29 Avis 2/13 - Avis au titre de l'article 218, paragraphe 11, TFUE, para 158, 166, 168, 170, 172, 194.

overridden the binding rule of TEU, namely an international treaty adopted and ratified by all Member States.[30] The very same Treaty it was intended to protect. The CJEU thus defied the unequivocal provision of TEU, and – since the Court is unaccountable – there are no legal instruments against its decision. This arbitrary decision is especially surprising in the light of the supposition that the CJEU – in the name of the value of rule of law – would not accept a similar defiance against the ECtHR.

However, this provides an argument for the constitutional courts of the Member States, including the Hungarian constitutional court, for the establishment of its own competence. Since the EU has not subjected itself to the jurisdiction of the ECtHR despite the requirement set forth in TEU, but the Member States have, the legal protection for the Member States is stronger. As referring to the ECtHR is a personal right, therefore the Member State cannot waive their own exercise of competence; consequently, it is not only their right, but also their obligation to resist the institutional infringements of the EU in cases involving fundamental rights.

As a conclusion, we find quite a few arguments that, on the one hand, provide opportunity for the Constitutional Court of Hungary for the revision of the harmony of EU law and the Fundamental Law of Hungary, and on the other hand, allow for the Hungarian Constitutional Court to deem the disputed issue as one that is included in the scope of retained competences originating from Hungarian sovereignty, or even – temporarily, so long as the infringement of the EU by omission persists – as reverted. Finally, in a given situation it can be concluded from the above that – on the basis of the decision of the Constitutional Court – the National Assembly or even the source of power, the nation shall decide on the exercise of competence.

30 L. Orbán, Balázs: *Európai bírói fórumok küzdelme a háttérben*. In: napigazdasag.hu, 09 January 2015, http://www.napigazdasag.hu/cikk/32780/ (as of 14 March 2015) and Michèle Finck: *The Court of Justice of the European Union Strikes Down EU Accession to the European Convention on Human Rights: What Does the Decision Mean?* In: I-CONnect, 28 December, 2014, http://www.iconnectblog.com/2014/12/the-court-of-justice-of-the-european-union-strikes-down-eu-accession-to-the-european-convention-on-human-rights-what-does-the-decision-mean/ (as of 14 March 2015).

Miklós Király*

Some Remarks on the Limits of the Harmonisation of Contract Law in the European Union

THE ROLE OF COMPARATIVE PRIVATE LAW

When attempting to assess the plans the European Union has worked out for the harmonisation of private law, and in particular, of contract law, several methods may be applied. A traditional analysis would approach the issue in terms of the discipline of private law, and examine the following: first, the legal institutions of the national legal systems that afford such an opportunity; second, the possible comparative law background of adopting common rules; third, the methods of assessing this possibility and, fourth, the ways and means of resolving the problems arising from different legal cultures and traditions having divergent terminologies and languages.[1] It will necessarily be scholars of comparative private law who will come to take a stand on the possibilities of legal harmonisation. Such an assessment is a fundamental and indispensable condition of elaborating any justifiable programme on legal harmonisation. This was essentially the approach taken by the *Lando Commission*, when preparing *Principles of European Contract Law,*[2] as well as the *Trento Project*[3] and the *Study Group on the European Civil Code*[4], when analysing the possible solutions to concrete cases according to the various rules of the national legal systems.

THE EU LAW APPROACH

It would not be irrelevant – and it would indeed aptly supplement the methods of examination mentioned above – to approach the harmonisation of contract laws from the point of view of the institutional and legal system of the European Union. In so doing, we would face such questions: How far does the functioning of European integration require the adoption of common rules for certain types of transaction? What legal base does the Treaty on the Functioning of the European Union (TFEU) provide for putting into practice the said harmonisation? And how can the actual application and unified interpretation of acts of the European Union be ensured? On this basis, we will arrive at a position on the possibilities and limits of the approximation of contract laws in the European Union. This was the attitude which the European Commission itself followed in three formerly issued Communications which

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1 Konstantinos D. Kerameus, "Problems of drafting a European Civil Code." In: *European Review of Private Law,* vol. 5, no. 4, 1997, pp. 475–476.

2 Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law,* Parts I and II. The Hague, London, Boston: Kluwer Law International, 2000, pp. xi–xvi; Ole Lando, Eric Clive, André Prüm and Reinhard Zimmerman (eds.), *Principles of European Contract Law*, Part III. The Hague, London, Boston: Kluwer Law International, 2003. pp. ix–xii; Luisa Antoniolli and Anna Veneziano (eds.), *Principles of European Contract Law and Italian Law.* A Commentary. The Hague: Kluwer Law International, 2005, pp. 5–6. In Hungarian legal literature the harmonisation of private law in Europe is thoroughly analysed by László Kecskés, *A polgári jog fejlődése a kontinentális Európa nagy jogrendszereiben*. Történeti vázlat [The Development of Civil Law in the Major Legal Systems of Continental Europe. A Historical Overview]. Budapest–Pécs: Dialógus-Campus Kiadó, 2004, pp. 457–517. The cultural context of harmonisation of private law is demonstrated by Csaba Varga, *Jogrendszerek, jogi gondolkodásmódok az európai egységesülés perspektívájában* [Legal systems and ways of legal thinking in the perspective of European unification]. Budapest: Szent István Társulat, 2009, especially pp. 83–120. Similarly, Rafael Manko: The Culture of Private Law in Central Europe After Enlargement: A Polish Perspective. In: *European Law Journal,* Vol. 11, No. 5. September 2005, pp. 527–548.

3 Hein Kötz, "The Common Core of European Private Law: Third General Meeting, Trento 17–19 July 1997." In: *European Review of Private Law,* vol. 5, no. 4, 1997, pp. 549–552; and Ewoud Hondius, "The Common Core of European Private Law, Trento, 15–17. July 1999." In: *European Review of Private Law,* 2000, vol. 8, no. 1, pp. 249–251.

4 The Study Group on a European Civil Code and the Research Group on the Existing EC Private Law (the 'Acquis Group') presented the Draft Common Frame of Reference (DCFR): Christian von Bar, Eric Clive and Hans Schulte Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR).* Outline edition. Munich: Sellier, European Law Publishers, 2009. The complete results of the Study Group on European Civil Code and the Research Group on the EC Private Law were published by Christian von Bar and Eric Clive (eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR).* Full edition, Volumes I–VI, Munich: Sellier, European Law Publishers, 2009.

sought to explore the possibilities of harmonising European contract laws.[5]

THE LEGAL BASE OF HARMONISATION

LIMITED POWERS

When assessing the feasibility of approximation of laws, it must always be borne in mind that the European Union has no general power to legislate: it is obliged to find a particular provision in the Treaty on the Functioning of the European Union that affords legal grounds for adopting any EU act. With regard to contract law, Articles 114, 115, 169 and 352 can serve as the legal base of legislation.[6]

Article 115 authorises the Council, acting unanimously, to issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the *internal market.* A related provision laid down in Article 114 lends scope for adopting measures to establish and ensure the functioning of the *internal market.*[7] Taking Union action is easier in this case in so far as the Council may make its decisions according to ordinary legislative procedure by qualified majority voting.[8] Referring to Article 114 of the TFEU, the appropriate functioning of the internal market and the elimination of obstacles to trade between the Member States became a recurrent theme of the directives aiming at the approximation of contract laws. This established practice, however, was limited by the decision of the European Court of Justice made on the *Federal Republic of Germany v. European Parliament and Council of the European Union* case in October 2000.[9]

Though the ruling was not passed on a directive that is aimed at the approximation of contract law, it has far-reaching consequences in that respect, as well. The European Court of Justice provided an authentic piece of legal interpretation of Article 95 of the EC Treaty (now Article 114 of the TFEU) that will have to be taken into consideration by Union legislature if it intends to regulate the internal market with recourse to it as a legal base. The requirement of verifying the specific trade-restricting effects resulting from the disparities of national laws will presumably stand in the way of the lofty notions of codification that wish to regulate – in obligatory legal sources – the whole field of contract law and civil law at Union level.[10]

By virtue of Article 169 of the TFEU, legislation on the harmonisation of laws governing consumer contracts has been granted specific powers. Accordingly, the Union contributes to a high level of consumer protection by measures (laws) adopted pursuant to Article 114of the TFEU in the context of the completion of the internal market.[11]

Article 352 of the TFEU might again seem to confer a general legislative power, in so far as it lays down the following: "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures."

Nevertheless, the Union legislature has to be aware of two serious limitations before adopting any act by recourse to Article 352 of the TFEU as its legal base. One of them is the requirement of unanimity clearly stated in the text, which is very difficult to achieve between the 28 Member States. The other one is actually a substantive limitation imposed by Opinion 2/94 of the European Court of Justice.[12] According to this, Article 308 (earlier: 235) of the EC Treaty, the predecessor of Article 352 of the TFEU, could not be used as a base for the adoption of a provision which would widen the scope of Union powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by the ones that define the tasks and the activities of the Union.[13] No measure of constitutional importance, i.e. one that would mean a significant widening of the scope of action of the Union, could therefore be adopted on the basis of a conferral of power under Article 352 of the TFEU; in other words, the powers on integration conferred cannot be increased in this way. Though the invocation of Article 352 of the TFEU is not without precedent in legislation touching on private law,[14] in view of the above, it could hardly be relied

5 Communication from the Commission to the Council and the European Parliament on European contract law. Brussels, 11.07.2001, COM (2001) 398 final; Communication from the Commission to the European Parliament and the Council. A more coherent contract law. An action plan. *OJ C 63,* 15.3.2003 (COM [2003] 68 final), p. 1; and Communication from the Commission to the European Parliament and the Council – European Contract Law and the revision of the acquis: the way forward. Brussels, 11.10.2004, COM (2004) 0651 final. A Green Paper from the Commission on policy options for progress towards a European Contract law for consumers and businesses was published in 2010. 1.7.2010. COM (2010) 348 final.

6 Former Articles 94 (100), 95 (100/A), 153 (129/A), 308 (235) of the EC Treaty. For an analysis of the issue in respect of the harmonisation of private law as a whole, see Walter van Gerven, "Coherence of Community and national laws. Is there a legal basis for a European Civil Code?" In: *European Review of Private Law,* vol. 5, no. 4, 1997, pp. 465–470 [van Gerven, 1997]

7 I decline giving a definition of the competing concepts of the common market and the single market, formerly included in the EC Treaty, as this would lead beyond the actual scope of this study. For a discussion of the question, see Anthony Arnull, Alan Dashwood, Malcolm Ross, and Derrick Wyatt, *European Union Law.* London: Sweet & Maxwell, 2000, pp. 502–503.

8 As the decision-making procedure in this respect is defined by Article 294 of the TFEU, earlier Article 251 (189/B) of the EC Treaty.

9 Case C-376/98, Federal Republic of Germany v. European Parliament and Council of the European Union. *ECR* (2000), p. 8419.

10 But a few years earlier, Winfried Tilmann had conceived the possibility of creating a European Civil Code on the basis of Article 95 of the EC Treaty. See his "The Legal Basis for a European Civil Code." In: *European Review of Private Law,* vol. 5, no. 4, 1997, pp. 471–472.

11 Article 169 paragraph 1 TFEU, formerly Article 153 paragraph 3(a) of EC Treaty.

12 Opinion 2/94 of the Court pursuant to Article 228(6) of the EC Treaty (Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms), *ECR* (1996), p. I-1759.

13 See especially point 30 of the Court opinion.

14 Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), OJ L 199, 31.7.1985, which was adopted on the legal base of Article 235 (later 308) of the EC Treaty.

on as a basis of, say, a comprehensive, obligatory regulation of contract law at Union level.[15]

THE LIMITS OF LEGAL HARMONISATION

FROM LEGAL BASE TO PRELIMINARY RULING

Union legislature faces difficulties which have accumulated in the course of harmonising contract laws. Any effort at legal harmonisation has to grapple with such complications but some of these issues stem from EU law itself. It is perhaps opportune to mention some of them, illustrating the obstacles to harmonisation which arise at various stages of its implementation by means of a fictitious example:

The European Commission drafts a proposal for a directive on the harmonisation of a certain area of contract law. The initiative sparks heated debate with the Member States; members of the European Parliament, stakeholders and scholars of law were divided over the need for this harmonisation.

(i) The proposal due to the limited scope of the provisions (legal base) granted for EU legislation covers a smaller area than the context of the private-law matters at hand would otherwise require.

(ii) In order to strike a deal between the Member States, the directive stipulates alternative rules, aiming at only minimum harmonisation and it refers back, from time to time, to the laws of the Member States, thereby accomplishing only a relative degree of harmonisation.

(iii) After several years of drafting, the directive is transposed by a number of Member States with considerable delay, while others, implementing it, pass faulty legislation. Further, the European Court of Justice refuses to acknowledge its direct horizontal effect, i.e. its applicability between private persons before national courts. On top of this, the laws of Member States allow different rooms for manoeuvre for an interpretation in conformity with the directive, or courts take different positions on the issue.

(iv) The transposition of the directive varies, too: some legislatures pass a special act while others amend their existing codes at the price of significant differences and contradictions.

(v) As a result of such factors as differences between court rules and civil procedure, and the assertion of rights under the directive before the courts of the Member States, the duration and costs of lawsuits are quite different in the Member States.

(vi) Finally, the courts of some Member States are reluctant to request preliminary rulings from the European Court of Justice and thus there is little chance of shaping a single interpretation of the directive.

In its Communications, the European Commission has often taken into account the difficulties of harmonisation, especially the consequences of piecemeal and transaction-specific regulation. It has been observed that there are unjustified divergences from current EU directives on contract law, which may treat similar life situations differently and stipulate different requirements. Thus, for instance, in the case of consumer transactions they provide for different deadlines and methods of calculation for withdrawal.[16] As an unwanted side effect, several EU acts may be applicable to the same situation, or their national transpositions may have a different content. Two different legislative approaches may feature in a single directive. Directives often use abstract legal terms, but they might not define them, or give them an overly broad definition. Certain terms are defined in some directives, while they are not defined in others, raising the interpretation issue of whether a definition in one directive can be exported to another. Apart from this, a situation might easily occur when the terms used by EU acts are simply alien to one legal system or another.[17]

SEEKING PROPORTION AND RESTRAINT

At this point, questions inevitably arise: Has the harmonisation of a given area of contract law actually been attained? Does the result justify the vast amount of money and time expended on it? Naturally, not all attempts at harmonisation lead to such a magnitude and accumulation of problems. Nevertheless, the difficulties outlined are genuine and typical, so much so that they render the establishment of a comprehensive, monolithic European regime of contract law unreal and unreasonable. It would, therefore, be only justified for the European Union to seek *proportion* and exercise *restraint,* in other words, to take full account of the principle of subsidiarity in any future harmonisation touching on contract law. Such a realistic approach has been given increasing emphasis in legal literature. Thus, the third edition of the collection of now classic studies on private-law harmonisation, *Towards a European Civil Code,*[18] has afforded much more attention to this issue, than it had done to the cultural differences that limit the possibilities of legal harmonisation. One eminent contributor to the volume, *Brigitta Lurger*, pointed out the lack of mapping of the social background of contract law,[19] while *Vincenzo Zeno-Zencovich* and *Noah Vardi* foresaw immense difficulties in any future adoption of a European contract-law

15 In October, 1999, the Tampere European Summit Conclusions urged legal approximation, "greater convergence in civil law", and stated: "As regards substantive law, an overall study is requested on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings. The Council should report back by 2001." Point VII/39, Presidency Conclusions, Tampere European Council, 15–16 October.

16 These problems are partially tackled by the Consumer Rights Directive (CRD): Directive 2011/83/EU on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

17 See points 13–24 of COM (2003) 68 final.

18 Arthur S. Hartkamp, Martijn Hesselink, Ewoud H. Hondius, Carla Joustra, Edgar Du Perron, and Muriel Veldman (eds.), *Towards a European Civil Code.* The Hague, London, Boston: Ars Aequi Libri – Nijmegen, Kluwer Law International, third fully revised and expanded edition, 2004, 847 pp.

19 Brigitta Lurger, "The 'Social' Side of Contract Law and the New Principle of Regard and Fairness." In: Hartkamp et al., 2004, pp. 273–304.

codex.[20] Not to mention the long-time critic of private-law unification, *Pierre Legrand,* who calls the proposal for a European Civil Code point-blank "a diabolical idea," a boorish assault on the diversity of the laws of the Member States.[21]

ALTERNATIVE WAYS OF TACKLING THE DIVERSITY OF CONTRACT LAW

THE FIRST COMMUNICATION

In its 2001 Communication, the European Commission outlined four possible scenarios on the role of the Community[22]: *(i)* The Community does not take any action in this field, trusting that the entwining markets, the initiatives of enterprises and the Member States will establish the required harmony between European contract laws. *(ii)* The second possibility is that the Commission – in conjunction with scholars of comparative law, legal theorists and practitioners – promotes the development of non-binding common principles of contract laws, which could lead to the eventual approximation of the contract laws of the Member States in so far as these principles are accepted in commercial practice and their voluntary application becomes widespread. In line with this kind of development, standard contracts modelled for cross-border transactions would be compiled. *(iii)* The review and improvement of existing legislation in view of its revealed shortcomings. *(iv)* Finally, it is conceivable that the Community would undertake to regulate contract law comprehensively through regulations, directives or recommendations.

The aim of the Communication was primarily to foster widespread discussion of the issues surrounding the future of European contract law for stakeholders, academic workshops, legal practitioners, governments and the Commission itself.

COMMON FRAME OF REFERENCE

The results of the ensuing debates were first published in 2003 and they were summed up, in a largely congenial way, by the Commission in 2004.[23] According to the 2003 summary, only a fragment of the opinions delivered to the Commission believed that reliance on the market was enough. Significantly more respondents supported the elaboration of common principles of contract law, but the majority deemed that the way forward was the review and improvement of existing acts. This also meant that the majority rejected the idea of Community legislation on the harmonisation of European contract laws, at least in the situation prevailing at the time. In the light of this, the Commission declared in its 2004 Communication that it is not "the Commission's intention to propose a »European civil code« which would harmonise contract laws of Member States." Instead, it would support, in order to improve the coherence of existing and future *acquis,* the development of a Common Frame of Reference (CFR), and foresaw its adoption in 2009, following thorough preparatory work.[24]

In conclusion, the Commission exercised considerable self-restraint in drafting its proposals and setting its time schedule for the tasks involved. As attested to by the 2004 Communication, this cautiousness can perhaps be attributed to its recognition of "the need to respect different legal and administrative cultures in the Member States" and "the range of different legal traditions in the European Union".[25] This cautious approach to the harmonisation of contract law was confirmed by the Stockholm Programme[26] of the European Union for 2010-2014 which invited the Commission to submit a proposal on the CFR. According to this programme the CFR should be a *non-binding* set of fundamental principles, definitions and model rules to be used by the law-makers at Union level to ensure greater coherence and quality in the law-making process.[27]

COMMON EUROPEAN SALES LAW (CESL)

In April 2010 the European Commission set up an expert group with a promising mandate to assist in the preparation of a Common Frame of Reference of European contract law, including consumer and business law.[28] After

20 Vincenzo Zeno–Zencovich and Noah Vardi, "The Constitutional Basis of a European Private Law." In: Hartkamp et al., 2004, pp. 205–214.

21 Pierre Legrand, "A Diabolical Idea." In: Hartkamp et al., 2004, pp. 245–272.

22 Communication from the Commission to the Council and the European Parliament on European Contract Law. Brussels, 11.07.2001. COM (2001) 398 final, points 49–70.

23 See Communication from the Commission to the European Parliament and the Council. A more coherent contract law. An action plan. 15.3.2003. COM (2003) 68 final, p 1; Communication from the Commission to the European Parliament and the Council – European Contract Law and the revision of the acquis: the way forward, Brussels, 11.10.2004, COM (2004) 651 final. For an introduction to both Communications, see János Verebics, *Az európai magánjog fejlődésének főbb irányai* [Major Tendencies in the Development of European Private Law]. Budapest: Miniszterelnöki Hivatal, Európai Integrációs Iroda, 2004. See also Ugo Mattei, "Basics First Please! A Critique of Some Recent Priorities Shown by the Commission's Action Plan." In: Arthur S. Hartkamp et al., op. cit., 2004, pp. 297–304.

24 The Commission funded a three-year research programme for the preparation of the CFR; scholars were to present their final report in 2007. The final result of the academic co-operation and network was published in 2009: Christian von Bar, Eric Clive and Hans Schulte Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR).* Outline edition. Munich: Sellier, European Law Publishers, 2009. The complete results of the Study Group on European Civil Code and the Research Group on the EC Private Law were published by Christian von Bar and Eric Clive (eds.): *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR).* Full edition, Volumes I–VI, Munich: Sellier, European Law Publishers, 2009.

25 Points 2.3 and 3.1.2 ibid.

26 Stockholm Programme – an open and secure Europe serving and protecting citizens, adopted by the European Council in December 2009, as cited by the preamble of Commission Decision of 26 April 2010.

27 The European Commission set up the Expert Group on a Common Frame of Reference in the area of European contract law by its decision of 26 April 2010. *OJ L 105,* 27.4.2010, pp. 109–111. This expert group has the mandate to assist the Commission in preparing a proposal for a Common Frame of Reference in the area of European contract law, using the Draft Common Frame of reference as a starting point.

28 Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law. (2010/233/EU) OJ 27/4/2010, L 105/109).

an astonishingly short period of time, after twelve meetings within twelve months, the expert group published its *"Feasibility Study"*[29], actually a set of rules on general contract law. Based on this work, a draft Regulation on Common European Sales Law (CESL) was disclosed in October 2011 by the Commission.[30] One could suppose at that time that the long-fore dream of creating a European Contract law would be fulfilled very soon. This was the first time that the EU promulgated a comprehensive draft law on sales – so, the project became more than a fascinating research subject for eminent scholars. However, in December 2014, the newly appointed Commission, "clearing the decks"[31], withdrew the existing proposal for CESL in the Annex of its Work Programme. The diplomatically phrased reason offered for the withdrawal was to prepare a "Modified proposal in order to fully unleash the potential of e-commerce in the Digital Single Market".[32]

However, the new initiative for contractual rules on online sales – focusing on an important but a much narrower field – is clearly different form the idea of Common European Sales Law. This U turn raises important questions: What has gone wrong? Is it the end of a "Grand Illusion", despite all the Resolutions of the European Parliament on a European Civil Code, later on contract law[33] and several Communications, green papers, progress reports[34] of the Commission? Are there any lessons to be learned for future plans of harmonisation of private law in Europe? Looking back to the exercise retrospectively, it is obvious that there were several layers of problems, and even a few of them could have been sufficient to derail the CESL project. At this point it is worth to revisit the legal base problem.

'SECOND CONTRACT LAW REGIME' V. PRIVATE INTERNATIONAL LAW AND REGULATION ROME I

According to the proposal of the Commission, the CESL had the goal to work as a *'second contract law regime within the national laws of each Member State'*[35]. This innovative, however somewhat complicated approach[36] is worth further analysis. The choice of the CESL as secondary contract law regime presupposes that a national law has already been selected according to the rules of private international law, more precisely according to Regulation Rome I[37] in the EU. This prior selection of the governing national law can be the result of the choice of the parties[38] or it is determined as the applicable law in the absence of choice.[39] Although the selection of the CESL can be reached practically by one strike, logically it includes two steps: first, designating a legal system of a Member State and then, within this national law, choosing the CESL.[40] This regime is characterised as a *"Vorschaltlösung"* by Mankowski.[41]

Based on this solution one can consider CESL as a dormant or latent secondary contract law within national laws.[42] The Regulation on CESL would build optional rules into national legal systems – in an abstract sense. Only the choice of the parties triggers or activates the application of CESL; their decision can make the CESL a real secondary contract law operative in their transactions.

Perhaps the sensitivity of the legal base issue was one of the reasons of presenting the CESL as a "second contract law regime" instead of a sui generis European legal regime[43], since

29 A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback. 03.05.2011.

30 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Brussels 11.10.2011. COM (2011) 635 final.

31 See the website of the EU Commission: http://ec.europa.eu/priorities/work-programme/index. Consulted on 13 August 2015.

32 Commission Work Programme 2015, A New Start, Strasbourg, 16.12.2014, COM (2014) 910 final. Annex II: List of withdrawals or modifications of pending proposals, item 60. The Commission has withdrawn altogether 80 former proposals.

33 Resolution of 26 May 1989 on action to bring into line the private law of the Member States, OJ C 158, 26.6.1989, p. 400; Resolution of 6 May 1994 on the harmonisation of certain sectors of the private law of the Member States, OJ C 205, 25.7.1994, p. 518; Resolution of 15 November 2001 on the approximation of the civil and commercial Law of the Member States, OJ C 140 E, 13.6.2002, p. 538; Resolution of 2 September 2003, OJ C 76 E, 25.3.2004, p. 95; Resolution of 23 March 2006 on European contract law and the revision of the *acquis:* the way forward; OJ C 292 E, 1.12.2006, p. 109; Resolution of7 September 2006 on European contract law, OJ C 305 E, 14.12.2006, p. 247; Resolution of 12 December 2007 on European contract law, OJ C 323E, 18.12.2008, p. 364; Resolution of 3 September 2008 on the common frame of reference for European contract law, OJ C 295E, 4.12.2009, p. 31; Resolution of 8 June 2011 on policy options for progress towards a European contract law for consumers and businesses, OJ C 380E 11.12. 2012, p.59; Legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM [2011]0635 – C7-0329/2011 – 2011/0284[COD]) (Ordinary legislative procedure: first reading).

34 Communication from the Commission to the Council and the European Parliament on European Contract Law. Brussels, 11.07.2001. COM (2001) 398 final; Communication from the Commission to the European Parliament and the Council. A more coherent contract law. An action plan. 12.3.2003. COM (2003) 68 final; Communication from the Commission to the European Parliament and the Council – European Contract Law and the revision of the *acquis:* the way forward, Brussels, 11.10.2004, COM (2004) 651 final. Furthermore, a *Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses* was published in 2010. 1.7.2010. COM (2010)348 final.

35 COM (2011) 635 final, recital (9): "This Regulation establishes a Common European Sales Law. It harmonises the contract laws of the Member States not by requiring amendments to the pre-existing national contract law, but by creating within each Member State's national law a second contract law regime for contracts within its scope. This second regime should be identical throughout the Union and exist alongside the pre-existing rules of national contract law. (…)"

36 Martijn Hesselink, How to opt into the Common European Sales Law. Brief Comments on the Commission's Proposal for a Regulation. 2012 (20) ERPL 1, pp. 195-212, (p. 198). EIDENMÜLLER et al. op. cit. p. 313.

37 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) Official Journal L 177/6, 04/07/2008 pp. 0006 – 0016.

38 Art. 3 1. of Regulation Rome I.

39 Art. 4 of Regulation Rome I.

40 Hesselink op. cit. p. 199.

41 *„Zum CESL komme Man im Prinzip nur, wenn Art 3 oder 4 Rome I-VO zum Recht eines Mitgliedstaates führe. Die Kommission will also das IPR in Gestalt der Rom I-VO Vorschalten. Sie wird eine Vorschaltlösung."* Peter Mankowski, Der Vorschlag für ein Gemeinsames Europäisches Kaufrecht (CESL) und das Internationale Privatrecht, RIW, 2012, No 3, pp. 97-105 (p. 100).

42 Unlike CISG rules backed by a ratified Convention.

43 As it was foreseen by Regulation Rome I earlier in its Preamble paragraph (14).

without presenting CESL as harmonisation of national laws, Article 114 could not be considered as a proper legal base. However this solution is still problematic. Article 114 does not have a solution for "optional instruments" which would not harmonise the law of the Member States in a strict sense, but which, as sui generis European rules, exist parallel to national laws. Article 352 could be a proper reference for the adoption of such instruments, however for a heavy price to be paid, which is the unanimity requirement in the course of the decision-making of the Council of Ministers of the EU. A veto right enjoyed by any Member State can easily block the adoption of even a well-prepared proposal in a Union of 28 Member States.

Before the publication of the CESL there was no sufficient time for discussing and digesting all aspects of the advantages and disadvantages of the "second national contract law regime concept" and for analysing all the nuances of the "*Vorschaltlösung*". This solution came as a surprise for the academic community, although it had far-reaching consequences to the relationship with Regulation Rome I as well.

Although Preamble paragraph (14) of Regulation Rome I had foreseen that "*Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.*", the CESL was not presented as a sui generis European legal instrument, but as a second contract law regime carefully implanted in the legal system of each Member States.

In sum: It is necessary to clarify the legal base and competences of the EU. At present, as it was explained above, neither Article 114 nor Article 352 of the TFEU is ideal. So, presumably an amendment of the TFEU, expressly facilitating – without the high threshold of unanimity requirement – the adoption of new instruments, creating a sui generis European legal regime in certain fields *parallel* to national laws, could pave the way to the adoption of a future Common European Sales Law.

Gyula Bándi*

From Sustainability to Circular Economy – Development of EU Strategies and Its Legal Consequences

One of the great novelties in the field of environmental protection proved to be the Encyclical Letter of Pope Francis[1]. Pope Francis underlined the responsibility of mankind, among others, as follows: "6. My predecessor Benedict XVI likewise proposed "eliminating the structural causes of the dysfunctions of the world economy and correcting models of growth which have proved incapable of ensuring respect for the environment (...)". We have forgotten that "man is not only a freedom which he creates for himself. Man does not create himself. He is spirit and will, but also nature"[2]. A clear consequence of the malfunctions of human economy is the need to turn much more towards sustainable development or its synonyms, emerged in the last few years: green economy, circular economy. The Pope emphasized: "13. The urgent challenge to protect our common home includes a concern to bring the whole human family together to seek a sustainable and integral development, for we know that things can change (…)".

FROM SUSTAINABLE DEVELOPMENT TO GREEN ECONOMY

Sustainable development is a great challenge in itself. As one Hungarian ecologist indicated, there are many different uses of sustainability or sustainable development, while no one claims to hold the holy grail of the perfect definition.[3] It would therefore be rational to start any examination regarding sustainable development with some scepticism, as for example, Fitzmaurice describes sustainable development as an elusive category,[4] while Lowe observes that sustainable development as a legal category is characterized by obscurity and confusion.[5]

One of the most eminent authors of sustainable development law tries to provide a balanced interpretation: "In this way, a principle of sustainable development, in accordance with the Bruntland Report and other global 'soft law' processes, could be argued to have a fundamentally normative character that is binding on the State, though it is a double-edged sword. It would not forbid development as such. Rather, it would require States not to prevent from or frustrate each other promoting sustainable development, and "where development may cause significant harm to the environment", it would require states to take steps to address a duty "to prevent, or at least mitigate, such harm." [6]

Of course, not all authors define the components of sustainability along the same lines, but most of the descriptions use similar interpretations: "It is by now well established that this definition is widely considered to encompass three main strands. These are: *(i)* economic development; *(ii)* environmental protection and conservation;

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1 Encyclical Letter *Laudato Si'* of the Holy Father Francis 'On Care For Our Common Home' http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html

2 Ibid.

3 Bulla, Miklós: *A fenntartható fejlődés fogalmi világa* in Vissza vagy hova – Útkeresés a fenntarthatóság felé Magyarországon, Tertia 2002, p. 105.

4 „Sustainable development as the precautionary principle is one of the concepts of international environmental law, the real nature of which is mysterious and intangible in spite of its frequent or perhaps overly frequent use." See Fitzmaurice, Malgosia: *Contemporary Issues in International Environmental Law.* Cheltenham: Edward Elgar Publishing, 2009, p. 67.

5 Lowe, Vaughan: *'Sustainable Development and Unsustainable Practices'.* In: Boyle, Alan E.–Freestone, David (eds.): *International Law and Sustainable Development – Past Achievements and Future Challenges.* Oxford: Oxford University Press, 1999, p. 23.

6 Cordonier Segger, Marie-Claire: *Sustainable Development in International Law,* in Sustainable Development in Sustainable Development in International and National Law, ed. by: Hans Christian Bugge and Christina Voigt, Europa Law Publishing, 2008, p. 128.

and *(iii)* human equity."[7] Equity in this respect is connected to social issues, listed usually as the third component of sustainable development.

If we wish to have a clear picture why it is so difficult to take hold of sustainable development, there are several arguments: "Sustainability is about visions, but the law as applied is not. The law is about how we can resolve specific disputes in specific circumstances. Because sustainability is about creating places and communities, and thus primarily about purpose and implementing visions, specific-resource-focused legal regimes are too narrow – or more appropriately, operate on the wrong scale – to effectuate any comprehensive vision of a sustainable community."[8] Thus the key to the enigma of the law of sustainable development is to determine how far and with what methods we wish to regulate the subject legally or whether is this really necessary. This is equally important in law, public and economic/financial administration and in virtually any field of management.

It would be impossible today to meet the general requirements of a clear definition as required, among others, by the case law of ECJ/CJEU[9] on the need to have a clear conceptual basis. The case cited here regards environmental impact assessment, but is of much greater importance, referring to the need for an unambiguous and clear wording, serving as a basis for laying down obligations for national legislation: „43. The need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope, must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question (Case 327/82 *Ekro* v *Produktschap voor Vee en Vlees* [1984] E.C.R. 107, paragraph 11)."

The complexity of the concept of sustainable development, consisting of several factors of development, such as poverty, social security, public health, indigenous peoples' rights, natural resources, environmental protection, water, etc. makes it impossible to set up a consistent system. "Sustainable development is not a static concept ... hence inherently varies *ratione temporis*... The contents of sustainable development thus vary *ratione personae*. They also vary *ratione materiae*."[10] It is my firm belief that we must also add that besides the different factors listed above, at least two further elements must be identified, namely the variations according to geographical area *(ratione territorii)* and the variations related to the level of development *(ratione progressionis)*. Contextual changes and the variations of the extent, scope or coverage of the problem are constant, and this may also be considered the *differentia specifica* of the subject.

Embarking upon the assessment of the content of the term, several authors share a similar understanding, claiming[11] that there are at least four elements of sustainable development: environmental integration, intergenerational and intragenerational equity and sustainable use – although the latter is much rather a tautology than a particular element. If we try to provide a selection of *those components, which may actually have legal consequences* and at the same time also serve sustainable development most likely, the following elements constitute the immanent essentials of the concept:

- The *rights of future generations* or intergenerational equity. It would be expedient to attach to it *the right to environment* or, in other words, to translate this equity into the language of environmental human rights.
- This is coupled with *intragenerational equity,* i.e. the rights of current generations, with a clear link to the right to the environment issue and the right to development. The International Court of Justice in its judgment in the Gabčikovo-Nagymaros Case[12] has discussed the concept of sustainable development in paragraph 140 of the judgment (see the quotation below). Judge Weeramantry's opinion attached to the judgment is even more widely known than the judgment itself[13].
- *Public participation*[14] is also fundamental, together with all of its three major pillars (access to information, participation in decision-making and access to justice). Stemming from the idea of environmental democracy, this principle also covers environmental justice and provides a better chance for the implementation of generational equity. For some more details see for example Article 1 of the Aarhus Convention[15].

7 Pedersen, Ole W.: *Environmental Principles and Environmental Justice,* Environmental Law Review, 2010, vol. 12, p. 43.

8 Long, Jerrold A.: *Realizing the abstraction: using today's law to reach tomorrow's sustainability,* Idaho Law Review 2010, vol. 46, p. 348.

9 Case C-287/98, preliminary ruling submitted by the Tribunal d'Arrondissement de Luxembourg in the legal dispute between the Grand Duchy of Luxemburg and the Berthe Linster, Aloyse Linster, Yvonne Linster, September 19, 2000. Reports of Cases 2000 I-06917.

10 Barral, Virginie: *Sustainable Development in International Law:* Nature and Operation of an Evolutive Legal Norm, The European Journal of International Law, Vol. 23. No. 2, 2012, p. 382.

11 Durán, Gracia Marin and Morgera, Elisa: *Environmental Integration in the EU's External Relations,* Hart Publishing, 2012, p. 41-41.

12 Case concerning the Gabčikovo-Nagymaros Project (Hungary/Slovakia). Judgment, I.C.J. Reports 1997, pp. 7–84.

13 See the Separate Opinion of Vice-President Weeramantry, p. 92.

14 See for the details: Gyula Bándi (ed.): *Environmental Democracy and Law,* Groningen; Amsterdam: Europa Law Publishing, 2014.

15 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998, available at http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf. The given Article reads: "Objective – In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."

- *Cooperation* or cooperative instruments play a primary role in all levels, for example, the IUCN Draft[16] has an entire Part (Part VIII) dedicated to implementation and cooperation. Indeed, most obligations related to the achievement of sustainable development necessitate cooperation – suffice it to mention the common heritage of mankind, shared natural resources, common and differentiated responsibilities, eradicating poverty, etc.
- *Integration* is a summary and the institutionalization of sustainability, providing a simplified or handy version of the major legal contents of sustainable development. Its main objective is to manage social, material, financial and environmental interests in one system, instead of considering them as separate issues. In the referred judgment[17], the ICJ emphasized: "140. ... Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development." There are many well-known legal instruments serving integration, among others the environmental impact assessment, strategic environmental assessment, or the work of the different sustainable development councils or committees operating in most countries.
  Integration and sustainable development are the two sides of the same coin. From the point of view of sustainable development, integration is a real challenge for legislation, as clearly stated in the above judgment and related assessments[18]. *Integration may be considered a practical path to implement sustainable development.*
- *The precautionary principle* covers, among others, prevention and risk assessment. It has a substantial moral content, covering an extended responsibility for different conducts. Principle 15 of the Rio Declaration[19] provides the principle with a global character: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." The CJEU (ECJ) rendered several important judgments[20] in order to clarify the content of the principle, among others introducing the concept of 'scientific uncertainty'.
- Finally, we must mention *subsidiarity,* which covers not only the effective distribution of competences and duties, but also the involvement of different institutional systems – state and local governments, social organs, NGOs, businesses, churches, small communities, etc. "Subsidiarity is therefore a somewhat paradoxical principle. It limits the state, yet empowers and justifies it. It limits intervention, yet requires it. It expresses both a positive and a negative vision of the role of the state with respect to society and the individual."[21]

Instead of going into the UNCED (1992) language, we refer to the Academies of Sciences of the World, which in 2000 also adopted a statement on sustainability[22] as a concise summary of current trends, that is at the same time emblematic of the available definitions: "Sustainability implies meeting current human needs while preserving the environment and natural resources needed by future generations."

The Rio+20 Summit mostly repeated what had already been stated before, albeit with one exception: the *green economy.* If one looks at the official outcome of the Conference – The future we want[23] – the most characteristic statement is part II ('Renewing political commitment'), containing the following : "15. We reaffirm all the principles of the Rio Declaration on Environment and Development..."

Green economy is an additional or seemingly new element, but it does not lead us closer to the matter, but rather seeks to invite businesses to work for sustainable development. The declarations in connection with green

16 Draft International Covenant on Environment and Development, Fourth Edition: Updated Text, 2010 IUCN.

17 ICJ 25 September, 1997, Official citation: Gabčikovo-Nagymaros Project (Hungary-Slovakia), Judgment, 1.C. J. Reports 1997, p.78, available at http://www.icj-cij.org/docket/files/92/7375.pdf

18 See, for example Sands, who underlines that the central element of sustainable development is integration – Sands, Philippe: *The "Greening" of International Law: Emerging Principles and Rules,* Indiana Journal of Global Legal Studies: Vol. 1: Issue 2, 1994, pp. 302-303.
Available at: http://www.repository.law.indiana.edu/ijgls/vol1/iss2/2

19 UNCED conference, 3-14 June 1992. Rio de Janeiro, http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163

20 Case N. 180/96, United Kingdom vs. Commission, which was also supported by the Council, May 5, 1998, Reports of Cases 1998 I-02265 or First Instance Court, T-13/99, Pfizer Animal Health SA vs. The Commission (2002), *E.C.R.* II-3305, September 11, 2001, or First Instance Court, joint cases T-74, 76, 83-85,132,137 & 141/00, Artegodan GmbH and others vs. The Commission, November 26, 2002. E.C.R. II-4945., etc.

21 Carozza, Paolo G.: *Subsidiarity as a Structural Principle of International Human Rights Law,* The American Journal of International Law, vol. 97, 2003, p. 44.

22 IAP Statement on Transition to Sustainability, 21 May 2000.

23 RIO+20, United Nations Rio de Janeiro, Brazil, 20-22 June 2012, http://www.uncsd2012.org/thefuturewewant.html

economy do not add to the original concept. For example: "60. We acknowledge that green economy in the context of sustainable development and poverty eradication will enhance our ability to manage natural resources sustainably and with lower negative environmental impacts, increase resource efficiency and reduce waste." *Green economy is not a novelty, but much rather a different expression of the same vague concept.* According to some, this lack of reforms means the crisis of global management and also a moral crisis, endangering our well-being.[24]

THE EUROPEAN INTEGRATION ON SUSTAINABLE DEVELOPMENT

I first consider the European environment action programs, having their origin at the Paris meeting[25]. The *Fifth Environmental Action Programme*[26] had two important bases: the UNCED process on sustainable development – look at the title of the Programme: 'Towards Sustainability' – and the Maastricht Treaty[27]. There are several new approaches listed in the Programme, such as the interests of present and future generations; the need to build on shared responsibilities in a way of involving all sectors of society, from public administration to the private sphere; partnership; to implement a broad range of regulatory and other instruments; to further develop integration, etc. The whole shall be based on subsidiarity, connected with shared responsibility. The revision of this Programme in 1998[28] links integration and sustainability in a wider context, as presented in the preamble: "(20) Whereas the further integration of environmental protection requirements into other policy areas is regarded as a key means of achieving sustainable development; (...)".

The implementation of sustainable development has been the key concept of the *Sixth Community Environment Action Programme*[29], covering material and social issues, linking living standards with sustainable development. The Programme is clear in defining the major elements of sustainability: "(6) A prudent use of natural resources and the protection of the global eco-system together with economic prosperity and a balanced social development are a condition for sustainable development. (...) (13) The Programme should promote the process of integration of environmental concerns into all Community policies and activities in line with Article 6 of the Treaty in order to reduce the pressures on the environment from various sources."

If we look at Art.2 on principles and overall aims, the close correlation between integration and sustainability becomes self-evident. We may come to the conclusion that sustainability and integration requires a bidirectional process:

- → integrating environmental concerns into all Community policies – Par.(1);
- ← environmental measures should be coherent with material and social dimensions of sustainable development – Par.(4).

The revision of this Programme took place in 2007 claiming, among others, that "However, the EU is not yet on the path of sustainable environmental development."[30] Anyhow, there is a need for further integration of environmental policy considerations into the EU policies. Of the 10 key messages of the SOER report[31] formulated at the end of 2010 there are several which are directly related to sustainable development, such as

- "Implementing environmental policies and strengthening environmental governance will continue to provide benefits (…)",
- "Transformation towards a greener European economy will ensure the long-term environmental sustainability (...)."

The *Seventh Environment Action Programme* – lasting till 2020, with some additional elements and a vision of the Union by 2050 – "Living well, within the limits of our planet"[32] – adopted in 2013[33] describes the details of the

24 Antypas, Alexios: *Rio+20: the future we still have to fight for,* Environmental Liability Review, Vol. 20 Issue 3, 2012, p. 92.

25 Meetings of the Heads of State or Government Paris 19-21 October 1972, The First Summit Conference of the Enlarged Community, Bulletin of the European Communities, No. 10, Brussels, p. 15-16, http://aei.pitt.edu/1919/2/paris_1972_communique.pdf

26 Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 February 1993 on a Community programme of policy and action in relation to the environment and sustainable development. Official Journal C. 138, 17.5.93.

27 Treaty on European Union (Maastricht Treaty), entering into force 1.11.1993, OJ C 191 of 29.07.1992

28 Decision No 2179/98/EC of the European Parliament and of the Council of 24 September 1998 on the review of the European Community programme of policy and action in relation to the environment and sustainable development "Towards sustainability" Official Journal L 275 , 10/10/1998 P. 0001 - 0013

29 Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, OJ L 242, 2002. 09. 10.

30 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-term review of the Sixth Community Environment Action Programme, Brussels, 30.4.2007, COM(2007) 225 final, p. 17

31 The European Environment State and Outlook 2010 Synthesis, published by the European Environment Agency, published by the European Environment Agency, http://www.eea.europa.eu/soer/synthesis/synthesis,

32 Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet"; Brussels, 29.11.2012, COM(2012) 710 final, 2012/0337 (COD)

33 Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' http://ec.europa.eu/environment/pubs/pdf/factsheets/7eap/en.pdf and http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013D1386

nine priority objectives listed in Art. 2[34]. As an example of the general attitude of the whole proposal, the fourth priority objective may be mentioned, relating to environmental legislation, covering five items and from among which three out of the five are somehow connected with public participation (access to information, citizens' trust in institutions, and access to justice). One may have the impression that the drafters have greater confidence in civil institutions and partnership with them and the EU institutions, than in the implementation systems of the Member States.

One of the many accompanying documents, issued together with the proposal must be mentioned, which is Annex 2 of the impact assessment[35] – 'Linkages of environment policy issues' – with a special focus on *green economy,* as a special answer to the debate related to the general problem of weak or strong sustainability. Green economy, according to Annex 2 means: "The concept of a green economy recognises that ecosystems, the economy [business] and human wellbeing (and the respective types of natural, produced, social and human capital) are intrinsically linked (Figure 1)[36]." This is again not questionable, but the main issue here, how this link is presented.

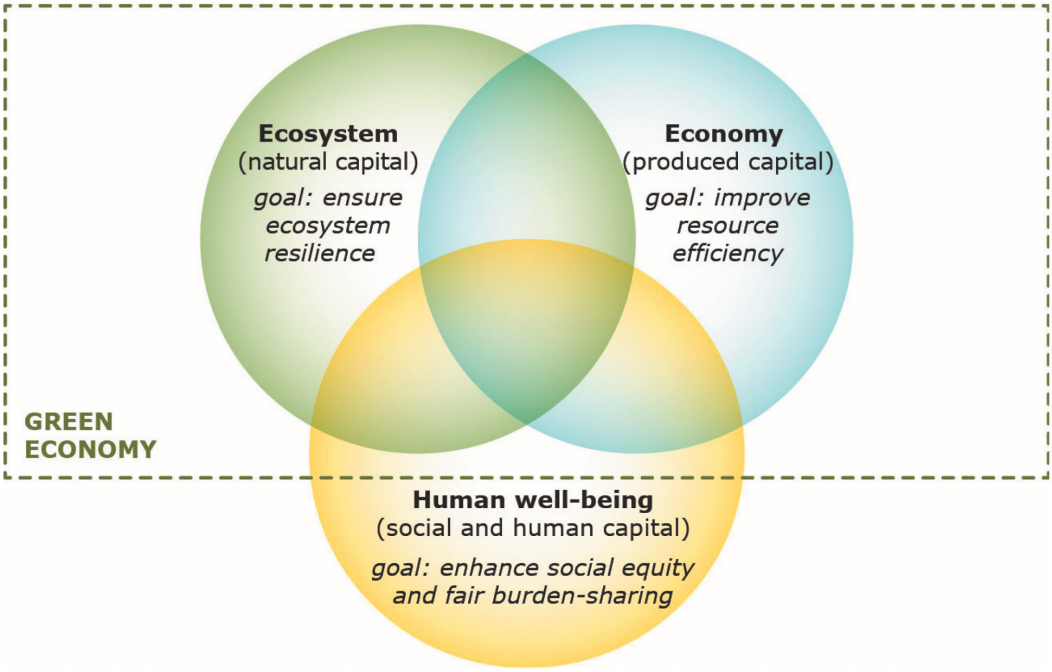

Figure 1.
(Source: http://ec.europa.eu/environment/action-programme/pdf/ia_annexes/Annex%202%20-%20Linkages%20of%20environment%20policy%20issues.pdf)

34 Art. 2 presents the directory of these objectives:
"*(a)* to protect, conserve and enhance the Union's natural capital;
(b) to turn the Union into a resource-efficient, green and competitive low-carbon economy;
(c) to safeguard the Union's citizens from environment-related pressures and risks to health and well-being;
(d) to maximise the benefits of Union environment legislation by improving implementation;
(e) to improve the knowledge and evidence base for Union environment policy;
(f) to secure investment for environment and climate policy and address environmental externalities;
(g) to improve environmental integration and policy coherence;
(h) to enhance the sustainability of the Union's cities;
(i) to increase the Union's effectiveness in addressing international environmental and climate-related challenges."

35 Commission Staff Working Document, Impact Assessment - *Accompanying the document* Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet", SWD(2012) 398 final, Brussels, 29.11.2012

36 http://ec.europa.eu/environment/action-programme/pdf/ia_annexes/Annex%202%20-%20Linkages%20of%20environment%20policy%20issues.pdf

The origin of the above figure is the general or weaker concept of sustainability with an interesting modification. First, we may notice the three major constituents with some specific explanations:

- ecosystem or natural capital must reach resilience (which is usually the immanent quality of the ecosystem);
- economy must be resource efficient;
- human well-being – originally society – must focus on equity and fair burden-sharing. These may mean intergenerational and intragenerational equity in genuine terms.

In case of weak sustainability, sustainable development is meant to be limited to the intersection of three circles, representing the three constituents of sustainable development. In the above outline green economy embraces most of the three constituents, only a part of human well-being is left out. This is partly acceptable, knowing that there are many elements of human well-being which may not be linked with material development and financial interest or business. On the other hand, even the non-material items of well-being may be connected with the ecosystem, thus the other side of the same coin is less satisfactory.

In order to better understand green economy, the Rio+20 documents need to be referred to again[37]: "56. ... we consider green economy in the context of sustainable development and poverty eradication as one of the important tools available for achieving sustainable development and that it could provide options for policymaking but should not be a rigid set of rules..." These words are somewhat different than the EU proposal. Rio takes green economy as a tool for sustainable development, while the Seventh Action Programme suggests that green economy is somehow a replacement of sustainable development. Nevertheless, we face an important terminological change, innovation in terms of sustainable development.

Sustainability had become part of the environmental policy long before an overall strategy could be developed. Soon the need to have a complex, integrated, uniform strategy became vital. The first step was the *Gothenburg Strategy,* but let us begin with its predecessor, the *Cardiff process* which proved to be the launch of a more uniform approach, based on environment protection, but getting a wider vision. The 1998 'Cardiff process' was not a success story[38]. The aim was to implement sustainability in practice, via integrating the environmental objectives into the implementation of other EU policies. Integration here may be understood as a counterpart or even synonym of the principle of sustainable development, meaning the procedure, which helps the different aspects of the protection of environmental interests to take part in the decision making practices outside environmental protection – external integration. The whole problem of integration was clearly summarized in the mid-term review process of the Sixth Environment Action Programme[39], under the heading '2.3.1. Poor integration of policies'[40]. The Communication[41], based upon the impact assessment is a bit more direct: "However, the integration of environmental concerns into other areas has been less successful. The Cardiff process – which was set up in 1998 in order to in institutionalise this type of integration – has not lived up to expectations."

The next step was the *EU Strategy for Sustainable Development*[42], emphasizing the primary role of developing an effective policy, which must be coherent, within which prices correspond with real costs, science and technology are improved, together with proper communication. Soon after the adoption of the Sustainable Development Strategy (SDS), the concept of 'global partnership'[43] could also appear within EU policy, positioning the EU as an active and leading partner in international cooperation. Sustainable management of natural and environmental resources should form an integral part of all policies, having the condition of the coherence of EU policies, also of better governance.

In 2005 the SDS was revised[44], emphasizing: "(...) Europeans value quality of life. They want to enjoy prosperity, a clean environment, good health, social protection and equity. (...) The challenge is to maintain a momentum that mutually reinforces economic growth, social welfare and environment protection." The most important principles of SDS were listed, embracing a wide range of aspects: protection of fundamental rights, inter- and

37 The Future We Want, United Nations A/CONF.216/L.1*, Rio de Janeiro, Brazil 20-22 June 2012, Distr.: Limited, 19 June 2012, Agenda item 10, point 56

38 Communication from the Commission to the European Council of 27 May 1998 on a partnership for integration: a strategy for integrating the environment into EU policies (Cardiff- June 1998) [COM(1998) 333 - Not published in the Official Journal].

39 Mid-term review of the Sixth Community Environment Action Programme – Impact Assessment, COM(2007)225 final, {SEC(2007)547}, p. 18-19

40 "Environmental integration was given an institutional boost in 1998 with the launch by the European Council of the 'Cardiff process', requiring different Council formations to develop strategies to this underpin integration."

41 COM(2007) 225 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the mid-term review of the Sixth Community Environment Action Programme, p. 15 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52007DC0225

42 Commission Communication of 15 May 2001 'A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development' (Commission proposal to the Gothenburg European Council) [COM(2001) 264 final – not published in the Official Journal].

43 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Towards a global partnership for sustainable development, Brussels, 13.2.2002, COM(2002) 82 final

44 Communication from the Commission to the Council and the European Parliament: On the review of the Sustainable Development Strategy A platform for action Brussels, 13.12.2005 COM(2005) 658 final

intragenerational equity, open and democratic society, public involvement, involvement of business companies and social partners, coherent policy and governance, policy integration, the precautionary principle, the polluter pays principle.

Based on the revision, the Council adopted a new SDS in 2006[45], which underlined that the Lisbon Strategy and SDS must be harmonized to complement each other. This SDS also emphasizes the role of material development in the process of creating a sustainable society and generally speaking material expansion is taken as a need. It is clear that the EU does not want to depart from growth as such. There were two more revisions[46], within which the second revision in 2009(?)[47] classified some major policy tools of the EU:

- the EU Better Regulation Agenda,
- the renewed Social Agenda,
- the Employment guidelines
- Corporate Social Responsibility
- the task to put the SDS agenda into the external policies, and finally
- good examples in Member States[48].

Parallel with SD strategy, there are essential economic strategies, the most important one in 2000 the Lisbon Strategy[49]: "5. The Union has today set itself a new strategic goal for the next decade: to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion. (…)" The original strategy proved to be a too complex set of ideas, with a diffuse system of responsibilities, therefore it was relaunched in 2005. The first implementation report[50] was very optimistic, listing results, such as the new package of climate change and energy resources, and the action plan of sustainable production and consumption.

As a result of economic crisis, *the new concept of development till 2020 had to be made.* First, a Commission proposal[51] has been adopted and later the Council Recommendation[52]. The proposal basically deviated from the original harmonised idea of sustainability, providing a narrower vision of sustainability, subject to material aspects:

"(…) Europe 2020 puts forward three mutually reinforcing priorities:

– Smart growth: developing an economy based on knowledge and innovation.

– Sustainable growth: promoting a more resource efficient, greener and more competitive economy.

– Inclusive growth: fostering a high-employment economy delivering social and territorial cohesion. (...)

These targets are interrelated. (…) Such an approach will help the EU to prosper in a low-carbon, resource constrained world while preventing environmental degradation, biodiversity loss and unsustainable use of resources. It will also underpin economic, social and territorial cohesion.[53]"

The 2008 crisis could not facilitate the situation of sustainability, but reorganized the structure and priorities instead. The *change of wording from development to growth* may cause serious concerns as it is not absolutely clear whether it is only a different phrasing or a really substantial change of attitude. In terms of different phrasing, we may agree with experts like Jans who believes that sustainable growth is a much weaker concept than sustainable development.[54] The Council clarified that the 2020 strategy incorporates the previous strategies, also environmental requirements.[55] In addition to the strategy, there are different, more detailed strategies made, such as the one on transport[56] or another one on Energy 2020[57].

45 Review of the EU Sustainable Development Strategy (EU SDS) – Renewed Strategy Council of the European Union, Brussels, 26 June 2006 10917/06

46 The second: COM(2007) 642 final Communication from the Commission to the Council and the European Parliament Progress Report on the Sustainable Development Strategy 2007 {SEC(2007)1416}

47 Brussels, 24.7.2009, COM(2009) 400 final Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development

48 Such as "France 'Grenelle de l'Environnement' brought together the government, business and civil society into a high-level debate on new measures for sustainable development."

49 Presidency conclusions Lisbon European Council, 23 and 24 March 2000

50 Brussels, 16.12.2008 COM(2008) 881 final Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Implementation Report for the Community Lisbon Programme 2008 – 2010

51 Brussels, 3.3.2010 COM(2010) 2020 final Communication From The Commission Europe 2020, A strategy for smart, sustainable and inclusive growth

52 Council Recommendation of 13 July 2010 on broad guidelines for the economic policies of the Member States and of the Union (2010/410/EU) OJ, L 191 23.7.2010 p. 0028 - 0034

53 http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf

54 Jans, Jan H.: *Stop the Integration Principle?,* Fordham International Law Journal, Vol 33, 2010, p. 1538.

55 Improving environmental policy instruments – Council conclusions – Environment Council meeting Brussels, 20 December 2010

56 Brussels, 28.3.2011 COM(2011) 144 final White Paper Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system SEC(2011) 359 final SEC(2011) 358 final SEC(2011) 391 final

57 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Energy 2020 A strategy for competitive, sustainable and secure energy, SEC(2010) 1346, Brussels, 10.11.2010 COM(2010) 639 final

SUSTAINABLE DEVELOPMENT IN PRIMARY LEGISLATION

In 1992 sustainability could appear in the Maastricht Treaty[58], first in the preamble as recital 7. The Treaty on European Union also amended the original Treaty of Rome, covering in the new Art.2[59] everything in connection with sustainability, environment, solidarity, social protection, quality of life, etc. Environmental protection in this article is an equally important constituent of sustainability. The Amsterdam Treaty[60] did not change sustainability and environmental elements in a great extent. The Treaty of Nice[61] in 2001 did not have any change in respect of sustainable development.

The Lisbon Treaty[62] made substantial changes in respect of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The Treaty of Lisbon[63] amended the previous Art.2 on the objectives of the EU, providing a much more elaborate and extensive approach, covering a wider context and relationship of sustainability, keeping the previous elements[64], and in Art. 3(5) the global role of the EU in sustainable development has also been covered[65]. The commitment towards sustainability within the international cooperation is clearly articulated, in connection with developing countries, covering the three pillars of sustainability and besides, in connection with environmental protection as a priority and sustainable management of global resources.[66] It is noteworthy that the Lisbon Treaty finally 'legalized' the Charter of Fundamental Rights, this change is found in Art.6 (1) TEU. The Charta, i.e. The Charter Of Fundamental Rights Of The European Union also refers to sustainable development, although its Article 37[67] may clearly not really be considered as a provision on rights to the environment.

The preamble of TFEU focuses more on financial and material development, not mentioning sustainable development again. A good illustration of the different approach is the wording of recitals 4 and 5 of the preamble[68]. The essence is the material, financial expansion and even the harmonious development – which may have some connection with sustainability otherwise – is clearly a problem of regionalism and not sustainability. In any case, this is a relatively great change compared with the previous Treaty.

As integration may be taken as a tool of practical implementation of sustainable development, Art.11 TFEU on environmental integration is imperative, containing a direct reference to sustainable development[69]. Unfortunately, the likely influence of integration has been narrowed here, due to the fact that the principle of environmental integration had been a stand-alone integration principle up till 2009, but afterwards a proliferation of integration principles seriously hampered its original position[70].

58 Treaty on European Union (Treaty of Maastricht) OJ C 191 of 29.7.1992

59 "The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."

60 Treaty of Amsterdam amending the Treaty on European Union, the treaties establishing the European Communities and related acts Official Journal C 340, 10 November, 1997

61 OJ C 80 of 10.03.2001

62 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 OJ 2007/C 306/01, 17 December 2007

63 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2007:306:FULL&from=EN

64 "Art. 3(3). The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child."

65 "5. (...) It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

66 Treaty of Lisbon, Art. 21(2) "The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:
(…)
(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
(...)
(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
(…)."
http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=EN

67 "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

68 "(…) RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,
ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions, (…)"

69 "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."

70 The TFEU mentions integration in diverse places:
- Art. 8: equality of men and women
- Art. 9: social protection, employment
- Art. 10: different types of discrimination
- Art. 12: consumer protection
- Art. 13: animal protection, or we may also add
- Art. 194 on energy policy, which also contains some references to the integration principle.

No wonder why some authors even believe that the Art. 7 TFEU on consistency shall be the only integration principle, making all the others superfluous[71]. Others warn us about the consequences: "The conclusion must therefore be that there is no hierarchy between the various integration principles..."[72] As a consequence, *integration as the practical materialization of sustainable development has lost most of its original positions* in the Lisbon Treaty. There are no provisions having direct legal consequences on sustainability in the Treaty, there are no direct legal instruments or legal requirements mentioned. Thus the key of the whole is the institutional and organizational structure of the EU and their willingness to implement the principle of sustainable development.

Sustainable development is on the one hand a principle and on the other hand an objective, the content of which has not been defined in the Treaty. The traditional elements of sustainability are present, but there are no innovations. The wording lacks both the legal clarity and also the sense of legal responsibility. The essence is that we should 'aim at' or 'take into account' sustainable development, as a general guidance, but there is no chance to take it as an obligation. Even the EU establishment shall not be obliged to perform any specific actions, which is a rather weak political challenge. The main question could be, how far this general expectation may be implemented in practice and in which regulatory fields, and how it is possible to come to a level of legal certainty.

The 'greening' of EU strategies beside the sustainable development strategy and the environmental actions programmes in the past some years has been turning towards the above mentioned 'green economy' which is coupled with some additional elements. The first in the list is to turn towards *green products*[73] in 2013. This does not mean any specific type of products; rather the general attitude of production is at the centre of the EU action. The relevant Communication summarizes the essence: "The general objective of the EU action in this area is to contribute to improving the availability of clear, reliable and comparable information on the environmental performance of products and organisations to all relevant stakeholders, including to players along the entire supply chain. (...) The generic concept of green product as the product that has a reduced environmental impact over the life cycle compared to an alternative product will thus be operationalized by two elements: 1) the method to measure life cycle environmental impacts; and 2) the product category-specific rules which will provide the benchmark necessary to define a truly green product. The same approach will also be implemented for organisations." The next steps, presented by the Communication are to focus on three fields of legislation: Eco-Management and Audit Scheme (EMAS), Green Public Procurement (GPP) and the EU Ecolabel. As it is clear from these proposals, the consumers' vision must have a better focus.

In 2014[74] the next call was a *follow-up of green economy, i.e. circular economy*, directly connected with sustainable growth: "Circular economy systems keep the added value in products for as long as possible and eliminate waste. They keep resources within the economy when a product has reached the end of its life, so that they can be productively used again and again and hence create further value. Transition to a more circular economy requires changes throughout value chains, from product design to new business and market models, from new ways of turning waste into a resource to new modes of consumer behaviour. This implies full systemic change, and innovation not only in technologies, but also in organisation, society, finance methods and policies. (…)"

At the end of 2015 *circular economy strategy was reformulated*[75], weakened a bit, but several additional concrete steps were also listed. According to its introduction: "The transition to a more circular economy, where the value of products, materials and resources is maintained in the economy for as long as possible, and the generation of waste minimised, is an essential contribution to the EU's efforts to develop a sustainable, low carbon, resource efficient and competitive economy. Such transition is the opportunity to transform our economy and generate new and sustainable competitive advantages for Europe." Circular economy shall have a direct input on growth, job creation This new strategic vision requires a *clear regulatory framework,* the first signs of which are different proposals for the development of waste legislation focusing or reuse and recycling. This is going to be followed by legislative proposals for example on plastics, food waste, construction, critical raw materials, industrial and mining waste, consumption and public procurement, later on fertilisers and water reuse, but horizontal measures are equally essential, namely horizontal enabling measures in areas such as innovation and investment. And in order to prove the continuity, the first focus area is product design and production process, followed by consumption – among others, public procurement policy shall also be greened. Thus, *a wide range of legislative reforms are coming soon.*

71 McIntyre, Owen: *The integration challenge, Integrating environmental concerns into other EU policies* in Suzanne Kingston: (Ed.): European Perspectives on Environmental Law and Governance, Routledge, 2013, p. 137

72 Ibid. p. 11

73 Communication from the Commission to the European Parliament and the Council: Building the Single Market for Green Products Facilitating better information on the environmental performance of products and organisations /* COM/2013/0196 final */

74 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards a circular economy: A zero waste programme for Europe /* COM/2014/0398 final/2 */

75 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Closing the loop - An EU action plan for the Circular Economy, COM/2015/0614 final

Law may support the implementation of the strategy, no wonder why the above listed documents all pay special attention to the development of legislation. A perfect *example is the improvement of waste legislation* towards providing better chance for reuse and recycling. The current waste directive[76] in Art. 3 (definitions) and further could successfully widen the approach on this subject, declaring: "15. 'recovery' means any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy. (…)" This definition has been the consequence of the gradual development of case law of the European Court of Justice (today CJEU), in this respect the ASA decision must have a significant position,[77] due to clarifying the borderline between re-use, recovery and waste disposal[78].

76 Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives

77 Case N. 6/00, preliminary ruling submitted by the Verwaltungsgerichtshof, Austria in a legal dispute between Abfall Service AG (ASA) and Bundesminister für Umwelt, Jugend und Familie, February 27, 2002, [2002] ECR I-1961.

78 "69. However, it does follow from Article 3(1)(b) and the fourth recital of the Directive that the essential characteristic of a waste recovery operation is that its principal objective is that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources."

Krisztina Karsai*

Division of Competences between Member States and the European Union in Criminal Procedural Law

1. INTRODUCTION AND SCOPE OF STUDY

With the entry into effect of the Lisbon Treaty (01 December 2009), it is primarily defined by the Treaty on the Functioning of the European Union (TFEU) in the reformed EU Treaty system what principles and rules are applicable to the division of competences between Member States and the European Union. The existence of these rules has a systemic significance: they obviously represent an "obligatory" element of the content regulation of the Treaties. At the same time, the Treaty text may and did receive additional meanings in the course of interpretation and application as integration developed, in connection with which doubts in Member States also arose.[1] For this reason, the competency regulation considered to be new aims for a more precise regulation if possible: this endeavour primarily stemmed from the argument for Member States' sovereignty and brings about the consequence that opportunities for judicial development of law related to competences – playing a significant role in integration – have been (or may be) restricted thereby. So for the Court of Justice of the European Union (CJEU), the provisions on competences of the TFEU have reduced the earlier margin of consideration. By contrast, it is not absolutely excluded either, that, as a result of more precise (?), more obvious (?) thematic limitations, only the focus of the CJEU's legal development activities (affecting competences) will change, and substantially any case can be elevated to a supranational level (to a shared or exclusive competence) by demonstrating a thematic connection, provided that further legislative conditions are complied with.

The 2016 jubilee congress of FIDE (Fédération Internationale pour le Droit Européen = International Federation for European Law) will be held in Budapest, including a special panel on the *"Division of Competences and Regulatory Powers between the EU and the Member States"*. The congress is to primarily apply an approach focussing on banking law, competition law, and European public law, but the issue of the division of competences between the EU and Member States has also become relevant in respect of the norms of criminal law (taken in the broad sense) as a result of legal developments in the course of the past 20-25 years. Practically, the process of the development and improvement of European criminal law started in the 1990s and brought about markedly novel and innovative ("revolutionary"[2]) solutions within the criminal jurisdiction systems of Member States as well as in their interactions. Therefore, criminal law, more specifically criminal procedural law is a justified topic worthwhile to examine, even in this special issue, and in connection with criminal procedural law this study is to examine how the issue of the division of competences can arise between the levels of Member States and the Union.

2. INTERPRETABILITY OF THE DIVISION OF COMPETENCES IN CRIMINAL PROCEDURAL LAW

Criminal procedural law plays a fundamental regulatory role in this branch of law within democratic criminal justice systems where the rule of law prevails: it defines the procedural framework of criminal prosecution; it restricts the enforcement of punitive claims by the state; and it also primarily serves to protect the rights of the defendant (and other private individuals). Laying down the procedural framework of criminal prosecution is traditionally the right and obligation of the domestic (national) legislator, as the question of criminalization (*ius puniendi*[3]) is also decided at state level, with respect to

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1 See in detail for instance László Blutman: *Az Európai Unió joga a gyakorlatban* [EU law in practice]. hvgorac, 2013. pp. 119-187; Craig, Paul–De Búrca, Gráinne: *EU Law, Text, Cases and Materials*. Oxford University Press, 2011. pp. 73-104.

2 Krisztina Karsai: *Alapelvi (r)evolúció az európai büntetőjogban* [(R)evolution of basic principles in European criminal law]. Jurisperitus, 2015.

3 In respect of domestic law, the following power layers of *ius puniendi* can be distinguished at a theoretical level: 1. value selection power / competence: the right to choose from values and interests extant in a social context, which of them should be protected by criminal law; 2. tool selection power/competence: the right to apply criminal law tools within the legal order (rather than tools in other branches of law) to protect the above values; 3. power/competence of definition: it represents the right to constitute the legal definition of crime, to set the limit between punishable and non-punishable conduct, to specify the pre-conditions of penalization, and to define punishments (what types of punishments are recognized by the legal order); 4. the power of criminal rigour: it represents the right to determine the degree of punishment, setting the application boundaries of theoretically unlimited punishment; 5. the right to establish criminal liability; 6. the right to administer punishment. For the results of the author's own research, see: Karsai (2015) pp. 17-18.

the (current) status of a given society. In connection with this, the international legal achievements of the 20th century – such as criminal liability based on international law, multilateral treaties stipulating the establishment of criminal liability, and setting up international criminal courts – are influencing factors to some extent, but they do not generate a rearrangement of competences. By contrast, when examining EU legal developments, it is a well-founded and demonstrable statement[4] that the current legal norm system of the EU has autonomous competences in drawing up criminal legal regulations as authorised by Member States. It also follows from this that, in connection with the division of legislative competences, it is expedient to discuss here legislative issues affecting the legal conditions of criminal procedural law. So, this study presents and briefly analyses those provisions of the TFEU by the authorisation of which the EU can create norms with criminal procedural content within its regular legislative procedure.

As regards competences of application of laws, it should be mentioned that prosecution to establish criminal liability is within the scope of competence of Member States; proposals – not at all fully developed – for setting up a European criminal court have been made only in the form of scientific theses,[5] so the division of competences between Member States and the EU in the area of the application of law cannot be defined for the time being. It is important to mention, however, that this cannot be considered as a future direction. The– probably very soon – establishment of the European Public Prosecutor's Office,[6] and endeavours to endow Europol with (increasingly) independent powers of investigation can be considered as directions of development which will rearrange competences in law enforcement. The difference is that the activities determined for the EU agencies mentioned will penetrate into the clearly specified competence areas of Member State authorities. And the direction of development to regulate and restrict the exercise of criminal jurisdiction,[7] and the European Investigation Order[8] do not primarily affect the issue of the division of competences between Member States and the EU, but can rather be interpreted in the interrelations of Member States.

The study intends to apply the most obvious system of criteria, showing how EU legal developments can penetrate into the "traditional" framework of criminal proceedings by the transformation of competences. The Hungarian framework of criminal procedural law is necessarily (and accordingly) used as a point of departure.

3. THEMATIC LIMITATIONS AND AUTHORIZING NORMS

3.1. LEGISLATION WITH SHARED COMPETENCES

Article 5 of the Treaty on European Union (TEU) includes the definition of conferral of competences and the legal grounds on which competences are specified in detail in the TFEU: "(1) The limits of Union competences shall be specified by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. (2) Under the principle of conferral, the Union shall act only within the limits of competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. (3) Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. (…)." In contrast, TFEU rules specifying competences refer the EU policy relevant to our topic to a shared domain, termed as an area of freedom, security and justice. Pursuant to Article 2 of the TFEU, shared power means that "when the Treaties confer on the Union a competence shared with Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence."

The literature distinguishes between two types of shared competences,[9] namely contiguous ("irregular") and concurrent ("regular") shared competences. The policy of the area of freedom, security and justice falls within regular shared competences; meaning that in the area concerned, the regulatory competences (rights to take action) of the Union overlap with those of the Member State. The TFEU also sets up a clear "ranking" by stipulating that "the Member States shall exercise their competence to the extent that the Union has not exercised its competence." This competence is also subject to the principle of "pre-emption", where EU regulation, when adopted, occupies or "pre-empts" the scope of regulating the life conditions concerned from the Member State; and the Member State may exercise its competence to the extent allowed by the EU norm itself. Further provisions of the TFEU set out the legal bases specifically authorizing Union bodies to act.

4 Karsai (2015) pp. 32-34.

5 Delmas-Marty, Mireille (ed.): *Corpus Juris der strafrechtlichen Regelungen zum Schutz der finanziellen Interessen der Europäischen Union*. Köln, 1998.; Abrami, Antonio (International Academy of Environmental Studies) – proposal to set up the International Criminal Court and the European Criminal Court (2010). An analysis thereof: Papadopoulou, Danai: International/European Environmental Criminal Court. A comment on the proposal of the International Academy of Environmental Sciences. European Parliament 2011.

6 Cf. Katalin Ligeti: Toward a Prosecutor for the European Union: Volume 1 (Modern Studies in European Law) Beck/Hart, 2013.

7 Cf. Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings. For an analysis, see e.g. Sinn, Arndt (ed.): Jurisdiktionskonflikte bei grenzüberschreitender Kriminalität. Ein Rechtsvergleich zum Internationalen Strafrecht. V&R unipress, 2012.

8 Cf. Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters.

9 Cf. e.g Blutman (2013) 122-125; Klamert, Marcus: *The Principle of Loyalty in the European Law.* 2014. Oxford, Studies in European Law (ed.: Craig, Paul – De Búrca, Gráinne). pp. 161-167.

3.2. ARTICLE 82 TFEU[10]

This article authorizes the EU to adopt measures (legislation) to regulate judicial cooperation in criminal matters for the approximation of laws and regulations. The topics set out in Article 82 (1) *a)* and *b)* can be closely related to the criminal procedural regulatory system taken in the traditional sense. The principle of mutual recognition is gaining ground in the regulatory system of cooperation in criminal matters, and it essentially aims to achieve that a legal product (decision) of a (criminal) procedure in a given Member State be "recognised" and used in the same manner in all other EU countries and for the same purpose for which it was made originally, meaning that it should fulfil the same function in the procedural coordinate system of another – host – country as in its own.[11] Such a system is held together by a real constructive trust of Member States in each other's jurisdiction: the principle of mutual trust is a declared basic principle to form an area of freedom, security and justice, which, however – and for the time being–is sometimesonly an illusion, rather than a real relationship of confidence between Member States. This is why well-grounded objections arise both on part of Member States and jurisprudence, referring to human rights deficits. Although each EU Member State is a signatory to the European Convention for the Protection of Human Rights, it is indicated by the activity and the high caseload before the ECtHR that not even minimum guarantees regulated by the Convention fully and always prevail in practice. The situation may be improved by the Charter of Fundamental Rights in effect since 1 December 2009; see further below.

Actually, this principle was first recognised by the framework decision on the European arrest warrant[12] in the form of a positive legal provision. It is generally characteristic of the process of the principle gaining ground that its direction is reversed; meaning that it is first applied to only certain types of decisions,[13] then the application of the principle is extended to more and more types of decisions. Therefore the introduction of general validity is the final destination of the process, with the "free circulation" of decisions in criminal cases in Europe. And the "free circulation" of decisions in criminal cases would mean that if a lawful decision was made in one Member State, it can (also) be enforced in all other Member States. The transnational prevalence of final decisions within the EU (*ne bis in idem* principle) is a culmination of the principle of mutual recognition.

As regards the competence to act in conflicts of jurisdiction under TFEU Article 82 (1) b), it can be stated that the avoidance of parallel criminal proceedings, the feasibility of procedural economy arises as a real objective in an all-European perspective. As a first step thereof, a so-called conciliation model[14] is already in effect, but in the long run, a system of criteria set out by law can be realised as a supra-national regulatory model (which state may act in case of a crime committed in several Member States[15]), or designation by an EU (?) authority (court) can come into effect as well. So, the authorisation is granted by Article 82; and it is also important to emphasize that not only directives, but EU regulations as well can be adopted in respect of these issues. It can also be important that in such cases, competences related to the institution and conducting of criminal proceedings would be rearranged as opposed to the "traditional" scheme, which can be manifested in domestic law in the end as an issue of jurisdiction and / or competence. If, however, a given Member State does not wish to open the Code of Criminal Procedure to procedures involving international elements, it can keep the regulation of conflicts of jurisdiction within the framework of international cooperation in criminal matters (by regulating restrictions on the jurisdiction of enforcement).[16]

TFEU Article 82 (2)[17] grants authorisation for the legislation of directives in subjects essential for criminal

10 TFEU Article 82 (1) Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:
a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
b) prevent and settle conflicts of jurisdiction between Member States;
c) support the training of the judiciary and judicial staff;
d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

11 Cf. Krisztina Karsai: Article 82 TFEU In: András Osztovits (ed.): *Az Európai Unió működéséről szóló szerződés magyarázata* [Commentary on the Treaty on the Functioning of the European Union]. Complex, 2011. pp. 779-780.

12 Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

13 Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties; Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders; Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union; Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions; Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

14 Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings. Critical views in Gebbie, George C.: Conflict of European Jurisdiction – a matter of concurrence. New Journal of European Criminal Law 2009. special edition. pp. 11-15.

15 Sinn (2012).

16 For details see Péter M. Nyitrai: *Nemzetközi és európai büntetőjog* [International and European criminal law]. Osiris, 2006.; Krisztina Karsai–Katalin Ligeti: *Magyar alkotmányosság a bűnügyi jogsegélyjog útvesztőiben* [Hungarian constitutionality in the maze of legislation on legal assistance in criminal matters]. Magyar Jog 2008/6 pp. 399-408.

17 (2) To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern: *a)* mutual admissibility of evidence between Member States; *b)* the rights of individuals in criminal

proceedings. Thus, regulatory minimums can be established in respect of evidence and the rights of the participants in criminal proceedings (the defendant, the aggrieved, etc.). The addressee of the regulation by directive is the Member State; such directive includes the objective to be achieved, which objective can be realised by the Member State at its own discretion, by drawing on its own means, through its legislation to integrate such directive. Nevertheless, it is important to see that directives providing minimum regulation and facilitating mutual recognition – in this EU policy area – contain rather detailed, many times technical and professional regulation, providing scope for action to Member States only in specific partial issues. For this reason, the Union level will be conclusive in respect of the definition of regulatory content; Member State legislation may not define derogations in substantial issues. In the event that directives are not or not adequately transposed, Member States can expect infringement proceedings in addition to the fact that in certain cases, the directive can be used as a direct framework of reference to private individuals – even in criminal proceedings. In my opinion, these "rearrangements" of legislative competences can bring about particularly significant changes for two reasons. On the one hand, if (for instance) procedural competences are defined by the EU legislator, in an extreme case these can be called to account with immediate effect in domestic criminal proceedings if they are not (properly) transposed. On the other hand, EU legislation on these provisions of criminal proceedings also allows for the application and consideration of the Charter of Fundamental Rights. Pursuant to Article 51(1) of the Charter, the provisions of the Charter are addressed to the Member States to the extent that they implement EU legislation, including the application of harmonised legal regulations, so for instance if regulatory content transposed from a directive is applied.[18] "Rearrangements" have a potential to influence the application of law; however, it is a question of fact that prosecutors and judges of the Member States acting in criminal cases must be perfectly aware of the consequences of EU legislation in terms of sources of law, the study of statutes, and legal protection, requiring special preparation.

In respect of the exercise of EU competencies, it is also necessary to mention the provision set out in Article 82(3) which contains the so-called emergency brake procedure. An exception for Member States, the emergency brake procedure provides opportunities for them to raise objections related to the fundamental issues of their criminal jurisdiction and to initiate further negotiations particularly in this respect before a compulsory legislative act is adopted. Adoption of a legislative act can even fail, as the case may be, due to controversies in such central issues; however, the difference should not be underestimated that while earlier on, in the so-called third pillar, in case of the obligation of unanimous decision, veto by a Member State could be enforced in case of any type of objection, today, legislation can only be blocked in issues of fundamental importance, mentioned above.

3.3. ARTICLES 85-89 TFEU –SUMMARY TABLE

Articles 85-89 TFEU also contain a number of provisions closely related to the regulation of criminal proceedings in the Hungarian understanding as well; these cannot be analysed in depth in this study for reasons of scope. Therefore a summary is published here, which categorises, according to the Hungarian classification, topics pertaining to the regulation of criminal procedural law. The table[19] displays the law of international criminal cooperation as a separate category; in a broad sense, it forms part of criminal procedural law, but state perceptions in this respect are not uniform. In addition, other thematic competences associated with criminal jurisdiction are also separately indicated, as in this sphere, too, a specific regulatory content can retroact even on criminal procedural law taken in a narrow sense. The table for overview also makes mention of topics where there is already a draft directive or an adopted one which is not yet transposed into national law, or the given direction of development has already appeared in the policy document. Furthermore, some scientific forecasts are also included in this table, indicating the subject of accepted EU legal sources. The summary examines the totality of the criminal law subsystem, but procedural law represents only some part of the system of norms regulating it.

procedure; c) the rights of victims of crime; *d)* any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament. Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

18 Cf. C-617/10 Åklagaren v Hans Åkerberg Fransson (26 February 2013)

19 For details see Karsai (2015) pp. 32-34.

	The Hungarian system of criminal law as affected by European criminal law competences				
TFEU	**TFEU competence**	**Legal area**	**Current achievements**	**Expected or hypothetic developments in the future**	**Type of legal act**
Art.79 (2) *d)*	combat against trafficking in human beings, particularly women and children	substantive criminal law	definition of the criminal act and sanctions of trafficking in human beings		in any legal source
Art. 82 (1) *a)*	rules securing the principle of mutual recognition	substantive and ***procedural criminal law, law of enforcement of criminal sanctions***	European arrest warrant, transfer of criminal proceedings, fines etc.; European Investigation Order	re-regulation of confiscation, European criminal record	in any legal source
Art. 82 (1) *b)*	prevention and settlement of conflicts of jurisdiction	substantive and ***procedural criminal law***	rules of conciliation for conflicts of jurisdiction	regulatory or judiciary relief of collision of jurisdictions	in any legal source
Art. 82 (1) *c)*	training of specialists	not criminal law		transformation of the European Police College	in any legal source
Art. 82 (1) *d)*	facilitation of cooperation between authorities	***procedural criminal law,*** law of international cooperation in criminal affairs	European Investigation Order; introduction of European forms	transformation of Eurojust	in any legal source
Art.82 (2) *a)*	mutual admissibility of evidence by approximation of laws through regulatory minimums	***procedural criminal law***	European Investigation Order; rules on forensic experts	rules of evidence for confiscation	in a directive
Art. 82 (2) *b)*	the rights of individuals in criminal procedure, by approximation of laws through regulatory minimums	***procedural criminal law***	right to translation and interpretation, right to information, communication rights, recourse to legal aid by an attorney-at-law; presumption of innocence	procedural protection of under-age perpetrators	in a directive
Art. 82 (2) *c)*	the rights of victims of crime, by approximation of laws through regulatory minimums	***procedural criminal law***	definition of rights of the aggrieved		in a directive
Art. 82 (2) *d)*	any other regulatory aspects of criminal procedure	***procedural criminal law***			in a directive
Art. 83 (2)	definition of criminal offences and sanctions in case of certain crimes by approximation of laws through regulatory minimums	substantive criminal law	sexual exploitation of children, criminal law treatment of abuse of dominant market position, intervention against attacks against information systems	protection by criminal law of the Union's financial interests, combatting drug trafficking, counterfeiting, confiscation	in a directive

	The Hungarian system of criminal law as affected by European criminal law competences				
TFEU	**TFEU competence**	**Legal area**	**Current achievements**	**Expected or hypothetic developments in the future**	**Type of legal act**
Art. 83 (2)	the same, if indispensable for the effective implementation of an EU policy in an area subject to measures of harmonisation	substantive criminal law	criminal prosecution of market manipulation		in a directive
Art. 84	crime prevention	administrative law	EU support systems for conducting crime prevention projects		in any legal source
Art.85	regulation of the role of Eurojust in Member States' criminal proceedings	***procedural criminal law***, law of international cooperation in criminal affairs	opportunities for consultation and assistance in coordination	authorisation of Eurojust to participate in Member State criminal proceedings	in a regulation
Art. 86	establishment of the European Public Prosecutor's Office and the definition of its role in national criminal proceedings	***procedural criminal law*** (substantive law as well)		investigation and/or supervision of investigation by the European Public Prosecutor's Office	in a regulation
Art. 87 (2)	police cooperation	***procedural criminal law***, legislation on police operations	certain EU investigation techniques have changed into forms of cooperation stipulated by internal regulations (e.g. checked consignments) European database of traffic offences	transformation of further tools	in any legal source
Art. 87 (3)	definition of operative police cooperation	***procedural criminal law***, legislation on police operations	restricted pursuant to the Schengen Convention	new regulation of data exchange and procedural acts	in any legal source
Art.88 (2)	regulation of the role of Europol to strengthen cooperation; operative actions completed by Europol staff	***procedural criminal law***, legislation on police operations	assistance in analysis and coordination	Europol officers in Member State territories, granted the authorisation to act	regulation
Art.89	carrying out a procedural act in the territory of another Member State	***procedural criminal law***, legislation on police operations	restricted pursuant to the Schengen Convention	general regulation, lifting restrictions; regulatory stipulation of applicable law	special legislative procedure, but any legal source

3.4. SUI GENERIS COMPETENCE – TFEU ARTICLE 325 (4)

TFEU Article 325 (4)[20] establishes competences for legislation and taking action in the fight against fraud; however, it is important to emphasise that this is about an independent competence, rather than the further breakdown of a shared competence.[21] This provision is of special importance as regards criminal procedural legislation, as it authorises the EU legislator ("to adopt the necessary measures"), to issue even criminal procedural provisions[22] to establish the European Public Prosecutor's Office, at the same time providing the opportunity for (partially) conducting independent EU-level criminal proceedings[23]. It is also important to point out that in terms of sources of law (in the regulatory sense), this provision does not represent a restriction on exercising legislative competence: EU legislators are entitled to issue any kind of legal act in this respect, even a regulation not requiring transposition by Member States, which is similar to Member States' laws in terms of legal impact.

4. CLOSING REMARKS

The currently effective system of EU legal authorisations has endowed EU legislators with clear legislative competences in various subjects, with some competences involving the (partial) transfer of the Member State's legislative competence. As regards the criminal procedural regulatory system, thematic authorisations are quite broad; moreover, the EU acts allowed to be issued are not only directives but regulations as well in most cases. Exercise of the EU legislative competence postulates majority decision making in a regular legislative procedure, and Member States' interests are allowed to be enforced directly in respect of certain subjects only (a so-called emergency brake procedure). Accordingly, the general restrictions on EU legislation, such as the principles of subsidiarity and proportionality, prevail in these cases as well, and the considerations serving as a basis for their application are transformed, many times, from a special Member State interest; still, it is clear that the EU policies of the area of freedom, security and justice are gaining ground considerably. Thereby legal developments of the past 20 years have been demonstrated by codification both in European criminal law and European criminal procedural law.

20 TFEU Article 325 (4) The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices, and agencies.

21 Hecker, Bernd: *Europäisches Strafrecht,* 4th edition, Springer, 2012. p. 151.

22 See the draft directive on the criminal law protection of the financial interests of the European Union. COM (2012) 363. Commission analysis of the document: Commission Staff Working Document SWD (2012) 195.

23 See Andrea Törő: The European Public Prosecutor. In: *Profectus in Litteris II.,* Lícium-Art Kft., Debrecen, 2010. pp. 327-186; András Csúri: *Naming and shaping. The changing structure of actors involved in the protection of EU finances.* eucrim 2012/2 pp. 79-83; Katalin Ligeti: The European Public Prosecutor's Office: Which Model? In: (ed.: Klip, André) *Substantive Criminal Law of the European Union.* Maklu, 2011. pp. 51-67.

Tamás Sulyok*

Erga Omnes Effect of Member States' Constitutions and Composite Constitutionality

This paper touches upon some issues selected from the highly complex system of relationships of Member States' constitutions, EU law, and the international legal protection of human rights, at the level of raising problems.

I. SOME COMPONENTS OF THE RELATIONSHIP BETWEEN A MEMBER STATE'S CONSTITUTION, EU LAW, AND INTERNATIONAL LAW

This time, we examine the issue of constitutionality from the point of view whether EU acts enforced in Member States can be reviewed for constitutionality in terms of the constitution of a given Member State concerned, which could result in the removal of such act from the legal system for being incompatible with the constitution.

Undoubtedly, one aspect of the above issue is the actual prevalence of the *erga omnes* effect of Member States' constitutions: whether there is any such thing at all today as the hegemony of the constitution in an EU Member State, or whether the constitution must share other rules derived from sources outside the constitutional powers of the Member State, which vindicate a *quasi* constitutional force to themselves.

So in examining this issue, the concept of state appearing to be dominant in the current phase of the development of the European Union should also be considered. At first sight, this problem also presents several aspects. Is there a common principle of constitutionality in the concepts of state of the member states of the European Union, and if so, what is it? And does the European Union itself – as a socio-political entity – carry the characteristics of statehood, and if so, to what extent and in what form? In other words, is there a margin for interpreting the European Union as a state, in respect of being a factual situation or an objective.

The most self-evident response would be that the European Union is not a state,[1] and it has no such objective, either, which could be derived from the Treaties. The EU offers an area for its citizens which has no internal borders and is based on freedom, security and justice, where the free movement of persons is ensured in conjunction with relevant measures on external border control, asylum, immigration, crime prevention and combating of crime.[2]

In order to achieve common objectives, Member States confer powers to the Union,[3] which powers are exercised via a *sui generis* institutional system and legal system established by a special type of international treaty.[4]

The historic novelty of the European Union lies precisely in this system of cooperation of states, established pursuant to special international law, but operated through a *sui generis* institutional system and legal system, rather than on the basis of international law.

Even at present, one of the fundamental questions of the EU is the location of the dividing line between international law and EU law in respect of its organisation and operation: for instance, to what extent the organisation and operation of the European Council is linked to inter-governmental

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1 A reference is made to this by Court advisory opinion no. 2/2013, section 156: "And these modifications are actually justified by the circumstance that, contrary to all other contracting parties, the Union cannot be considered as a state by nature in terms of international law".

2 Article 3(2) of the Treaty on European Union [TEU].

3 Article 1 TEU.

4 Court advisory opinion no. 2/2013, section 157: "As the Court has established several times, the Treaties of the Union created a new legal order with its own institutions by derogation of customary international treaties, to the benefit of which states restricted their sovereign rights in an increasing number of areas, and the subjects of which not only include these Member States but their citizens as well (see in particular: Van Gend & Loos judgement, 26/62, EU:C:1963:1, p. 23; Costa-judgement, 6/64, EU:C:1964:66, p. 1158; 1/09 opinion, EU:C:2011:123, section 65)."

cooperation – that is, international legal regulations – and to what extent to EU law.[5]

This issue involves another interesting aspect, namely the system of relations between the Council of Europe and the European Union, as the Council of Europe and its institutions were established and are operated under international law. However, operations of the institutions of the Council of Europe – the ECtHR and the Venice Commission – are closely interlinked with the law and institutional system of the European Union.

As opposed to the adjudication by the ECtHR, the Court of Justice of the European Union [CJEU] "defended" EU law from "being subjected to external control"[6]; at the same time, reports by the Venice Commission are regularly taken over and utilised by the European Commission in its own proceedings, especially if it intends to voice its dissatisfaction with the constitutional arrangements of Member States. So the standpoint of the CJEU supports the view that the ECtHR's operations would subject EU law to external control, the same way as it is lawfully done in the case of Member States. Thereby, Member States are subjected to double external control – CJEU and ECtHR –, as opposed to the law and institutional system of the Union. Therefore the autonomy of Member States –in the opinion of the CJEU – is not prejudiced in case of the parallel powers of the two European courts, but the autonomy of EU law is, in turn. The following standpoint of the CJEU can be derived from this: the autonomy of EU law is considered to be an almost absolute value which needs to be protected much more strongly than the sovereignty of Member States and which is actually required to be enforced in such an extreme fashion precisely because the EU has no sovereignty over Member States.

So on the one hand, we can see the endeavours of the CJEU to interpret EU law autonomously, independently of international law, where it can surely maintain its right to have the last word; and on the other hand, exactly the opposite can be observed in the relationship of the European Commission and the Venice Commission: namely that European law would actually call international law to help reduce its own Member States to obedience if the rules of European law do not provide sufficient room for action. This room for action can become necessary for EU institutions particularly if – in the opinion of the European Commission – there is a definite risk that a Member State will grossly violate the values set out in Article 2 of the Treaty on European Union [TEU], because in such a case a procedure under Article 7 of the TEU can be launched before the European Council.

The definition of the content of the values set out in Article 2 of the TEU – human dignity, freedom, democracy, equality, rule of law, human rights, including the rights of persons belonging to minorities, as well as pluralism, non-discrimination, tolerance, justice, solidarity, and gender equality – is not at all easy, particularly at the level of legal interpretation.

Actually, most of these concepts are included in the constitutions of Member States, therefore guidelines for their exact meaning can also be provided by the case law of the constitutional courts of Member States, provided that there is such a forum. On the other hand, international law – particularly the practice of the ECtHR – also contains alternatives for interpretation in respect of most of the above values; furthermore, certain guidelines for interpretation can also be provided by EU law, though to a smaller extent. All this is modulated by the fundamentally political content of basic values, which can obviously have a substantial impact on the legal content of the same values, formulated in parallel – but not necessarily identically – at various levels.

EU institutions utilise the interpretations of international law reflected in the reports of the Venice Commission. The Venice Commission is a body of specialists well-versed in the comparative analysis of the constitutions of European states, and as such, it is indeed capable of for declaring opinions on the study of the content of the values set out in Article 2 of the TEU. However, this expression of views can pass beyond the level of mere professional opinions if – via the European Commission – the European Council came to the conclusion on the basis thereof that Article 7 must be applied against a Member State, for instance if there were a definite risk in respect of the constitution of the Member State concerned that the values set out in Article 2 would be grossly violated.

In such a case, the products of the constituent power of a Member State could be qualified under EU law by the European Council – based on the opinion of a body operating on the basis of international law – as products which fail to comply with certain fundamental values of the Union.

Therefore, according to EU law, the double external control "of Member States" sovereignty does not suggest the violation of the TEU as opposed to identical EU law control.[7] EU law, also by reference to the principle of Member States' loyalty, can restrict Member States' constituent power, meaning that Member States' constituents are subjected to constitutional control by the Union in spite of the fact that no such rule is included *expressis verbis* in the TEU. Perhaps this is not only an accident, as such a type of restriction of Member States' constituent powers is basically not legal, but is based primarily on political, and only secondarily on legal grounds.

Actually, the fundamental values defined in Article 2 of the TEU are basically politically defined, just as the procedure under Article 7, which is also a procedure of political nature,

5 See also Fabbrini, Federico: *States' Equality v States' Power: the Euro-crisis, Inter-state Relations and the Paradox of Domination*. Cambridge Yearbook of European Legal Studies (17) 2015/1. pp. 3-35. DOI: 10.1017/cel.2014.1, Published online: 03 March 2015.

6 This external control means control of the European Union and its institutions by the European Court of Human Rights set up by the Council of Europe, which, according to the Court, is incompatible with the Treaty. See advisory opinion no. 2/2013. 181.

7 This reference is made to the decision of the Court as expounded in advisory opinion no. 2/2013.

since the TEU does not include provisions on seeking remedy at the Court against the Council's decision.

Protection of the fundamental values of the Union is indeed a very important – or, if you prefer, a fundamental – function of the Union, required to be enforced against Member States as well. Basically, this protection is enforced through the political control of Member States' constitutions in the cooperation of the European Commission and the Venice Commission. This mechanism having a political content operates in a legal framework provided by international and EU law, with Member States' participation. Another requirement from this control mechanism is to ensure compliance of Member States' constitutions with the common European value system manifested in both the ECHR and the Charter of Fundamental Rights. Basically, the system presented cannot be objected to as long as this double external control does not result in double standards, meaning that no direct or indirect negative discrimination is demonstrated against Member States in the enforcement of controls. In the functioning of the Venice Commission, however, some sort of theoretical differentiation can be perceived between the old and new Member States of the European Union[8] based on the "maturity" of democratic institutional system. Proceeding from the different historical traditions of Member States, it is easy for the Venice Commission to conclude that the propensity for democracy is different, as a matter of course, in each Member State: older Member States have already "proven themselves" on democracy, but newer ones still need to catch up. This negative discrimination is inconsistent with the fundamental principle of Member States' equality. At the same time, following from the political content of Article 7, this type of approach can hardly be excluded; nevertheless, the problem seems to be necessary to be detected.

The central point of the legal protection of the fundamental values of the Union is the idea of the absolute nature of the autonomy of EU law[9], coupled with the absolute interpretation of the doctrine on the supremacy of EU law, worked out by the CJEU. Such absolute perception of autonomy protects EU law against both international law and Member States' law,[10] ensuring the existence, the *sui generis* nature of EU law. It is a question, however, whether the *sui generis* nature of EU law can be protected only by the absolute interpretation of the supremacy of EU law; to put it in another way: whether autonomy can also be ensured in the event of the relative supremacy of EU law, so to say whether the doctrine of supremacy is necessarily absolute or can it be relative as well?[11] According to *Bogdandy* and *Schill*, this issue is the most difficult problem for the European legal area to be solved, both theoretically and dogmatically.[12] It can also be particularly dangerous to give up autonomy because EU law is executed by Member States,[13] so if the doctrine of the supremacy of EU law is weakened, the execution of EU rules would become dubious.

Nevertheless, pursuant to Article 4 (2) TEU, the Union respects the national identity of Member States,[14] so there is a domain in Member States' constitutional law that seems to evade the doctrine of the supremacy of EU law. This provision made it clear that in lieu of the traditionally hierarchic modelling of parallel legal systems, emphasis should be put on the multilevel and network nature of legal systems.[15]

According to *László Blutman*, it follows from this provision that the "Union may not change and may not violate unilaterally the constitutional arrangements and basic state functions of Member States."[16] On the basis thereof, in reply to the first question, the approach is obvious that the hegemony of Member States' constitutions[17] has terminated in EU Member States: Member State level constituent power is not capable any longer to define, *erga omnes*, the constitutional order of a Member State.

In addition to the constitutions of Member States, legal value and impact comparable to this is represented in Member States by the ECHR through the case law of the European Court of Human Rights interpreting it, as well as EU law,

8 Varga Zs., András: *Alkotmányos identitás és a demokrácia kora* [Constitutional identity and the age of democracy] (in publication): "In the practice of the Venice Commission, there is an emphasis on the formal distinction between "old" and "new" democracies. It is expressly declared among constitutional rules on courts, for instance, that certain rules can be applied in "old" democracies which are unacceptable in »new« ones." Cf. CDL-PI(2015)001, Compilation of Venice Commission Opinions and Reports Concerning Courts and Judges, section 2.2.3.1. Basis of reference: CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§2-3, 59 and 12-17. Apart from the fact whether such distinction can be maintained at all, scope for action is clearly different for the two groups of countries: the new ones may not refer to the rules and practice of the old ones because what one may do the other may not. The new ones' own traditions can be used even less as a reference as tradition as such cannot even be interpreted in "new" democracies.

9 The problem can be described by both a discursive and exclusive approach to the autonomy of EU law; according to some standpoints, in advisor's opinion no. 2/2013, the Court coted for the exclusive approach, which is reluctant "to accept as a matter of principle that there are other courts with their own jurisdiction". See. Pirker, Benedikt H.–Reitemeyer, Stefan: *Between Discursive and Exclusive Autonomy – Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law*. Cambridge Yearbook of European Legal Studies (17) 2015/1. pp. 168–188.

10 Advisory opinion 170.

11 According to Armin von Bogdandy, this is that major opposition about, which lies between the interpretation of the law by the Court, on one side, and Member States' constitutional courts – or in the absence thereof, court forums with the same powers – on the other side; the former interpret primacy to be absolute, the latter as something relative. See. Bogdandy, Armin von–Schill, Stephan: *Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs.* Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 2010. pp. 702–733.

12 Bogdandy–Schill 2010. p. 702.

13 Cf. Orbán, Endre: *Ügynökprobléma – az Európai Unió állapotának egy lehetséges diagnosztikája*. [Agent problem – a possible diagnostics of the status of the European Union] Available at: http://jog.tk.mta.hu/blog/2015/11/ugynokproblema (Downloaded: 13.01.2016.).

14 Cf. Sulyok, Márton: *Nemzeti és alkotmányos identitás a nemzeti alkotmánybíróságok gyakorlatában* [National and constitutional identity in the practice of national constitutional courts], in: Jakó Mira Anna (szerk.): Nemzeti identitás és alkotmányos identitás az Európai Unió és a tagállamok viszonylatában. [National and constitutional identity in the relationship of the European Union and Member States] SZTE NRTI, Szeged 2014. pp. 44–62.

15 Bogdandy–Schill 2010. 704.

16 László Blutman: *Az Európai Unió joga a gyakorlatban*. [EU law in practice] HVG – ORAC, Budapest, 2014. p. 12.

17 Apart from the charta or non-charta nature of the constitution.

including the case law of the CJEU. A definitive political and legal impact may be exercised on Member States' constitutions by rule of law reviews by the European Council and the European Commission,[18] in it the Venice Commission has a political influence, through its reviews, whereas the latter has a legal influence, through the CJEU.

Due to the termination of the hegemony of Member States' constitutions, Member States' constitutional courts cannot necessarily protect the constitutional order of the given Member State, taken in the absolute sense.

Therefore the constitutional issues of EU Member States are primarily composite issues of constitutionality, qualified as *"Verfassungsverbund"* [constitutional federation] by *Bogdandy* and *Schill* on the basis of which they arrive at *"Verfassungsgerichtsverbund"* [multilevel cooperation of constitutional courts] as an option for practical solution.[19]

II. INTERPRETATION OF COMPOSITE CONSTITUTIONALITY FROM THE POINT OF VIEW OF THE CONSTITUTION OF AN EU MEMBER STATE

In order to approach this problem, primarily system of the interconnections of legal systems should be examined.

The state systems and legal systems of Member States are based on the constitutions of Member States, which rest upon the sovereignty of the Member State, that is, the sovereignty of the people forming a state. This sovereignty provides a basis for the constituent power of the Member State, representing the foundation of the state system and legal system of the given Member State.

As regards its *input*, this sovereignty is unified – identical with the people constituting the given state –, but as regards its *output*, it is divided as some part of its sovereignty is exercised by the Member State itself, and another part collectively with other Member States by way of conferral of powers to the EU, required "to reach the common objectives"[20] of the Union.

A double conclusion can be drawn from all this: the Union does not have sovereignty, and Member States do not transfer some part of their sovereignty to the Union, but only their competences associated therewith, they exercise the part of their sovereignty related to the achievement of EU objectives jointly with other EU Member States. Therefore, through the collective exercise of some part of the sovereignty of Member States by Member States, the Union receives conferred powers from Member States which are required for the achievement of common objectives. Thus, the Union is not a state, but an institutional and legal system established on the basis of international law, which is entitled and obligated to exercise the powers conferred to it by Member States to the degree necessary on the basis of the sovereignty collectively exercised by Member States.

The source of Member States' constituent power is their member-state sovereignty based on people's sovereignty, and the constitution is the most important manifestation of state sovereignty. Member States' national constitutions express and manifest the national identity of Member States, which forms an integral part of their fundamental political and constitutional arrangements, and regulates basic state functions, including the protection of the territorial integrity of the state, maintenance of law and order and the safeguarding of national security.

Pursuant to Article 4(2) of the TEU, the Union is actually obligated to respect this particular content of identity, meaning that a Member State's constitution – as the source of an integral part of national identity – may hardly be affected by the powers conferred according to the TEU.

So it does not necessarily follow from an EU Member State status at first sight that this status should affect state sovereignty in any manner. However, in accordance with the principle of Member States' loyalty[21], Member States are subject to a fairly broad range of open-ended obligations in the support and implementation of EU objectives, and the functioning of the European Union also support the view that behind the Member States' powers conferred to the Union there appears an autonomous authority, separated from the Member States, and showing the characteristics of sovereignty, as a source of EU law.[22] Together with the deepening of European integration, Member States' sovereignty as an "anti-integration" concept is becoming less and less desirable in the context of European law. In comparison, national identity is the result of a more "integration-friendly" approach. The fact that the TEU is not about respecting Member States' sovereignty but national identities as a step towards the self-definition of Member States, "shows the depth achieved in European integration and the fundamental change executed by a state as an EU Member State."[23]

This necessarily gives rise to the question whether, in case of a collision of Member States' constitutions and EU law, the rules of constitution of a Member State and their interpretation by the constitutional court of a Member State can have priority over competing EU rules, and if so, under what terms and conditions?

18 Communication from the Commission to the Parliament and the Council on the EU framework to reinforce the rule of law (COM (2014) 158 final).

19 Bogdandy–Schill 2010. pp. 704–705. quoting *Voßkuhle*: "So setzt sich in der Verfassungsrechtswissenschaft zunehmend die Vorstellung von einem Verbund zwischen unionalem und mitgliedstaatlichem Verfassungsrecht durch, in dessen Rahmen EuGH und nationale Verfassungsgerichte Teile eines Verfassungsgerichtsverbunds bilden."

20 Article 1 TEU.

21 Article 4(3) TEU.

22 2/13. advisory opinion 166.

23 Bogdandy–Schill 2010. 709.

In case of any collision of EU law and so-called simple law, functioning as a non-constitutional regulation, it is beyond dispute that the principle of the supremacy of EU law prevails according to the practice developed by the CJEU.

Nevertheless, as opposed to international law, EU law automatically becomes an integral part of domestic law even in the case of Member States applying a dual system, and consequently it occurs that in case of any collision with the rules of a Member State's constitution, they could be subject to the control of Member States' constitutional courts or superior courts with the same subject matter jurisdiction, in the same way as other Member State rules. So for instance, if the law of the European Union made it possible to sell genetically modified living beings in the internal market, such an EU regulatory provision would only be applicable and executable in violation of the Fundamental Law of Hungary, by reason of its incompatibility with Article XX(2) of the Fundamental Law of Hungary.

The conferral of powers to the Union can hardly be interpreted in a manner that it could also be extended to the exercise of powers running counter to or incompatible with the provisions of the constitution forming the basis of the sovereignty of the Member State concerned. Actually, it seems to be absurd that the Union could have a common objective[24] to force Member States to violate their own constitutions which is the basis of their sovereignty, since such a situation could severely violate the freedom and equality of Member States.

In summary: The use of the concept of Member States' sovereignty in a European legal context is not befitting,[25] on the one hand; and it is not expedient, either, on the other hand, as the sovereignty of the 28 Member States, taken separately, can hardly lead to a sensible result in an EU context. However, along the concept of national identity to be applied instead, appropriate room can be provided within the scope set out in Article 4(2) TEU in the framework of *Verfassungsgerichtsverbund* for court forums interpreting and applying Member States' constitutions. In this respect, the corresponding practice of the CJEU is also crucial in the sense to what extent the CJEU makes mention of the fact in its reasoning, in case of any collision of a Member State's constitution and EU law, that if the constitutional rule concerned is related to the constitutional identity of the Member State, how it is interpreted by the judicial forum qualified for the interpretation of the constitution of the Member State concerned. However, the CJEU's practice so far demonstrates exactly the contrary: the CJEU consistently refrains from any such type of reasoning or scrutiny.[26]

Thus, composite constitutionality and judicial dialogue will remain a European scenario impossible to bypass for long in the 21st century. However, its actual content should be discussed in depth, and all possible views are required to be clashed. Nevertheless, the absolute notion of the supremacy of EU law by the CJEU prevents Member States' constitutional court forums from interpreting national identity under Article 4(2) TEU, which can lead to a CJEU monologue rather than court dialogue, thereby resulting in a constitutional deadlock.

The only solution is *in-depth* judicial dialogue – *Gerichtsverbund – Verfassungsgerichtsverbund* – to be established and maintained, by way of *mutual* compromises. As soon as Member States' constitutional courts focus on national identity rather than on Member State sovereignty in an EU legal context, the CJEU could also consider concentrating on the relative interpretation of the supremacy of EU law – rather than its absolute interpretation – in the course of the application and interpretation of Article 4(2) TEU in case of any collision of Member States' constitutions with EU law, and in this framework of interpretation, Member States' constitutional court forums could also expound the precise content of national identity in an EU legal context.

24 TEU Article 1, sentence 1.

25 The lack of befittingness can be caused by the fact that the Union cannot have sovereignty – not to be declared at least – as the *demos* is missing from it, therefore it is just as impolite to mention Member States' sovereignty as to talk about ropes in the house of a hanged person.

26 Case C-409/06. Winner Wetten GmbH versus Bürgermeisterin der Stadt Bergheim [2010] EBHT I-08015, section 61: "It is not allowable that the provisions of national law – even at constitutional level – should detriment the unity and efficiency of EU law." For a similar argumentation, see section 59 of the reasons in case C-399/11. (Stefano Melloni versus Ministerio Fiscal).