UNION POLICIES

UNION POLICIES

Edited by

Petra Lea Láncos
Kinga Debisso
Laura Gyeney
and
Marcel Szabó

Editorial assistant: Balázs Tárnok

eleven
international publishing

CONTENTS

Distributive Policies of the Union

Redistributive Policies of the Union

THE EUROPEAN UNION AS A LEGAL ENTITY IN INTERNATIONAL LAW

Marcel Szabó

1 Phases of European integration

The current structure of the European Union is determined by the Lisbon Treaty,[1] which is effective as of 1 December, 2009. When we wish to understand the structure of the European Union, however, we need to go back in the history of European integration as far as its date of formation.

With some simplification, we may divide the history of European integration into four phases. The first phase of the European integration occurred in the 50s and its aim was the formation of the three Communities.

The first one of these was the European Coal and Steel Community (ECSC) or as it was also called, the Montanunion based on the Schumann Plan announced on 9 May, 1950.[2] The European Coal and Steel Community came to existence on 23 July, 1952 for a definite term and was created as an independent legal entity from the moment of its formation. The European Coal and Steel Community was formed for a fifty-year period, which expired on 23 July, 2002. From then on, the tasks and activities of the European Coal and Steel Community were amalgamated into the European Economic Community.

The European Community, or the European Economic Community (as it was originally named) and the European Atomic Energy Community (EURATOM) were formed on 1 January, 1958.[3] All three Communities were created in their founding treaties by the founding member states as independent legal entities in international law. In the past decades, the founding treaty of the European Community has been modified on countless occasions. Its provisions have been changed also by the Treaties of Maastricht, Nice and Amsterdam. The Reform Treaty, also called the Treaty of Lisbon, which came into force on 1 December, 2009, also changed the name of the founding treaty of the European Community, which, from then on, is called the 'Treaty on the Functioning of the European

1 'Treaty on the European Union and the Treaty on the Functioning of the European Union as amended by the Lisbon Treaty signed in Lisbon on 13 December, 2007.'

2 Formed by the 'Treaty establishing the European Coal and Steel Community as signed on 18 April 1951'.

3 The treaty forming the European Community (formerly: the European Economic Community) was the Treaty of Rome dated 25 March which became effective as of 1 January, 1958. The other treaty of Rome forming the European Coal and Steel Community (EURATOM) was also dated 1 March, 1957, effective as of 1 January, 1958.

Union' (TFEU). The history of the EURATOM Treaty is much simpler, as no amendment has occurred since its effective date of 1 January, 1958, despite several proposals aimed at its modification. Currently, the TFEU Treaty and the EURATOM Treaty are two out of the three most important treaties of the European integration.

The date of 7 February, 1992, when the Treaty of Maastricht was signed, can be deemed as the starting date of the second phase. This treaty came into force on 1 November, 1993. The Treaty of Maastricht includes, in part, the amendments to the founding treaties of the European Community and, in part, the treaty whereby the European Union was established. The treaty creating the European Union comprises the European Union as a political entity meaning the political framework of the integrative cooperation of the member states without contemplating the same as a legal entity. The treaty creating the European Union formed and added two more pillars to the three previously established Communities, which can be deemed collectively as its first pillar, while the common foreign and security policy made up the second pillar, and the cooperation in the field of justice and home affairs formed the third pillar at that time.[4]

The next turning point in the historical development of the European Union was the creation of the Treaty establishing a Constitution for Europe[5] and then – its failure. The idea of its creation when it was signed on 29 October, 2004 was that it should provide for the constitutional rules of the functioning of the European Union by replacing all the primary sources of law of the European Union then existing. The founding treaties of the European integration and the accession treaties provided for the structural and operational regulations of the European Union which were supposed to be replaced as of the effective date of the Treaty establishing a Constitution for Europe and such structural and operational regulations should have been supplemented with the rules serving the protection of fundamental rights that are normal in an 'ordinary constitutional regime', which have been formed as the general legal doctrines and principles within the European legal regime developed by the European Court. The Treaty establishing a Constitution for Europe would have granted a legal personality to the European Union, also vesting it with appropriate powers and competences so that it could act in the name of the community of the European states in international relations as a *sui generis* international legal entity. As it is known, however, after

4 The three-pillar structure so established was abolished by the Reform Treaty with the primary aim of making the powers of the Union less ambiguous and for the avoidance of collisions between the competences belonging, on the one hand, to member states, and those belonging to the Union, on the other hand.

5 'The draft of the Treaty establishing a Constitution for Europe' adopted by the European Council on 18 June, 2004. The draft treaty was signed in the same year in the presence of the President of the Council Josep Borrell Fontelles but its ratification failed due to the referenda held in France and the Netherlands (on 29 May, 2005 and on 1 June, 2005, respectively).

the referenda had been conducted in the Netherlands and France, the ratification procedure of the Treaty establishing a Constitution for Europe came to a halt and this development path of the European law turned to a cul-de-sac.

The creators of the Reform Treaty crammed all the amendments of the Treaty establishing the European Union into a single article[6] and renamed it as the Treaty on the Functioning of the European Union (TFEU). In addition, all the amendments of the Treaty on the European Community went into a single article[7], and it was renamed as the Treaty on the European Union (TEU).

The Lisbon Treaty amalgamated the European Community and the European Union calling the institution so merged European Union and the Lisbon Treaty vested the same with legal personality.[8] Accordingly, the European integration has currently two institutions vested with legal personality, which are the European Union and EURATOM.

The following treaties comprise the current structure constituting the European Union (and as such, may be deemed as a 'historical constitution' of the European Union):

- Treaty establishing the European Atomic Energy Community;
- Treaty on the European Union;
- Treaty on the Functioning of the European Union;
- Accession Treaties;
- general doctrines and principles of EU law.

2 The types and importance of legal personality in international law

The legal entities in the traditional doctrine of international law were states exclusively. After 1945, however, it became more and more acceptable and currently it is widely acknowledged that international organizations are also legal entities in international law.

There is some hint of ambiguity, however, lying in the fact that the European Court of Justice applied the Vienna Treaty of 1969[9] concerning the international law on treaties between states as a legal rule based on customary law in connection with the treaties of the European Community instead of the Vienna Treaty

6 Art. 2 of the Lisbon Treaty.

7 Art. 1 of the Lisbon Treaty.

8 Notwithstanding, the member states attached a declaration to the Reform Treaty, wherein they declare that even if the European Union is vested with a legal personality, it is not authorized to adopt any laws or measures beyond the competences wherewith it is vested by the member states through the provisions of the Treaty.

9 1969 Vienna Convention on the Law of Treaties, dated 23 May, 1969. It was promulgated as a Hungarian statute as Law decree 12 of 1987.

of 1986[10] on the treaties between international organizations. The correct approach is, however, if we classify the international legal status of these legal entities as international organizations.

We believe that it would be wrong to try to press the European Union as an international legal entity into the Procrustean bed of the international organizations, as its characteristics as a legal entity are much more similar to those of the states. An arbitration award that Max Huber rendered in 1929 construed the territory, the population and sovereign power crystallized over the latter as the criteria of the status of states. In its founding treaties, the European Union contemplates the aggregate of the territories of all the member states as the territory of the European Union. Even though European citizenship is not meant to replace national citizenships, it still creates a direct relation, through the special rights included therein, between the European Union as a legal entity and the individuals living on the territory of the European Union[11]. No international organization serves as an example for an analogous direct relationship of that nature.

3 Federative and confederative elements in the legal system of the European Union

A confederation is a rather loose though permanent alliance between or among states to which the Commonwealth of Independent States (CIS) can serve as an illustrative example. A confederation as such is not capable of issuing direct orders and instructions below the level of its member states. Even if the members of a confederation agree that certain measures are to be taken and the confederation renders a resolution or decision in this respect, implementation of such a decision remains within the responsibility of each of the member states, respectively. While a confederation is no subject to international law, its sovereign member states are independent legal entities in international law. An attribute of confederations is that the cooperation among the member states is provided by a conference-like organization and the member states make unanimous decisions regarding the operation of the confederation or about its role in international relations. Usually, a confederation has no citizens of its own and the citizens of the member states comprising the confederation hold their own citizenships. The entirety of the confederation does not have as much bearing in international relations as its member states. A confederation usually does not sign international

10 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, dated 20 March, 1986.

11 Pursuant to Art. 8 of the Lisbon Treaty, the citizenship of the European Union does not serve as a substitute for the particular citizenships of the member states but the former rather supplements the latter while providing additional rights for the citizens of the member states.

treaties, and it is not usual that a confederation as such would establish diplomatic relations with third party states.[12]

The most important attribute of a federation or a federal state is the existence of a permanent structure above the member states, which comprises the typical components of the executive, legislative and judicial powers as separate branches of power. The federative institutions operating above the member states are capable of enforcing their power below the level of the member states directly.[13] A federative state has its own citizens, while there is either no separate citizenship in the member states or even if there is, it has no bearing in international relations. The member states of a federation are not independent subjects of international law. International treaties are concluded by the federative state. The member states have similar powers in special cases only and diplomatic relations with other countries of the world are also maintained by the federation. Of course, it is only the federation which has a bearing within the entirety of the international relations. Member states may have any kind of power in the economic sense but they have no independent bearing of their own in the field of foreign policy. The United States and Germany serve as typical examples of federations.

As can be seen from the above, the European Union cannot be classified as a confederation or a federation either, and therefore we need to deem it as a *sui generis* state-like entity. As far as the European Union is concerned, it has permanent structures which show the typical attributes of the operation of executive, legislative and judicial branches of power.[14] The bodies and institutions of the European Union, however, are not capable of enforcing their intentions directly below the level of the member states, but instead, they can force the member states only by litigation through the European Court of Justice to implement the legal orders of the European Union.

---

12 Confederations vary on a large scale: loose confederations are rather similar to international organizations, while other ones wherein the connections among the members are tighter are sometimes not easy to distinguish from federative states.

13 One of the fundamental differences between a confederation and a federation is the freedom of membership. While the sovereign states comprising a confederation are free to decide whether they wish to join or leave the confederation, the member states of a federation have no such freedom of choice. As it is well-known, the controversy between the *unionist*s of the North and the *confederationalists* or *secessionists* of the South formed an important political antecedent of the American War of Independence.

14 From the constitutional point of view, the role of the European Commission within the framework of the European Union can be deemed as a parallel of the government of a federative state. Likewise, the European Parliament can be seen as one correspondent to the House of Commons in a federative state which embodies the symbolic intentions of the European *demos*, i.e. that of the common European population. The Council of the European Union plays the role of the upper chamber which expresses the aggregate of the intentions of the member states, and therefore, it is legitimate that the Council of the European Union as a *quasi*-second chamber be a participant in the procedures resulting in the promulgation of legal norms.

In the field of foreign policy, both the European Union and its member states and especially the United Kingdom and France have significant international bearing and importance (the latter two being also permanent members of the Security Council of the UN). The European Union represents a major weight comparable to that of the United States in the WTO. Both the member states and the European Union conclude international treaties with other countries of the world. In diplomatic relations, the European Union and the member states are likewise present in the world. As from 1 December 2009, the European Union places significant emphasis on calling its diplomatic institutions embassies.

THE SYSTEM OF EUROPEAN POLICY-MAKING

Petra Lea Láncos

1 Emerging structures of cooperation in policy-making

As the modern state developed, the continuously growing central governments deemed more and more areas to be 'public matters' drawing them into the sphere of the legislative and executive action. To manage these public tasks, an organized system of public administration evolved structured on the basis of geographical jurisdiction and of the different subject matters. The national public administrative bodies were vested with responsibilities and powers to act within their scope of competence, while administrative action was typically restricted to the citizens and of the territory of the particular state.

While we are living in an 'ever smaller world', problems tend to show global attributes. By the 20th century, technical development and the intensification of trade relations had given rise to unprecedented hazards and various new needs which called for a cross-border, joint management of such new issues and challenges.[15] Some authors even go so far as declaring the crisis of the nation state meaning that the state in the context of globalization has become incapable of regulating, controlling and enforcing economic and social processes.[16] These tendencies result in an 'opening' of the national system of public administration to international cooperation with the aim of increasing the efficiency of its operation. Interpol, which was established to prevent and investigate international (i.e. cross-border) criminal activities is a good example for this process. The structure of the Interpol comprises both the international level (general assembly) and the national level (national bureaus) of administration.

Based on the above, the 'internationalization' of policy-making activities gave rise to multi-level structures comprising jointly managed international bodies as well as the already existing or newly formed national administrative organs of the participant states. The procedures and rules of cooperation are usually detailed in international treaties[17] which provide for the management structures and

15 Tamás Kende & Tamás Szűcs (eds), *Az Európai Unió Politikái*, Osiris, 2001, p. 13.

16 Alan S. Milward, *The European Rescue of Nation State*, Routledge, 2000, p. 4.

17 International conferences are often held with the aim of discussing certain challenges but it is also typical that an exchange of experiences between state organizations and agencies starts on an informal basis. Cooperation may lead to the formation of joint international structures or it may remain in the form of conferences. As an outcome of the efforts of formalized structures or informal meetings, documents are often prepared which, even though not binding upon the participants, are likely to

the allocation of competences and responsibilities, dividing regulatory and enforcement tasks between the international and national level.

The European Union is a unique form of cooperation of the participant states formed in response to the economic, social and security-related questions arising after the Second World War which then went on to become a global economic and political centre of power. The member states of the European Union have gradually surrendered, in part or in whole, the exercise of more and more competences to the supranational level.[18]

Deepening of integration

The European project was launched by the six founding states and was initially restricted to a relatively narrow scope i.e. for of the common market of coal and steel (European Steel and Coal Community – 1951). Encouraged by the success of this cooperation, the member states decided to form a broader community (European Economic Community – 1957). In the course of their efforts at deepening their economic relations and developing the conditions of the common market, the member states faced several new challenges which jeopardized the common results achieved so far.

For example, the different requirements of the members states regarding environmental protection strongly affected production costs, and, which in turn affected the conditions of competition on the common market. In order to level the playing field, common rules on environmental protection had to be adopted and not primarily for the purposes of environmental protection but much rather in the interest of the common market. The extension of the scope of European legislation was therefore the result of a *spillover*. This means that a measure taken in the process of integration (the removal of trade impediments) gives rise to processes (the free movement of products) which jeopardize (through the different environmental requirements distorting price competition) of the benefits flowing from a given achievement of integration (consumer welfare resulting from competition), which can only

strongly orient the participant states to follow a certain practice or to adopt a certain legislation (e.g. OECD directives addressing multinational undertakings).

18 Surrender of regulatory, executive or controlling functions is caused not only by the inability of the member states to solve certain issues on their own. Some authors recognized that a further source of motivation for member states to delegate certain tasks to the supranational level is that this way they may achieve significant savings, since the *transactional costs* of preparing and implementing policies may be relatively low when shared among the participating states. This will mean that Member States will also delegate responsibilities to the level of the Union where such delegation is not inevitable. 'The European Union (EU) began its life as a rather specialized political institution, superimposed on a pre-existing level of Member State governments, and with a rather narrow list of political powers enumerated in the Treaties of Rome. Over time, however, the EU has expanded the range of its activities dramatically, so that by the early 1990s, the policies of the Union had spread from the core economic activities of the common market to embrace almost every conceivable area of political, economic and social life. Indeed, the 1990s witnessed a striking political backlash against the spread of centralized policy-making in the EU, much as the expansion of the US federal government had been met in the 1980s with calls for states' rights and devolution.' Mark A. Pollack: 'The End of Creeping Competence? EU Decision-Making Since Maastricht', *Journal of Common Market Studies*, Vol. 38, No. 3, 2000, p. 520.

be safeguarded by introducing a further integrative measure (by extending cooperation to another area, resulting in the formation of a new policy). Such 'creeping competences', or encroachments on national powers were finally codified in the founding treaty: environmental policy and the appropriate legal basis for environmental legislation was inserted into the Treaty Establishing the European Economic Community by the Single European Act in 1986.

The success of European integration may partly be explained by the fact that integration had started in a less sensitive field (*low politics*) bolstering mutual trust and building structures and routines of cooperation between the participant member states. In the course of the last few decades, however, member states have gradually converged into an ever closer Union, making it possible to include more sensitive fields (*high politics*) such as common foreign policy and common defence in the integration process.

The documents laying the foundations for the allocation of powers stemming from national sovereignty are the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), however, further important documents had also been adopted by the member states which gradually became part of the European policies (e.g. the Schengen Treaties). These treaties set out the framework of the European administrative space: its structures, stakeholders, subject matters, principles and procedures.

2 Multi-level governance and European integration

2.1 Formation of the European Administrative Space

A European public administrative regime is taking shape and gradually evolving before our very eyes. According to certain surveys, eighty percent of the rules of the member states that are of public administrative nature have their origins in Union legislation.[19] Due to its scarce institutional capacity, the European Union is forced to rely heavily on the legislative and executive infrastructures of the member states in the process of implementing European measures. Accordingly, the term 'European administrative law' means the entirety of European legal provisions adopted to regulate the areas which are traditionally considered to fall under the scope of public administration as well as the entirety of national legal acts of European relevance, while the term also refers to systems serving the implementation of these Union acts.[20] This vast area of policy-making and imple-

19 Tania Börzel & Thomas Risse, 'When Europe Hits Home: Europeanization and Domestic Change', *European Integration online Papers (EIoP)*, Vol. 4, No. 15, 2000, p. 3. Legal provisions originating from the Union comprise those adopted directly by the European legislator and those passed by the Member States when implementing the law of the Union.

mentation is operated in the cooperation of two different levels: that of the Union and the member states.

2.2. 'Europeanization' of administrative structures

The processes taking place in the administrative systems of the Union and the member states in the course of European integration are designated as 'Europeanization'. The concept of Europeanization[21] is used to describe two different phenomena. It means, one the one hand, the processes of capacity-building and establishing institutions, passing legislation, creating processes for resolving conflicts and solving problems, including all formal and informal contacts and relationships at the level of the Union which evolve responses given to challenges surfacing in the course of integration. It also comprises, on the other hand, the changes in national policies, regulatory efforts and institutional structures that emerge as a result of EU policies and legislation, including the shifting interests of the member state stakeholders participating in these processes. As integration moved forward, the processes of Europeanization brought about radical changes in the institutional structures of the member states. For the purposes of the effective implementation of directly applicable EU law, member states were compelled to establish new institutions and/or to restructure their already existing administrative organization. As a consequence of these developments, the relationships and the position of the stakeholders involved changed and new vertical and horizontal systems of relationships or 'networks' emerged that are specific to the individual states concerned.

> According to Börzel and Risse, the effect of europeanization in member states structures may appear (depending on the degree of change) in the following forms: (1) *absorption*: adjustment of the existing structures of the member states to satisfy the EU requirements, (2) *adaption*: supplementing existing member state structures and/or the introduction of minor modifications in order to comply with EU requirements, (3) *transformation*: major or total reorganization of member state structures which lose their original characteristics resulting in fundamentally new attributes.

As a direct consequence of the Europeanization of traditional public administrative tasks, a system of so-called *multilevel* governance arises wherein new vertical and/or horizontal relations and networks emerge connecting the various ad-

20 Eberhard Schmidt-Assman & Bettina Schöndorf-Haubold, *Der Europäische Verwaltungsverbund*, Mohr Siebeck, 2005, p. 3.

21 Heather Grabbe, 'Europeanisation Goes East: Power and Uncertainty in the EU Accession Process', in: K. Featherstone & C. Radaelli, *The Politics of Europeanisation*, Oxford University Press, 2003.

ministrative bodies and levels within a member state (local municipalities, county-level, provincial/regional, national) and/or across state borders. The various forms of cooperation between special government agencies, administrative units and other players of public administration – whether stronger or looser – that may reach beyond national borders slowly loosen the rigid national public administrative structures (which have proven to be insufficient for the efficient implementation of the EU law) and pave the way towards the creation and the adoption of the different forms of 'European public administration'.

The European public administrative system is inevitably *complex*[22] since it comprises institutions and bodies of the member states and those of the EU in the framework of which however, the relations between the member states and the Union may take various forms depending on the particular regulatory subject matters. Whether a special policy falls within the exclusive competency of the Union, or rather within that of the member states, or competencies over the issue concerned are shared, the legislative and executive organizations of the various levels participate in the formation of the given special policy to a different extent and in a different manner. Accordingly, the European system of public administration is not only a complex system, but also a *heterogenic* one. The inevitably heterogenic nature of the system of European public administration can be observed on both the level of legislation and implementation.

2.3 The legal framework of 'multilevel governance'[23]

2.3.1 The purpose limitation principle and conferred powers

The basic principles of the system, including the aims and tasks of the Union, the areas and the extent of its actions, as well as the obligations of the member states are set forth under the TEU and the TFEU. These provide that the Union shall in the interest of attaining the *objectives* set out in the Treaties (Article 5 paragraph 2 TEU). The European Court clarified the principle of conferral in its judgment rendered in the *Costa vs ENEL*[24] case, stating that 'the Member States have limited their sovereign rights, albeit within limited fields.' With this, the Court clearly declared that the Union has no general authority as its activities may only serve the attainment of the objectives provided for under the fundamental treaty. As such, the operation of the Union is bound to the implementa-

22 Deirdre Curtin, *Executive Power of the European Union*, Oxford University Press, 2009, p. 29.

23 *Multi-level governance* – it was Marks who first used this expression and it has since become a fashionable term broadly used in European legal literature (Gary Marks, 'Structural Policy and Multi-Level Governance in the EC', in: A. Cafruny & G. Rosenthal (eds.), *The State of the European Community*, Longman Group, London 1993.)

24 Case 6/64, Flaminio Costa v ENEL, [1964] ECR 01141.

tion of the objectives spelled out in the Treaties which means that serving objectives other than those set forth in the Treaties would be unlawful. The objectives of the Union are listed in Article TEU encompassing a wide range of different goals ranging from contributing to peace to securing the free movement of persons or the respect for international law. The Union implements such objectives its *policies* (Articles 3-6 TFEU).

In order to attain its different objectives, the Union enacts law and adopts executive measures. These are adopted within the framework of Union policies, based on the relevant particular legal basis provided for under the Treaties. These legal bases authorize the Union to enact legislation in order to attain the objectives provided for in the fundamental treaties. According to Article 5 paragraph 2 TEU, 'competences not conferred upon the Union in the Treaties remain with the Member States.' Accordingly, the Union cannot arbitrarily extend its powers, meaning that it is not entitled to draw new areas into its regulatory powers, for it is only the masters of the treaties, i.e. the member states which have the power to do so through an appropriate amendment of the TFEU.

An example for a legal basis for legislation in the founding treaties within the scope of agricultural policy (Article 43 paragraph TFEU) is the following:

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy.

2.3.2 The principles of cooperation and the types of competences

The success of European policies within the system of multilevel governance depends to a great extent on the harmonious cooperation between the supranational level and the member states. Accordingly, the TFEU stipulates the member states' *obligation of mutual cooperation* in pursuing the objectives set forth under the founding treaties, which also includes the duty to respect the existing division of competences. The *principle of sincere cooperation* gives rise to both positive and negative obligations for the member states: they need to fulfil their obligations arising out of the Treaties and facilitate the achievement of the EU's tasks, while also refraining taking measures that could jeopardize the achievement of the common objectives (Article 4 paragraph 3 TFEU). It is the obligation of the Union to respect the equality of the Member States as well as their

national identities meaning primarily their political and constitutional structures (Article 4 paragraph 2 TEU).[25]

The Union may adopt law with reference to the appropriate legal basis. Whether and which type of measure the Union may adopt depends on the type of policy which serves as the framework for the legal act concerned. Since the Lisbon amendment, the TFEU provides for certain *types of competences* (Article 2) defining under which competence a given policy belongs (Articles 3-6). In harmony with the established case-law of the Court of Justice of the European Union, the Treaty distinguishes between the following three types of competences: exclusive competence, shared competence, and supporting, coordinating and complementary competence.

Pursuant to Article 3 TFEU, it is only the Union which may adopt binding legal acts in the areas which belong to its exclusive competence. In such areas, the member states may only act, if they are so authorized by the Union or with the aim of implementing the acts of the Union. In practice, this means that the Union has a freedom to form the particular policy 'independently from the member states' regarding its content as well as the depth of integration. The customs union, the monetary policy in the Euro-zone or the common commercial policy are examples of areas which belong to the exclusive competence of the Union.

In areas pertaining to *shared competence*, both the Union and the Member States may adopt legal acts with binding effect. There are, however, three important principles which regulate the competing regulatory ambitions of the two levels, i.e. that of the Union and that of the member states. First, according to the principle of subsidiarity (Article 5 paragraph 3 TEU) the Union is allowed to initiate the adoption of a legal act only in case a particular regulatory goal cannot be achieved at the level of the member states (at the national, regional or local level), at the same time, by reason of the scale or effects of the proposed action, it can be better achieved at Union level. The principle of proportionality means that insofar as the Union is authorized to regulate an issue, the 'content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties', where 'form' means the type of regulatory act taken (Article 5 paragraph 4 TEU). From a substantive aspect, this means that the Union is not allowed to over-regulate the subject matter or legislate beyond the extent required by the legislative goal pursued, while from the aspect of form, the type of legislative act chosen must be the one causing the least intrusion into Member State law, i.e. the primary form shall be the directive. As long as Union legislation satisfies the criteria of subsidiarity and proportionality, the adopted acts will

25 The TEU expressly points out that the fundamental functions of the states such as the protection of the territorial integrity of the state, the maintenance of public order and the defence of national security shall remain the tasks of the member states.

be deemed to have a *pre-emptive* effect. This means that the member states are no longer allowed to adopt legislative acts in the areas so 'reserved' for the Union unless the Union has so decided by waiving the exercise of its competence. Most of the policies belong to the areas of shared competence, e.g. the agricultural policy, environmental protection and energy policy.

In certain more sensitive areas, the Union may contribute towards the efforts of the member states in a *supporting*, *coordinating* or *complementary* way, but in this context, the concept of pre-emption does not apply, meaning that member states are not prevented from exercising their legislative and executive powers. Under this competence, the Union cannot harmonize law, however, this does not mean that the Union would be prevented from adopting binding legal acts; it is rather the case that the member states wish to remain 'in charge' of policies such as e.g. education, culture or civil defence.

The type of competence under which a particular policy falls strongly influences the character of the adopted measures and the ensuing EU policies. Taking the area of customs policy as an example which belongs to the exclusive competence of the Union, it may be observed that the Union sets the customs tariffs and the rules of the customs procedure by creating *a uniform body of law* with effect to all Member States. By comparison, in the areas of education or culture which fall under the supporting, coordinating and supplementary competence, the Union only has softer tools at its disposal. In the latter areas, the Union employs initiatives or launches *programmes* such as the life-long learning initiative in the year of 2006,[26] proposing special programmes (such as Erasmus, Leonardo da Vinci, Comenius, Grundtvig, Jean Monnet) through which the Union seeks to contribute to the improvement of learning conditions. In both cases the member states an play important role in implementation, since customs procedures are dealt with by national customs officers and learning programmes are coordinated through so-called national bureaus.

Based on the above, it is the type of competence that determines the depth and the of tasks that the bodies of the Union or the member states must carry out. In a field that falls under exclusive competence (such as the conservation of marine biological resources under the common fisheries policy) the responsibilities of the member states are limited to executing Union acts, while in areas falling under the supporting, coordinating and complementary competence (such as e.g. tourism), member states are the primary decision-makers. In the field of shared competences, the level of integration varies from policy to policy since the Union has adopted various regulations in various depths and qualities also in these areas. These differences reflect the heterogeneity of the European policies.

26 Dec. 1720/2006/EC of the European Parliament and of the Council, on establishing an action programme in the field of lifelong learning of 14 November 2006, OJ 2006 L 327/45.

3 The policy cycle[27]

In order to describe the activities of the Union related to the various policies, authors apply the model of the so-called policy cycle which demonstrates the process flow of the policy-related activities and their main steps within a simplified model. Due to the general nature of this model and the fact that the policy cycle is described as a system circle, it is inevitably inaccurate. Naturally, the players involved in the process, as well as the interests, relationships and the legal bases underlying the different policy fields are divergent and this renders the picture even more complex. However, the policy cycle still provides a useful overview of the characteristics of the particular policy-related activities, the (usual) sequence of the events as they occur.

Stages of the policy cycle

1 *Agenda setting*

2 *Policy formulation*

3 *Policy decision*

4 *Implementation*

5 *Evaluation*

Agenda setting occurs in response to an actual or a looming problem. In this phase, a common position is formed about the topics to be addressed: what are the threats and unresolved issues that must be put on the agenda and channeled into the policy procedure? Several factors are taken into consideration when setting the policy agenda: for example the severity of the problem (e.g. concentration of the sulphur dioxide may be close to the threshold or even exceed it), an sudden threat may emerge (e.g. a flood), emotionally charged events (e.g. abuse of children, issues affecting personal safety), etc. Participants in a problematic situation may draw attention and lobby for having a problem put on the agenda e.g. the so-called expert communities possessing a high-level of expertise in a certain area placing the problem into an academic or scientific context, provid-

27 Márton Varjú, http://jog.unideb.hu/tanszekek/eu/tse/tse_eupolitikak_kozpolitika_jegyzet-08-09-1.pdf, p. 11; William Wallace, Hellen Wallace & Mark Pollack, Policy making in the EU, Oxford University Press, pp. 46–47.

ing causal or empirical data with the aim contributing to the solution. Likewise, civil society and lobby-groups, trade unions or other bodies such as business lobbyists and, not rarely, politicians themselves may demand that an issue be put onto the agenda. The European Commission prepares a so-called *green paper* shedding light on the problems revealed which is then forwarded for consultation at the level of the Union.

In the summer of 2010, media attention focused on certain measures taken in France with the aim of abolishing illegal settlements and expelling dwellers of such settlement. Doubts were raised in connection with these measures i.e. whether they were discriminative or otherwise violated human rights in particular, because those affected belonged to the gypsy minority. Meanwhile, similar proposals surfaced also in Italy and Germany. The absence of guarantees in connection with the expulsion of EU citizens coming from other members states of the European Union without proper documents was not settled satisfactorily and gave rise to further legislative needs in the area of freedom, security and justice.

The next phase comprising policy formation seeks to formulate the *aims and possible solutions* to the problem outlined in the agenda-setting step. In this phase, programs and proposed legal acts are elaborated as possible European answers to the issues at stake. Prudent preparatory work often requires the involvement of experts and as well as further consultations. In this phase, the role of expert communities is highly appreciated since they may come up with scientifically sound solutions for coping with a particular problem. Authors addressing this phase use the term of 'policy networks' for the involvement of loose communities comprising persons belonging either to the public or private sphere on whom competent decision makers may rely in both the formulation of possible solutions and the promotion of the same before the general public as well as their implementation. Again, it is the Commission who takes central stage in summarizing the goals, principles and tasks identified for solving the issue at hand in a so-called *white paper*. The content of the white paper may later serve as the basis for the proposed legislation.

For example, the White Paper of 2007 on a strategy on nutrition, overweight, and obesity-related health issues[28] was based on a green paper prepared under a similar title seeking to outline a uniform European approach regarding the provision of information aimed at increasing combating obesity through awareness raising, food labelling and cooperation. This white paper identifies various levels of action (including that of the Union and that of the member states, as well as the private sphere and international cooperation) allocating the respective responsibilities.

28 White Paper on a Strategy on Nutrition, Overweight, and Obesity-related Health Issues – Brussels, 30.5.2007 COM (2007) 279.

In possession of the possible solution described in the previous phase, the Union legislator responds to challenges primarily in the form of legal acts. The legislative process and the form of the legal act depend on the legal basis for legislating on the particular policy issue as well as the principle of proportionality.[29]

> In order to fight the financial crisis and consolidate the financial system, the Committee prepared two draft resolutions which prescribe a recording of over-the-counter derivative transactions in central archives and reporting the shorting of securities. Their aim is to render these transactions secure and transparent and prevent future dysfunctions.

A new policy trend takes shape in the phase of the *implementation*. Generally, implementation is considered to be an area 'free from politics' since the political part of the process is completed in the phases of agenda-setting, policy-formulation and decision-making leading up to a political compromise. This, however, looks different in the Union due to the complexity of the decision-making procedure and the multilevel character of the implementation. Usually, decision-makers apply the concept of the smallest common denominator, resulting in the incorporation of ambiguous language in the adopted legal act. Therefore, implementation in practice depends to a great extent on the preferences of the persons vested with the power of implementation. Since legal acts are mostly adopted in the form of directives (in compliance with the principle of proportionality), these must be first transposed, meaning that ministries, agencies, etc. designated for implementation enjoy considerable freedom leading to divergent solutions in various member states.

In the phase of *evaluation / feedback*, elements leading to the success, failure or inefficiencies of the measure adopted in the policy cycle are unearthed. Evaluation makes it possible to establish whether the policy adopted resulted in achieving the goals set and in delivering cost-efficient solutions. Evaluation occurs on the basis of both quantitative and qualitative factors. The information gathered in the course of the evaluation procedure is fed back into the public policy cycle with the aim of improving the original measure. While the Euro-

29 There is also an interesting dynamic underlying this, i.e. the question of the appropriate legal basis for the adoption of a legal act where there is more than one possible choice. The scope of legal bases prescribing unanimity has been considerably reduced, yet the question remains pertinent. For example, the adoption of the directive on tobacco advertising in 2009 looked back on a long and controversial process, and subsequently became the subject of litigation since the directive was based on the legal basis for harmonization in the internal market while according to the German government, the legal act should have been adopted as a public health measure which precludes harmonization and foresees unanimity in the Council (falling under the supporting, coordinating and complementary competence). Since the directive aimed at harmonization, Germany contended that it was *ultra vires*.

pean Court of Auditors conducts audits of particular policies from the aspect of legality, efficiency and practicality, 'in-house' assessments must also be carried out in order to reveal the strengths and weaknesses of the policy solution and to establish lessons learned.

For assessing efforts made in the area of regional policy, the Directorate-General for Regional and Urban Policy operates a separate Evaluation Unit and Evaluation Network with the involvement of experts delegated by the member states. For instance, the 2009 Evaluation Plan of the Directorate-General focuses on feasibility studies, the efficiency of certain areas where measures are applied, the successful operation of funds and certain initiatives such as e.g. INTERREG or URBAN and their cost-efficiency. The Directorate-General has outsourced most of its evaluation tasks.

Carrying out evaluations on the EU level, however, also faces serious difficulties. This is so because the starting point and the political body responsible for Union policies is the European Commission, while it is usually the public administrative systems of the member states that are responsible for implementation. The distance between the stakeholders is considerable rendering feedback difficult. Another problem is that it is difficult for the Commission to access further sources that could supply information on the success or failure of national implementation, such as national parties, interest groups, trade unions, etc. Ultimately, a further factor that makes it difficult to build on lessons learned is the phenomenon of *path dependency*, meaning once a certain policy decision has been made, it is difficult to depart from it. One of the reasons for this is that decision-makers do not want to return to a sensitive issue after a compromise was achieved, even in cases where the decision finally adopted was not perfect. Other factors include the impact of the policy decision on the mindset of decision-makers and those implementing it, and the fact that often an entire institutional background for the operation of the policy decision had been established – these are difficult to change.

The evaluation of a particular policy measure may arrive at the conclusion that cooperation should be further extended, since the particular policy measure actually gave rise to unforeseen consequences. This phenomenon would be the classic case of the *spill-over* effect.

4 Classification of policies

There are two ways to classify the policies of the European Union. The first classification considers the *objective of the policy*. a) The so-called constitutional policies concern the basic issues of integration and the most important

principles of cooperation, e.g. enlargement policy, common foreign and the security policy. b) Policies of a distributive nature are primarily aimed sharing resources pursuant to uniform rules, e.g. the common agricultural policy, development policy. c) Redistributive policies seek to channel resources to where they are needed the most, e.g. the regional policy. d) The regulatory policies form the last group, serving the harmonization of a given are of law, e.g. social policy, consumer protection policy.

The classification by the *nature of the policy* covers horizontal and sectoral policies. a) Horizontal policies are aimed developing comprehensive areas through setting a great number of objectives and employing various tools. An example would be regional policy, which comprises several goals including raising the standard of living through the development of the built environment or the promotion of local enterprises pursued through different instruments ranging from the redistribution of funds to technical assistance. b) By contrast, sectoral policies concern narrowly defined areas, where the specific nature of the policies themselves are strongly linked to the development targets and the adequate tools employed to attain these goals, e.g. fisheries policy or education policy.

Constitutional-Type Policies of the Union

CERTAIN ASPECTS OF THE RELATIONSHIP BETWEEN RELIGION AND THE EUROPEAN UNION

András Pünkösty

1 Introduction

The relationship between the European Union, and, in a larger sense, the European public sphere, and religion is rather controversial. The subject has become an increasingly important topic in international academic literature,[30] and nowadays we can discern significant processes which are, on the one hand, part of the discourse about the future of the European Union and, on the other hand, indispensable for understanding the role of religion in European public life. To begin with, we should point out that the European Union cannot interfere in ecclesiastical, religious and confessional matters, which fall exclusively within member states' competence. The Lisbon Treaty explicitly states the above,[31] an entry which was included in the Constitutional Treaty mainly in response to pressure from churches.[32] Nothwithstanding, there are numerous links between religion and the European Union's public policies, which can be distinguished on different levels from a legal, sociological and ethical point of view. Article 17(3) of the Treaty on the Functioning of the European Union stipulates that the European Union recognises the specific contribution of churches and religious

30 Byrnes & Katzenstein (eds.), *Religion in an expanding Europe.* Cambridge University Press, 2006. p. 336; Burkhard Josef Berkmann: *Katolische Kirche und Europäische Union im Dialog für die Menschen – Eine Annäherung aus Kirchenrecht und Europarecht*, Duncker & Humbolt, Berlin 2008. p. 686; Ronan McRea, *Religion and the Public Order of the European Union*, Oxford University Press, 2010. p. 272; Norman Doe, *Law and religion in Europe*: *A Comparative Introduction*, Oxford University Press, 2011. p. 336; Lucian N. Leustean, *Representing Religion in the European Union: Does God Matter?* Routledge, 2012. p. 246; Lucian N. Leustean, *The Ecumenical Movement & the Making of the European Community*, Oxford University Press, 2014. p. 278.

31 TFEU Art. 17 (1) The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. 2. The Union equally respects the status under national law of philosophical and non-confessional organisations.

32 Pope John Paul II in his post-synodal apostolic exhortation *Ecclesia in Europa*, concerning the draw up of the future European constitutional treaty, emphasises the following: 'While fully respecting the secular nature of the institutions, I consider it desirable especially that three complementary elements should be recognized: the right of Churches and religious communities to organize themselves freely in conformity with their statutes and proper convictions; respect for the specific identity of the different religious confessions and provision for a structured dialogue between the European Union and those confessions; and respect for the juridical status already enjoyed by Churches and religious institutions by virtue of the legislation of the member states of the Union.' *Ecclesia in Europa. II. János Pál pápa Az Egyház Európában kezdetű szinódus utáni apostoli buzdítása*, Szent István Társulat, Budapest 2003. p. 97.

organisations to the structure of the Union and maintains an open, transparent and regular (structured) dialogue with these organisations.[33] On the following pages we will succinctly review how this structured dialogue evolved and what its prospects are (2), we will then examine the main tendencies shaping the understanding of the role of faith in European public life, which are closely linked to the evolution of legislation concerning religious freedom (3). Thereafter we will analyse the connections between European law and religion (4) and finally we will seek to draw a few conclusions on the basis of the above (5).

2 The representation of religion in the European Union – the antecedents and possibilities of structured dialogue

Religion has been historically problematic from the perspective of European integration, so much so that it was practically not mentioned explicitly in European documents from the Schuman Declaration (1950) to the adoption of the Maastricht Treaty (1991). This period was characterised by the growing secularisation of the continent, especially its Western part and, as a result, Europe became more non-religious than any other continent, whereas in other parts of the world we could observe the opposite trend of de-secularization.[34] Lately, the academic community has been willing to speak of a certain shift concerning the role of religion in the public sphere, although some authors consider it a poorly construed academic presumption.[35] The silence of the EU over religious matters has been broken with the 11th Declaration attached to the Treaty of Amsterdam (1997), which states that 'The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.'[36] This disregard of religion seems rather strange, considering the fact that the statesmen who played a prominent role in the creation of European integration were well aware of the importance of churches and religious associations, and many of them had Christian Democratic background. The latter fact contributed directly to the success of European integration as the founding fathers were operating on common ideological grounds, thereby smoothing the way of cooperation. One of the explanations of the si-

33 TFEU Art. 17 (3) Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.

34 John T.S. Madeley & Lucian N. Leustean, 'Religion, Politics and Law in the European Union: an Introduction', *Religion, State & Society*, Vol. 1–2, 2009, p. 3.

35 Jens Köhrsen doubts the increasingly dominant role of religion in the public sphere and the prospect of a post-secular society. Cf. Jens Köhrsen, 'How religous is the public sphere? A critical stance on the debate about public religion and post-secularity', Acta Sociologica, Vol. 55, No. 3, 2012, pp. 278–283.

36 Declaration on the Status of Churches and Non-Confessional Organizations.

lence regarding religion could be that the founders, albeit driven towards integration by ethical principles stemming from their religious beliefs, chose to ignore faith formally as they were concerned that, instead of deepening collaboration, it could lead to new conflicts between East and West.[37]

Despite the marginal role of religion during the integration process churches have closely followed the European project and have mostly adopted a supportive stance. This is also true for the Catholic Church,which has tried to contribute within its powers to the success of integration, enabling Europe to fulfill its mission and responsibility in the context of global civilizational processes.[38]

According to the typology of L. N. Leustean, presented below, there are four types of intermediaries (actors) representing religion at the European Union.[39]

Based on L. N. Leustean's theory, the first type of relations between churches and European institutions are *public-private relations*, which emerged mainly as the product of personal religious interests of politicians involved in the process of European integration rather than from a systematic policy on religion.[40] The second type are called *experimental relations*, initiated by Gaston Thorn, President of the European Commission, with the aim of establishing the possibility of cooperation with churches and religious organisations on the Commission's side as well. Upon recommendation from Secretary General Émile Noël, Thorn appointed Umberto Stefani, on the 13th of September 1983, as special counsellor in charge of compiling a census of religious organisations and informally liaising with the Holy See.[41] The continued development of experimental relations was also encouraged by President Jacques Delors – the creator of the internal market – who himself was also committed to religious and ethical affairs, and once said, 'Europe needs a soul'.[42] During the creation of the internal market, churches and religious organisations strengthened their presence in Brussels, as gradually increasing integration had an indirect impact on their activities as well. One of Delors's closest advisors was Louis Lacroix, who was entrusted with the

37 Lucian N. Leustean, 'Representing Religion in the European Union. A Typology of Actors', *Politics, Religion & Ideology*, Aug. 2011, p. 296.

38 Blandine Chelini-Pont, 'Papal Thought on Europe and the European Union in the Twentieth Century', *Religion, State & Society*, Vol. 1–2, No. 37, 2009, p. 143.

39 See: Leustean 2011, pp. 295–315; Lucian N. Leustean, 'Does God matter in the European Union?' in: Lucian N. Leustean (ed.), *Representing religion in the European Union, Does God matter?* Routledge, 2013, pp. 5–11.

40 Id. Such group was the Ecumenical Commission on European Cooperation, chaired by André Philip and existed between 1950 and 1974, which brought together high-ranking politicians and churchmen.

41 Id. Umberto Stefani retained his position during the first five years of Jacques Delors's presidency and was instrumental in organising the visits of Pope John Paul II to European institutions in 1985 and 1988.

42 Quoted by Miklós Király, 'Európa keresztény gyökerei és az Alkotmányos Szerződés', *Iustum Aequum Salutare*, Vol. II, No. 3–4, 2006, p. 67.

ethical aspects of integration. After his death, Delors appointed the so-called 'Lacroix Group' of advisors in 1987, and later, in 1989, the Forward Studies Unit (FSU), which was asked to establish informal contact with churches and religious communities beside examining ethical issues.

The third type of intermediaries between integration and religion are the *proactive relations*, whereby seeking potential cooperation became a direct goal of the European Commission. Within the mandate of the Forward Studies Unit, the appointment of Marc Luyckx in 1990 led to new opportunities for building a relationship between the Commission and religious communities. A report by Luyckx concluded that, despite the process of secularisation, there was an increasing interest in spirituality coupled with science and technology.[43] Luyckx tried to foster closer relations between the Commission and religious communities,[44] although his previous religious affiliation (he had worked as a Catholic priest) was regarded as a problem by some religious groups. In 1996, the Forward Studies Unit was renamed as the Group of Political Advisors to the European Commission (GOPA) and lasted until 2005. During that time, a programme was implemented under the leadership of Tomas Jansen and later Michael Weniger, named 'A Soul for Europe: Ethics and Spirituality'.[45] With this programme, the Commission intended to promote religious dialogue between Christians, Jews, Muslims and humanists, pursuing Delors's concept, but the programme never had an effect on a formal legal level. The discussion on the text of the Treaty Establishing a Constitution and its Preamble – which focused on the question of whether or not to include a reference to God and Christianity – revealed that, despite the increase of religious presence in Brussels, national governments continued to have the final word on religious issues based on their preestablished views on what religion's role should be in the EU.

According to the classification of N. L. Leustean, the fourth form of mediation between the EU and religious organisations is that of *institutionalised relations*. In 2005 GOPA became the Bureau of European Policy Advisors (BEPA) and represented José Manuel Barroso's stance on religious issues. From November 2014 BEPA has been replaced by the European Political Strategy Centre (EPSC)[46] in the Commission led by Jean-Claude Juncker.[47]

In terms of institutionalised relations, the Roman Catholic Church stands out as the only religious group with a diplomatic representation. According to the

43 Religion confronted with science and technology. Churches and ethics after Prometheus. An exploratory report by Marc Luyckx, Brussels, European Comission 1992, cited by Leustean 2013, p.8.
44 Churches, religious and convictional communities were equally involved in this work.
45 http://ec.europa.eu/dgs/policy_advisers/archives/activities/dialogue_religions_humanisms/sfe_en.htm (10 January 2015).
46 http://ec.europa.eu/epsc/.
47 http://europa.eu/rapid/press-release_IP-14-2262_en.htm.

rules of the diplomatic representation established in 1970, the Apostolic nuncio not only represents the Holy See, but also holds the title of doyen of the diplomatic corps accredited to the European institutions. The Catholic Church opened an official representation in Brussels in 1980, namely the Commission of Bishops' Conferences of the European Community (COMECE).[48] The COMECE monitors the work of European institutions and aims to convey the opinions of the Catholic Church by adapting them both to the working of the Union and to the church's own priorities.

The first Protestant church to have an independent office was the Evangelical Church of Germany (EKD) in 1990, which, in addition to maintaining contact with European institutions, provides experts to the Church and Society Commission of the Conference of European Churches (CSCCEC). The CEC is an interchurch organisation, comprising different Protestant Churches and representing them altogether in strict cooperation with COMECE. After the Maastricht Treaty, more and more Christian Churches followed the strategy of the Evangelical Church of Germany and set up an independent office in Brussels in addition to common representation. Thus the Patriarchate of Constantinople (1994) the Orthodox Church of Greece (1998), The Orthodox Churches of Romania and Cyprus (2007) and the Anglican Church (2008) also have their own representations.

Among the Catholic religious orders, the Jesuit order has been the most active in engaging with the European project. In 1956, they founded the Jesuit European Office (OCIPE) in Strasbourg, and they opened another OCIPE office in Brussels in 1963, which now functions as the Jesuit European Social Centre (JESC), and in 1990, they opened an office for the Jesuit Refugee Service. The Dominican order established its presence in Brussels through its spiritual centre (Spirituality, Culture and Society in Europe).

The presence of churches and religious organisations in the proximity of European institutions increased considerably after the Maastricht Treaty. Maastricht was seen as precursor to a deeper integration, which could trigger the enlargement of the competencies of the European Union to additional fields where it could have a direct impact on the pastoral and institutionalized social work of churches and religious associations. There were certain concerns voiced by churches and religious organisations that the EU will ignore their specific operating needs during its progress, and will hinder their functioning under their own ethical rules with its ever-expanding lawmaking. The Lisbon Treaty laid down a reassuring solution for churches and religious organisations, when it stipulated that 'The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States',

48 http://www.comece.org/.

which had been proposed already by the 11th Declaration attached to the Treaty of Amsterdam. Perhaps the most important objective of the intensified presence of churches and religious associations in Brussels is to channel their traditions and experience through their representation into a dialogue with with European institutions in order to help shape the future development of the integration process. The Lisbon Treaty leaves ample room for such endeavors, recognizing explicitly the 'specific contribution' of churches and religious organisations and requiring that the Union maintain 'an open, transparent and regular' dialogue with them. In compliance with the above, several high-level expert meetings take place, partly at annual summits, [49] partly arranged ad-hoc for debating special issues.[50]

The fact that the European Union is a *secular organisation* is a determining factor for structural dialogue, as it can only be successful if the churches and religious organisations are capable of translating their views to the secular language of the EU.[51] From the Union's point of view, these meetings are excellent occasions to communicate its openness – beyond making 'family photos' for representative purposes – towards religious issues, promoting its acceptance and legitimacy in certain communities. However, the practical results of the dialogue and meetings have been rather modest according to Péter Erdő, President of the Council of European Bishops' Conferences (CCEE), taking into account the fact that they aren't followed up by serious collaboration.[52]

3 The place of religion in the European public sphere

As indicated previously, religion is not a primary issue for the European Union, it has no specific policies and scope of authority nor does it take concerted actions on the matter. The member states' attitude towards religion typically includes the consideration of the positive and negative sides of religious freedom, the regulation of the relationship between state and church, and the institutional framework of religious freedom. However, limiting the relationship of religion and law only to these aspects can lead to a restricted approach. The European Union, through its practices and the definition of its identity, must also formulate a standpoint to answer the demands represented by religion in Europe, both in the private and the public sphere. Religion influences the law of member states

49 http://www.comece.org/site/en/euchurchdialogue/annualsummitmeetings.
50 http://www.comece.org/site/en/euchurchdialogue/dialogueseminars.
51 Churches and religious organisations are typically compelled to use a secular language and mechanisms in order to communicate opinions coming from their religious stance during their dialogue with European institutions. For more, see the experiences and view of Frank Turner, formal OCIPE director. Frank Turner, 'Dialogue and advocacy at the EU', in: Leustean 2013, pp. 83–86.
52 http://www.magyarkurir.hu/hirek/erdo-peter-az-europai-unioban-nem-divat-vallas.

by moulding the notion of public morals and public perception and, consequently, promoting certain behaviours and restraining others. As such, cultural and religious backgrounds have a direct impact on national laws. The EU, in matters within its competence, like internal market law, has an indirect effect on these national norms through its legislative actions, thereby reducing the ability of member states to govern issues falling into these categories.[53] Hence, EU law affects the general role of religion in today's Europe, but this effect works both ways as, religion can also influence EU lawmaking. McCrea notes that this religious influence, with mediation from member states, is present in the EU's laws, as a source of its constitutional values and is also an element of lawmaking.[54] Habermas observes that the ethical content of religion underwent a slow secular transition and has been built into the theory of statehood, thus a secular version of religious discipline is inextricably connected to the deeper layers of the modern, democratic, constitutional state.[55]

When it comes to protecting religious freedom, The European Court of Human Rights, similarly to the EU's basic stance, lays more emphasis on the limitation of interference from religion (the negative aspect of religious freedom) than on ensuring the freedom of religious expressions (the positive aspect of religious freedom). Thus the prevailing trend in the European public sphere is to secure the independence of public life from religious communities, based on both an underlying assumption that personal autonomy is the more important value and on a particular interpretation of the meaning of a neutral state.[56]

There is an intense debate concerning the shift of emphasis between the positive and negative sides of religious freedom and the governing concept of a neutral state, in which the ruling of the ECHR in the *Lautsi v. Italy case* became a key reference point. On 3 November 2009, the European Court of Human Rights unanimously ruled that the compulsory display of crucifixes in the classrooms of public schools restricted the right of parents to educate their children in conformity with their convictions and the right of the child to believe or not to believe, therefore it violated the Convention.[57]

---

53 For example, the European law on the organisation of working time; in the context of Sunday trading, the collision between the protection of the Sunday and economic freedoms; concerning the institutions of churches, their employer status versus the rules on non-discrimination based on religion; the display of religious symbols and trade marks law; biotech regulation and related ethical questions, etc.

54 McCrea 2010, pp. 35–73.

55 Conversation of Jürgen Habermas and Joseph Ratzinger cited by Balázs Fekete, 'Túl a közhelyek Rubikonján', *Iustum Aequum Salutare*, Vol. I, No. 1, 2005, p. 172.

56 Javier Martínez-Torron, 'The (Un)protection of Individual Religious Identity in the Strasbourg Case Law', 2012 *Oxford Journal of Law and Religion*, pp. 1–25.

57 For a detailed case study, see: Schanda Balázs & Koltay András, 'A Lautsi-ügy a feszületről az állami iskola osztálytermében', *Jogesetek Magyarázata*, 2011/4, pp. 77–85.

The decision caused a considerable stir in European public opinion. The Italian Government lodged an appeal to the Grand Chamber of the Court which reversed the Lower Chamber's ruling in its March 8th, 2011 decision, declaring that the compulsory display of crucifixes in public schools did not violate the Convention. According to the Grand Chamber there is no consensus among European states on whether religious symbols should be present or not in public life and public education, the decision belongs to the competence of each member state, therefore it cannot be considered as a violation of the Convention.

The priority of personal autonomy (based on freedom and equality) as the defining value of the EU, and the ideal of a religion-free public order arises from the essential tenet of the Age of Enlightenment, according to which the radical separation between the realm of faith and that of reason is desirable, and the ruling of the public sphere should be based exclusively on the latter, which is equally accessible to all individuals. Dominic McGoldrick notes that these assumptions on the relationship of religion and public life are challenged by the following statement of Pope Benedict XVI reflecting on the European situation during his visit to England in 2010: '(...) where is the ethical foundation for political choices to be found? The Catholic tradition maintains that the objective norms governing right action are accessible to reason, prescinding from the content of revelation. According to this understanding, the role of religion in political debates is not so much to supply these norms, as if they could not be known by non-believers – still less to propose concrete political solutions, which would lie altogether outside the competence of religion – but rather to help purify and shed light upon the application of reason to the discovery of objective moral principles."[58] For the Pope, distorted forms of religion, such as sectarianism and fundamentalism, arose when insufficient attention was given to the purifying and structuring role of reason within religion. This is why the Pope suggested that the world of reason and the world of faith – the world of secular rationality and the world of religious belief – needed one another and should not be afraid to enter into a profound and ongoing dialogue, for the good of civilization. McGoldrick argues that if faith has a role to play in public debates on the determination of 'reason' then this mixes the realms of faith and reason again, and this takes faith back into the 'public sphere'.[59]

58 http://www.vatican.va/holy_father/benedict_xvi/speeches/2010/september/documents/hf_ben-xvi_spe_20100917_societa-civile_en.html

59 Dominik McGoldrick, 'Religion in the European Public Square and in European Public Life – Crucifixes in the Clasroom?', *Human Rights Law Review*, 2011/3, pp. 459–463.

In the speech[60] he delivered to the European Parliament on November 25th, 2014, Pope Francis underlines the importance of the individual, who is not only an economic agent, but also endowed with *transcendent dignity*. In this way, the head of the Catholic Church makes a connection between the concept of human dignity, one of the core elements of the theory of human rights, an ethical pillar of European integration, and the perception of the person – which constitutes the basis of the Catholic doctrine. The Pope emphasises that a Europe no longer open to the transcendent dimension of life is a Europe at risk of losing its own 'humanistic spirit'. He adds that this Christian legacy, which played an important role in the social and cultural shaping of the continent, and still has a contribution to offer, does not represent a threat to the secularity of states or to the independence of the institutions of the European Union, but rather an enrichment. This is clear from the ideals which shaped Europe from its beginnings, such as peace, subsidiarity, solidarity, and humanism.[61]

4 Relationships between religion and EU law

4.1 Relationship with regard to the Treaties

As a starting point of our analysis, we should note that in the constitutional traditions of member states religion, and in most cases this means Christianity, has historically occupied an important place, the significance of which has slowly diminished with the growth of secularization and the separation of church and state.[62] The EU started to focus on religion relatively late, alongside the drive to protect fundamental human rights and the Lisbon Treaty represented an important step forward. The Preamble of the TEU mentions religion as one of the sources of the EU's core values: 'Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law (...)'.

Alongside the breakthrough achieved by The Lisbon Treaty in the field of protecting fundamental human rights, it has become increasingly important to un-

60 Cardinal Reinhald Marx, the President of COMECE calls the speech of Pope Francis a message of hope and encouragement. He draws attention to the fact that the decision of the Pope to come to Strasbourg before visiting any individual EU member state, as such, gives a strong signal that the Pope supports the European Union and encourages dialogue with it. http://www.comece.eu/site/en/press/pressreleases/newsletter.content/1866.html.

61 See: http://w2.vatican.va/content/francesco/en/speeches/2014/november/documents/papa-francesco_20141125_strasburgo-parlamento-europeo.html.

62 See: Szabolcs Anzelm Szuromi, 'Megjegyzések az egyház es az állam modern kori viszonyának változásához', *Jogtörténeti Szemle*, 2003/2, pp. 7–13.

derline the values of the European Union. The basis of the public structure of the European Union derives from the traditions of member states and, as such, it reflects their common values. In the context of fundamental rights, the constitutional traditions of member states are part of EU law as general principles.[63] Article 2 of the Treaty on European Union states the fundamental its values:

> 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

In article 3 of TEU, the European Union has set the following goal:

> 'The Union's aim is to promote peace, its values and the well-being of its peoples.'

The context of article 2 of TEU is set by article 3(1), so the articles above together mean that the aim of the European Union is to promote peace, human dignity, freedom, democracy, equality, the rule of law, respect for human rights and the well-being of its peoples. The Preamble of the TEU lays down that they 'continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity.'[64] In regard to the principle of subsidiarity, the TEU provides the following.

> Article 5(3) of TEU: 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in 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.'

Although there is no consensus about the philosophical history of certain values among authors of various ideological backgrounds,[65] and they are recog-

63 TEU Art. 6 (3) Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

64 Pius XI: Quadragesimo anno(1931) in: Tomka Miklós & Goják János (eds.), *Az Egyház társadalmi tanítása*, Szent István Társulat, Budapest, 1993, p. 117. 'it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.'

65 Ladislas M. Orsy (Georgetown Law) states that international human rights conventions are the minimum of the ethical and moral standards of a given era, but there is no consensus about their philo-

nized by divergent philosophical doctrines, it is hard to argue against the fact that from the values listed in the Treaty, human dignity, the principles of solidarity and subsidiarity are deeply rooted in the Christian tradition.[66] Furthermore, emphasising these values opens the door for dialogue with the churches as they are strongly entitled to opinions on the matter.[67]

The article of the EU on Churches entered into force with the adoption of the Lisbon Treaty:

> Article 17(1)-(3) of TFEU: '1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
> 2. The Union equally respects the status under national law of philosophical and non-confessional organisations.
> 3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.'

A new, outstanding element compared to the Declaration attached to the Treaty of Nice is article 17(3) of TFEU where the Union acknowledges the 'specific contribution' of churches, and stipulates the requirement of a structured dialogue with them.[68] This requirement concerns both churches and philosopical and non-confessional organisations, which definition relativizes the importance of the provision by extending the list of addressees to organisations which are difficult to define. However, the undisputable significance of this provision is that it creates an obligation in the Treaty for a substantial, structured consultation with the churches.[69]

When discussing the relationships between religion and the Treaties, it is worth mentioning the lively debate around the drafting of the Preamble of the Constitutional Treaty, which managed to reach the threshold of wider public

---

sophical history. The origins of certain values are explained differently by authors belonging to different philosophical approaches. Interview.

66 Balázs Schanda states that prioritising the human dignity and the idea of solidarity are undeniably Christian values. See: Balázs Schanda, 'Vallási diszkrimináció – európai normák', in: Gábor Galik & Miklós Matók (eds.), *Vallási sokféleség es a vallási antidiszkrimináció jogi szabályozása a magyarországi es a határon túli vallási közösségek tapasztalatainak es teológiájának tükrében*, Ministry of Education and Culture, Budapest, 2009, p. 120.

67 Interview with Johanna Touzel COMECE officer 20 August 2012. In this regard, see for example A Europe of Values, The ethical Dimension of the European Union, COMECE, March 2007.

68 Point 20 of the European Parliament's report on the perspectives of developing dialogue with the civil society under The Lisbon Treaty (2008/2067(INI)) of 13 January 2009 stresses that, besides dialogue with the civil society itself, there is also a need for an open, transparent and regular dialogue between the Union and churches and religious communities, as provided for by The Lisbon Treaty.

69 The Catholic Church shows great sensitivity towards the problems of Europe and the European Union, which comes through its rich work in this regard. See: Francois Foret & Blandine Chelini-Pont, 'Papal Thougt on Europe and the European Union in the Twentieth Century', *Religion, State & Society*, Routledge, Vol. 37, Nos. 1–2, 2009, pp. 131–146.

awareness. The central point of the discussion was where to put the emphasis when defining Europe's identity. In that respect, it is worth recalling Joseph Weiler's remark. In Weiler's opinion, the draft of the Convention[70], despite its international nature, deliberately used the term 'constitution', which, beyond the regulation of the functioning of the state and the relationship between the state and the individual, also implies a choice of values and identity made by the political community.

This choice is usually expressed through references in the preambles. The Convention chose to proclaim Europe's common moral background with the insertion of a rather solemn preamble, without reference to God or Christian roots, therefore it seems to be a choice of values in the context to come. Weiler argues that religions freedom is a generally accepted value in the constitution of most member states. Certain national constitutions have abundant reference to God, others acknowledge certain religious organisations as state religion, so such references are not incompatible with European legal and constitutional history.[71] On the other hand, there is the approach which declares secularism as the core value, like the Italian and the French constitutions, which have proud secular preambles. In the course of drafting the Constitutional Treaty, one principle was that it could not be biased – even on the level of symbolism – in any way; neither by confronting the religious sentiment with the secular one, nor by favouring a specific religion. Nevertheless, the wording isn't neutral if it advocates the secular viewpoint, this means only that from the secular and religious option, it chooses the first. Weiler believes that the correct solution is that of *tolerant pluralism*, which guarantees both the religious sensitivity (freedom to have a religion) and the secular sensitivity (freedom not to have religion) alike, as does the new Polish constitution of 1997.[72]

The opinion of Frank Turner, the former leader of the since transformed OCIPE, provides an extraordinary insight. He is inclined to accept the omission of any reference to God in the Constitutional Treaty, because such reference would be inevitably defined by politicians, and would be presumably different from the theological notion of God, which could only lead to misunderstanding.[73]

---

70 The European Convention worked from 28 February 2002 to 10 June 2003 to create the draft of the Treaty establishing a Constitution for Europe.

71 The German constitution uses the expression 'Conscious of their responsibility before God and man'; the Irish constitution says 'In the Name of the Most Holy Trinity (...) and (...) our Lord'. The Greek constitution states that 'The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ', etc.

72 'We, the Polish Nation – all citizens of the Republic, *both those who believe in God* as the source of truth, justice, good and beauty, *as well as those not sharing such faith* but respecting those universal values as arising from other sources, equal in rights and obligations towards the common good (…)'.

73 Interview with Frank Turner, 30 August 2012.

According to Ronan McRea, the European Union structured its approach towards the integration of religion in its public order around the common European cultural heritage (constitutional tradition) and the currently dominant attitude, according to which the EU prefers to maintain a balance between the religious, cultural and humanist influences on the public sphere. This drive to achieve a balance appears as an aim at the normative level, but it is also a part of European identity. Moreover, it considers religion itself as a constituent of identity on a personal and collective level. He notes that the EU can integrate more successfully those religious traditions which already have roots in European culture and which do not aim for exclusiveness.[74]

4.2 The European secondary law on religion

An in-depth examination of relations between European legislation and religion clearly shows that religion was initially left out from the scope of community law, a tendency also noticeable in the practice of the EU's Court of Justice. European law didn't recognize the concerns raised by religion, consequently, it generally acted as a barrier to religious demands raised in accordance with the traditions of member states. This one-sided relationship slowly eased, and European lawmaking has been paying growing attention to religious needs.

The first source of European law which included religious aspects was *the Council Directive 93/119/EC,*[75] on the protection of animals at the time of slaughter or killing. The Directive provides that the particular requirements of certain religious rites must be taken into account, and it excludes the 'animals subject to particular methods of slaughter required by certain religious rites' from the list of animals which should be otherwise stunned before slaughter or killed instantly.

The *Council Directive 94/33/EC*[76] on the protection of young people at work states that 'with respect to the weekly rest period, due account should be taken of the diversity of cultural, ethnic, religious and other factors prevailing in the Member States; (…) it is ultimately for each Member State to decide whether Sunday should be included in the weekly rest period, and if so to what extent.' In this context, the directive refers back to the religious and cultural traditions and respects them in regard to the regulation of the weekly rest period on Sundays. This way, the legislator avoided a typical conflict between European law and the religious demands embedded in member states' law.

74 McRea 2010, p. 4.

75 Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing, OJ L 340, 31.12.1993.

76 Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work, OJ L 216, 20.8.1994.

The *Directive 97/36/EC of the European Parliament and of the Council* (30 June 1997)[77] prohibits advertising and teleshopping in any broadcast of a religious service, except when the scheduled duration is 30 minutes or longer. Furthermore, member states have to ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality.[78]

An important aspect of the European legislation which concerns religion is the anti-discrimination regulation. According to the *Council Directive 2000/78/EC*,[79] a discrimination based on religion or belief, disability, age or sexual orientation undermines the achievement of the objectives of the EC Treaty, therefore any direct or indirect discrimination as regards the areas covered by this Directive should be prohibited, with the exception of a few cases when a difference of treatment can be justified. The directive refers to the 11th Declaration on the status of churches and non-confessional organisations, annexed to the Amsterdam Treaty, in view of which the member states can maintain or lay down specific provisions with regard to genuine, legitimate and justified occupational requirements which might be indispensable for carrying out a particular activity.

The *Regulation (EC) No 45/2001 of the European Parliament and of the Council*[80] prohibits the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and of data concerning health or sex life. As a limitation on the scope of the prohibition, the regulation refers back to the national data protection law and excludes from the prohibition all non-profit-seeking bodies not subject thereto, provided that the processing is carried out in the course of their legitimate activities with appropriate safeguards and on condition that the processing relates solely to the members of this body or to persons who have regular contact with it. A further condition for the limitation of the prohibition is that the data are not disclosed to a third party without the consent of the data subjects.

77 Directive 97/36/EC of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 202, 30.7.1997.

78 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989.

79 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2.12.2000.

80 Reg. (EC) 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.1.2001.

The delegated legislation of the Commission also contains a regulation[81] acknowledging religious aspects, which describes the origins of the protected traditional terms used for certain wine sector products. As in the case of the wine called Lacryma Christi, 'a product of high quality level which owns religious connotations', produced through a 'particular production method'[82] from the grapes growing on the slopes of Mount Vesuvius. The register includes in addition the historical term 'Vin Santo',[83] of which it is said that 'with regard to the origin of the term, numerous hypotheses have been formulated, most of them are connected to the Middle Age. The most reliable is strictly connected to the religious value of wine. This wine was considered quite extraordinary and boasted miraculous virtues. It was commonly used when celebrating the Holy Mass and this can explain the term "Holy wine" (vinsanto).'[84]

We can also find examples of legal documents accepting religious points in the foreign policy of the Union.[85] The Council, concerning the enforcement of measures regarding Libya imposed by a resolution of the UN Security Council, excluded from the travel ban prohibiting entry to the territory of member states the cases when travel is justified on the grounds of humanitarian need, including religious obligations.

The *Directive 2010/31/EU of the European Parliament and of the Council*[86] makes it the sole responsibility of member states to set minimum requirements for the energy performance of buildings and building elements, but they can decide not to set or apply these requirements to buildings used as places of worship and for religious activities.

81 Commission Regulation (EU) 401/2010 of 7 May 2010 amending and correcting Regulation (EC) 607/2009 laying down certain detailed rules for the implementation of Council Regulation (EC) 479/2008 as regards protected designations of origin and geographical indications, traditional terms, labelling and presentation of certain wine sector products, OJ L 117/60.

82 The point of the method is that grapes are pressed lightly.

83 The term refers to the particular wine typology and to the corresponding and complex production method which implies the storage and drying of wine grapes in suitable and properly ventilated places for a long aging period and in traditional wooden containers.

84 Commission Regulation (EU) No 401/2010 of 7 May 2010 amending and correcting Regulation (EC) No 607/2009 laying down certain detailed rules for the implementation of Council Regulation (EC) No 479/2008 as regards protected designations of origin and geographical indications, traditional terms, labelling and presentation of certain wine sector products.

85 Council Decision 2011/137/CFSP of 28 February 2011 concerning restrictive measures in view of the situation in Libya, OJ L 58/53, 3.3.2011.

86 Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings, OJ L 153/13, 18.6.2010.

4.3 Religion-related and ethical principles in the cases of the European Union's Court of Justice

In the *Van Rosmaalen case*,[87] the European Court of Justice had to settle a case regarding the pension of a Roman Catholic priest belonging to the Premonstratensian Order, who served as a missionary between 1955 and 1980 in the Belgian Congo, which in 1960 became Zaire. Since no other appropriate category existed in European law, the Court considered that the missionary priest who was supported by his community was a self-employed person. Although the national laws of member states usually have specific categories under which religion-related work can be recognized, European law didn't take this into consideration.

In the *Vivien Prais versus Council case*,[88] the Court admitted the lawfulness of a claim based on religious grounds. In the particular case, Ms Prais was unable to attend the written examination for a position held by the Council on Saturday, claiming that it was against her Israelite faith. Even though the Court dismissed the request that the Council should allow Ms Prais to take the tests on another date, it stated that if the appointing authority was informed that religious reasons made certain dates impossible for candidates to take the written test, the appointing authority should take this into account in fixing the date for tests.

On the subject of Sunday trading, the Court had to resolve the conflict between the regulation of the seventh day as a day of rest, mostly for religious reasons, and the requirements of the free movement of goods. The problem is a good example of how the Community law – in relation with the internal market, particulary at a certain stage during the development of the legal practice – overreachingly tried to enforce economic freedoms and restrain the member states' rules serving other pubic policy purposes. In the *Torfaen case*,[89] The Court ruled that the member state's ban on Sunday trading constituted a measure having an effect equivalent to a quantitative restriction, however it accepted the legitimacy of the purpose of these national measures 'in accordance with national or regional socio-cultural characteristics' and left it to the competence of the national courts to ascertain whether the effects of such national rules exceed what is necessary to achieve the aim in view (and in that respect, to assess their compatibility with the Treaty).

87 Judgment of 23 October 1986 in Case 300/84, A. J. M. van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen, [1986] ECR 03097.

88 Judgment of 27 October 1976 in Case 130-75, Vivien Prais v Council of the European Communities, [1976] ECR 01589.

89 Judgment of 23 November 1989 in Case C-145/88, Torfaen Borough Council v B & Q plc. European Court Reports, [1989] ECR 03851.

In the well-known *Grogan case*[90] the Court had to settle a dispute between an Irish society for the protection of foetal life, and a student association, which provided information on abortion accessible in the United Kingdom. The rule of the Irish law on the protection of foetal life was in conflict with the freedom of services. The European Court ruled that the medical termination of pregnancy, performed in accordance with the law of the state where it is carried out, constituted a service within the meaning of the Treaty, but in the case – because there was no connection between the clinics and the student associations distributing the information – it did not find any infringement of the Treaty. Concerning the moral argument of the society for the protection of foetal life, the Court made it clear that it was not for the Court to substitute its moral assessment for that of the legislature of those member states where the activities in question are practiced legally. Through its reasoning, the Court avoided addressing moral questions and it expressly rejected the implied request for a choice of values.

In the *Omega case*[91] the freedom of services ran counter to the principle of human dignity (its civil law definition) enshrined by the German basic law in connection with a shooting game. Regarding the violation of human dignity, the court of reference asserted that the game could violate the constitutional principle of human dignity. In its judgement, the European Court, besides noting that the level of protection varies in different member states, confirmed the legal practice of the protection of fundamental rights being able to override economic freedom in certain cases. It is worth noting that in the *Omega* case the European Court based its ruling on a public order complaint, which relied on a fundamental right, that of human dignity, espoused by the German constitution. The main import of the case is the admission that the moral stance of national law has a direct impact on Community law through the notion of public order.

The European Court's ruling in the *Oliver Brüstle versus Greenpeace case*[92] is of great importance to the protection of human dignity. The Court decided on the patent filed by Oliver Brüstle in December 1997, which concerned isolated and purified neural precursor cells, processes for their production from embryonic stem cells and the use of neural precursor cells for the treatment of neural defects. On application by Greenpeace, the *Bundespatentgericht* (Federal Patent Court) ruled in the proceedings at first instance that the patent at issue was invalid. During the appeal proceedings, the *Bundesgerichtshof* (Federal Court of

90 Judgment of 4 October 1991 in Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others, [1991] ECR I-04685.

91 Judgment of 14 October 2004 in Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberburgermeisterin der Bundesstadt Bonn, [2004] ECR I-09609.

92 Judgement of 18 October 2011 in Case C-34/10, Oliver Brustle versus Greenpeace eV, [2011] ECR 09821 For case analysis see: András Pünkösty, 'Az Európai Bíróság ítélete az emberi embrió fogalmáról és védelméről', *Jogesetek Magyarázata*, 2012/1, pp. 101–106.

Justice) submitted a question to the European Court concerning the interpretation of the concept of 'human embryo', not defined by the Directive 98/44/EC on the legal protection of biotechnological inventions. Although in the pursuit of the meaning of the concept of 'human embryo', the Court points out that it is not called upon to broach questions of a medical or ethical nature, but must restrict itself to a legal interpretation of the relevant provisions of the Directive,[93] it also concludes that, in the context and aim of the Directive it is shown that the European Union's legislature intended to exclude any possibility of patentability where *respect for human dignity could thereby be affected*.[94] As part of the examination of the purpose of the Directive, the Court refers to the preamble of the Directive, which states that 'ordre public and morality correspond in particular to ethical or moral principles recognised in a Member State, respect for which is particularly important in the field of biotechnology'. Article 6 of the Directive provides that 'Inventions shall be considered unpatentable where their commercial exploitation would be contrary to ordre public or morality'. According to the Court, the concept of 'human embryo' must be understood in a wide sense. The importance of the judgement consists essentially in the fact that it excludes from patentability the result of a research which is not separable from industrial and commercial use and which includes a process that necessitates the prior destruction of human embryos, or for which human embryos are needed as base material. Thus, the Court accepted to pass a judgement directly on a bioethical issue, already significant in the member states, and this decision was welcomed by certain religious associations with a declaration of support.[95]

5 Closing thoughts

Schuman's original vision that the great plan of establishing Christian democracy will prevail with the construction of Europe emanated from the conviction that there is a strong correlation between Christian ideals and the progress of democracy.[96] These motivations were predominant while writing the well-known Schuman declaration,[97] presented on May 9th, 1950, in which he set as objectives the contributions which 'Europe can bring to civilization', 'the preserva-

93 Judgement point 30. 'it should be pointed out that, although, the definition of human embryo is a very sensitive social issue in many Member States, marked by their multiple traditions and value systems, the Court is not called upon, by the present order for reference, to broach questions of a medical or ethical nature, but must restrict itself to a legal interpretation of the relevant provisions of the Directive'.

94 Judgement point 34.

95 http://www.comece.org/site/en/press/pressreleases/newsletter.content/1390.html (23 October 2011).

96 Cited by Erich Kussbach, 'Keresztény Európa és európai integráció', *Valóság*, Vol. 7, No. 3, 1995.

97 http://europa.eu/abc/symbols/9-may/decl_hu.htm (20 October 2011).

tion of peace' and to 'create a de facto solidarity' and invited the European nations to this quest.[98] The declaration was received favourably and integration has moved forward on its path, albeit with a changing pace. Nevertheless, it could be startling that almost six decades after the Schuman declaration, in its 2007 report entitled *A Europe of Values, The Ethical Dimension of the European Union*, the COMECE voices its concerns over the fact that 'Europe's leaders shared a vision of European integration that was overly technocratic' and 'in the absence of a clear agreement between them on the final goal of the European project, they ceased to proclaim its underlying values'. 'Europe, which was a visionary project – uniting peoples and nations to ensure lasting peace – now looks a mechanistic process.' 'Its citizens see the European Union as a powerful bureaucratic machine which endlessly argues about obscure subjects, which is remote, cumbersome and costly and over which they have very little influence.'[99] In view of the above, seemingly there is a sharp contradiction between the vision of Schuman and its reality, though with the adoption of the Lisbon Treaty the European values and the moral aspects of the Union have been formally reinforced. But only the near future will tell how much of it will actually become effective.

In the beginning, European integration paid little attention to the existence of religion, the Community (today: European Union) law was rather limiting of the expression of religious needs embedded in the traditions of member states and, furthermore, it focused on independence from any religious influence instead of highlighting the communal identity building role of religion, and refused to refer to specific religious traditions.[100] The attitude of the Union towards religion is slowly shifting. The process is upheld by the necessity to form its own identity, which is indispensable for its citizens to be able to better relate to the European Union and for the ambitious European project to be sustained over time. In that aspect, the results of the contractual reform are controversial, the Union wasn't quite able to harness the identity forming elements of religion for boosting the legitimacy of the Union,[101] however, its stance based on European values, the recognition of the contribution of religious organisations, the initiation of a structured dialogue with them, as well as the increased sensitivity of the European courts all point towards a more consistent balance.

98 In the Declaration Schuman also calls the development of the African continent one of Europe's essential tasks, as an international aspect of the achievement of solidarity.

99 Commission of the Bishops' Conferences of the European Community: A Europe of Values, The Ethical Dimension of the European Union, March 2007, Brussels, 8. The brief quotation above does not allow us to draw conclusions about the COMECE's standpoint on the European Integration.

100 Therefore in the debate relating to the Constitutional Treaty, the EU refused to refer to Christianity, and later in connection with the Iraqi conflict also avoids to call by its name the Christian community, even though this particular characteristic is the very reason of their persecution.

101 See: Francois Foret, 'Religion: a Solution or a Problem for the Legitimation of the European Union?', *Religion, State & Society*, Vol. 37, Nos. 1–2, 2009, pp. 38–50.

EUROPEAN LAW AND THE FAMILY

Laura Gyeney

1 The protection of family life in the integration law

Before all it must be pointed out that the European Union has no competence for the comprehensive harmonisation of family law issues. As certain aspects of family law is very sensitive, Member States wish to keep their regulatory competence in the issues of this field. Nevertheless, EU law concerns the situation of families at several points, even if indirectly.

The founding fathers of the European Community formulated the Treaty of Rome as a document regulating *economic relations* between Member States, for which reason it included provisions of an economic nature primarily. Having this in mind it is probably not surprising that there are no specific family law provisions in the founding document. At the same time it became clear very early that the institution of 'family' had an *important role* in the law of the European Economic Community. The granting of community rights related to the family, primarily *family reunification rights* was a necessary *prerequisite* for the operation of the *internal market*.

The rules on the free movement of workers, the provisions for social security coordination and the requirement of equal treatment in employment all affected the family lives of citizens in the Member States. These provisions, however, were primarily meant to facilitate *the creation* and efficient operation *of the internal market rather than the protection of the family as such*.

Besides, the above provisions were intended to foster the free movement of the citizens of Member States, i.e. the Community (today, of the Union) only, while the integration legislation did not include any regulations similar to the above with reference to the family reunification of third countries.[102]

This does not mean, however, that Member States were totally free to act in this sensitive field. There are several international instruments regulating on the protection of family life, which influences both the legislation and the case law of Member States. For example, the *Universal Declaration of Human Rights* declares in its Article 16 (3) that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State' or

102 With the exception of certain international agreements made, on the one hand, between the EC and Member States and, on the other hand, between the EC and a third country.

Article 8 of the *European Convention on Human Rights* explicitly stipulates the right to respect for private and family life.[103]

None of the above instruments stipulate, at the same time, under *what conditions* the contracting states should grant the right of family reunification. Thus they enjoyed a rather broad scope of discretion until the directive on the family reunification rights of third country nationals[104] was born. Thus, while the directive already presented in the chapter on the legal status of third country nationals is one of the Union's measures related to asylum and immigration, it emphasises at the same time the obligations related to the protection of family life.

2 European civil procedure law and the family

Beyond the above mention must be made of the family law-related provisions of EU-level private international law norms. Through the amendments made in the Treaty of Amsterdam and the establishment of the Area of Freedom, Security and Justice, the view that family relations did affect EU law and, vice versa, EU law also affected family relations, grew increasingly stronger. As a first step, Brussels II Regulation[105] was adopted as the communitisation of the Brussels II Convention, which deals with issues of family law relevance specifically, such as jurisdiction in procedures on matrimonial matters and parental responsibility for the children of spouses as well as the recognition and implementation of resolutions.

This was thus the first EU norm in the field of justice cooperation in the civil law cases formulated in the Treaty of Amsterdam, which made a very important step by recognising the mutual recognition and implementation of court decisions in the field of family law. Of equal significance was Regulation 2201/2003/EC, i.e. the 'new Brussels II Regulation' replacing the former regulation. The new regulation was made at a French initiative with the fundamental aim to extend the single jurisdiction and the mutual recognition and implementation rules set up by the earlier regulation to cases where the legal dispute related to parental guidance was not related to a matrimonial case but emerged independent of that.

One of the factors facilitating the adoption of the former acts was the Tampere Conclusions which declared that, within the framework of establishing a 'gen-

103 Art. 8 of the ECHR: 'Everyone has the right to respect for his private and family life, his home and his correspondence'.

104 Council Directive 2003/86/EC on the right to family reunification, OJ L 251/12, 3.10.2003.

105 Council Directive 1347/2000/EC on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160/19, 30.6.2000.

uine European area of justice', judgements in the field of family litigation 'would be automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement'.[106] It is a shortcoming of the above regulations at the same time that they did not include any rules on the applicable law itself. Thus, if a matrimonial case was brought before the court of a Member State, the applicable law was determined by the national conflict-of-law rules of that particular Member State, and these, as we are aware, are based on very different criteria.[107]

As an attempt to remedy the above, the Commission adopted a *Green Paper* on the applicable law and jurisdiction in divorce matters in March 2005. The green paper launched a broad public consultation on potential solutions to the problems that could occur in the current situation. On the basis of this, in July 2006, the Commission made a proposal for *amending* Council Regulation 2201/2003/EC with reference to jurisdiction and introducing rules on the applicable law in matrimonial cases. At the same time, the Council arrived at the conclusion that there was no consensus on the proposal and there was unlikely to be one in the near future, either. It established furthermore that the objectives of the proposed regulation were not to be reached within reasonable time by the enforcement of the applicable provisions of the Treaties. Thus Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Luxemburg, Hungary, Malta, Austria, Portugal, Romania and Slovenia made a request to the Commission according to which they wished to establish *enhanced cooperation* among themselves in the area of the law applicable in matrimonial cases.[108]

It is unsurprising that Member States strive for cooperation in the above issue. According to the current data, of the approximately 122 marriages in the European Union some 16 million (13%) are of a cross-border nature. Besides, from the 875,000 divorces initiated in the Union per year, 170,000 aim at the dissolution of an 'international marriage', and there are very big differences between the conflict-of-law norms of Member States with reference to the applicable law in the case of the dissolution of marriages.

The detailed rules on selecting the applicable law for 'international' marriages are laid down in what is referred to as the Rome III Regulation.[109] The regulation took effect on 21 June 2012 and does not concern national regulations on divorces and marriages; it merely aims to make the conflict-of-law rules for

106 Miklós Király, 'Egység és sokféleség', *Új Ember*, 2007, p. 68.

107 Differences between national conflict-of-law rules thus lead to serious *legal uncertainty*, not to speak of encoruaging spouses to '*running to court*'.

108 In the meantime Lithuania has joined the cooperation as the 16th state. States that have not joined the cooperation continue to decide on the law applicable to divorce cases on the basis of their own legislation.

109 Council Regulation 1259/2010/EU implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343, p. 10.

determining the applicable law for divorce and separation cases in the participating Member States more uniform.

Considering its material scope, the regulation determines the applicable law for the dissolution of international marriages exclusively, i.e. it is only to be applied in cases where the state of affairs is related to different states. The regulation is of universal force, which means that its provisions are applied by a member state court irrespective of whether the governing law in the case is the law of a Member State where the regulation is in force or where the regulation is not in force, or is a third-country legislation of a non-member state.

In the regulation the principle of autonomy is implemented, which allows for the parties' free choice of law.

In their choice of law, parties have the following alternatives to choose from:

- the law of the country where they both have their habitual residence, or
- the law of the country of their previous common habitual residence provided one of them is still staying there,
- the law of the country of one of the spouses by citizenship,
- the law of the country of the administering court (*lex fori*).

For determining the applicable law where there is a lack of choice of law, the regulation sets up a gradual set of rules by merging the two principles that are the usual connecting factors in family law: the law of the country of habitual residence and that of the state by citizenship.[110]

As regards the secondary legislation on freedom, security and justice, mention should be made furthermore of Council Regulation 4/2009/EC on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.[111] This regulation aims to make decision-making and the enforcement of decisions easier for the eligible party in the case of maintenance obligations arising in cross-border situations. The regulation has a very broad scope of implementation covering any and all maintenance obligations arising from family and kinship relations, marital bonds or kinship by marriage. Although it is not a part of family law in the narrow sense of the concept, mention should also be made of the regulation on succession[112] adopted by the European Parliament and the Council in 2012, which is to facilitate the administration of cross-border succession cases in future by harmonising

110 Dezső Tamás Cziegler & Katalin Raffai, 'Az európai integráció újabb állomása: egységesülő európai nemzetközi (kollíziós) családjog?', *Külgazdaság*, Vol. LVII, Nos. 5–6, 2013, pp. 43–69.

111 Council Regulation 4/2009/EC on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L7, pp. 1–79.

112 Regulation 650/2012/EU of the European Parliament and of the Council, on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201/107, 27.7.2012.

the rules on the governing and the applicable law in succession cases in the Union. The main connecting factor of the regulation for determining both the jurisdiction and the applicable substantive law is the testator's habitual residence at the time of his death.

3 Provisions of the *Charter of Fundamental Rights* related to the family

Mention should be made finally of the EU's document on fundamental rights which became legally binding through the Treaty of Lisbon, the *Charter of Fundamental Rights*, which considers the family worth protection in its own right, independently of any other EU policy. Article 33 (1) of the Charter stipulates straightforwardly: 'The family shall enjoy legal, economic and social protection.'

Several other provisions of the Charter, too, make references to the importance of family life, e.g. Article 7 declares that 'Everyone has the right to respect to his or her private and family life, home and communication.' Article 9 stipulates the right to marry and to found a family by saying: 'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights'. Article 33 (2) of the fundamental rights document provides for the reconciliation of family and professional life.[113] Finally, by virtue of Article 24 (3) 'Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.' Article 14 of the Charter on the right to education and Article 21 on the prohibition of discrimination, furthermore, are also related, even if not directly, to the family.

It is welcome that the Charter put family-related issues on the political agenda, especially because, unlike before, their role in the development of European law can no longer be questioned.

We must see, however, that family-related provisions in the Charter can be found sporadically, in *various chapters* of the Charter, as if indicating the *marginal* significance of family issues when compared to other policies of the Union, primarily those of an economic nature.[114]

113 To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

114 Closely related to the above is also the frequency of references to the Charter. Experience shows that the Charter serves as a more frequent basis of reference if the aim is to facilitate the economic interests of the integration specifically.

4 The Treaty of Lisbon

The sensitive nature of the issue is indicated by the fact that not even the *Treaty of Lisbon* brought about a significant change in the EU-level harmonisation of family law. Article 81 (3) of the TFEU[115] created a legal basis for the adoption of measures targeting family law issues having cross-border implications within the framework of *judicial cooperation in civil matters*, but the opposition of Member States in this respect is well reflected by the fact that the requirements of *unanimousity and consultation procedures* are kept.[116] At the same time, by the introduction of a special *passerelle clause*, the Treaty makes it possible for Member States, if they agree to give up unanimousity by a unanimous decision, to *switch* to ordinary legislative procedures. It is the Council to decide on switching to an ordinary legislative procedure by unanimous decision, after consultation with the European Parliament.

The reason why many oppose the EU-level harmonisation of family law is the fear that the *conservative family model* currently dominating the EU law might get cemented, preventing liberalisation in family law for long decades.

At the same time, understandably, certain European countries very strongly cling to their traditions and values; suffice it to think of Poland which stipulates, in a unilateral declaration[117] enclosed to the Treaty that the Charter shall not affect Member States' rights to legislate in the fields of *public morale, family law or human dignity*.

It must be noticed at the same time that several countries have witnessed considerable *changes* in the past decade in the recognition of *non-traditional relationships*. Therefore the family protection rules of various Member States considerably vary as regards public opinion about church marriage, the conditions for the dissolution of marriage or extra-marital or same-sex relationships.

In what follows we will present an overview of the types of legally recognised relationships in the respective Member States, to be followed by an overview of the relevant EU legislation and especially the relevant case law of the CJEU, how it responded to the changes that had taken place in the societies of the individual Member States.

In general it can be established in advance that, in this sensitive issue, the Court seems not to be willing to markedly move away from Its traditional family model until Member States reach an absolute consensus about its liberalisation.

115 Former Art. 65 (3) of the EC Treaty.

116 National parliaments must be notified before a decision is made. If a national parliament makes known its opposition within six months of the date of such notification, the decision will not be adopted (Art. 81 (3) of the TFEU).

117 Cf. Declaration No. 61.

5 The recognition of domestic partnership and same-sex relationship in the legislation of Member States and the EU

5.1 The legislation in Member States

The Netherlands was the first country to legalise *same-sex marriage* in the year 2000. The Netherlands was followed by Belgium where homosexual couples have been able to get married since June 2003. In Spain, same-sex marriage was legalised in July 2005, while in Sweden same-sex couples have been able to officially get married by civil or church ceremonies since May 2009. In Portugal there was a law enacted on 1 June 2010 which deleted the reference to 'different sex' spouses from the definition of marriage. Since 2012, same-sex couples in Denmark have even had the opportunity to have a church wedding.[118] In England and Wales, the Parliament approved the legalisation of same-sex marriages in 2013. Finally, as the 14th country in the world, France legalised same-sex marriage in summer 2013. In Slovenia a bill to legalize same-sex marriage was approved by the country's parliament in the spring of 2015. However, it was rejected in the referendum of December 2015.

Moreover, cohabiting couples have the opportunity in several EU countries (like Austria, Spain, Sweden, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Luxembourg, Slovenia, the United Kingdom, Belgium, the Netherlands, Ireland) to make their relationship official without getting married. They can do so through the *registration of domestic partnership*.[119]

It should be noted, however, that there are huge differences between the respective EU countries in this area, not only in with regard to the rights granted to those concerned but also whether they recognise domestic partnerships registered abroad and, if they do, to what extent. At one extreme of the spectrum you can find countries following what is referred to as the Scandinavian model where essentially the same rights are enjoyed in a marriage and in a registered domestic partnership. Thus the first European country was Denmark to stipulate by law that in the Danish regulations the concepts 'marriage' and 'spouses' were also to include partners to a registered domestic partnership and their relationship as well. After that legislation only the exceptions had to be specified, which were still abundant at the time of introducing the new regulation, but they have been practically eliminated by today. This method is very simple and elegant and

118 At the same time, some of the clerics of the evangelical Danish People's Church strongly oppose the church marriage of same-sex couples. After the law has taken effect, they by virtue of their own decision, may deny ceremonies to same-sex couples.

119 Scandinavian states were the first to introduce a new type of relationship beyond marriage to their legal system: registered domestic partnership.

as a result the registration of a couple's domestic partnership has the same legal effect as marriage. At the other extreme end of the spectrum there is France where the law on the basis of which establishing registered partnerships became an option both for different-sex and same-sex couples was born only after lengthy heel-dragging in Parliament, on the basis of which both different-sex and same-sex couples living together were granted the opportunity to establish a registered partnership. The rights granted by the law to couples in registered partnership were just slightly similar to those enjoyed by married couples, considering which, in accordance with the changes that have recently taken place in society, a new bill was put forward to the French Parliament, as a result of which the above mentioned regulation recognising the marriage of same-sex couples was made.

It must be mentioned furthermore that almost half of the EU Member States continue not to recognise registered domestic partnership (see below). Even more importantly, it is explicitly stipulated in the constitutions of several Member States that marriage is a union between a man and a woman, i.e. the constitutions of the states concerned restrict the institution of marriage to different-sex couples. Thus the Constitution of Poland stipulates: '*Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland'*. Similarly it was incorporated in the new bill of 2013 of the Romanian Constitution that family was '*the marriage between a man and a woman*'. Although in 2001 Romania deleted from the Criminal Code the article that punished public homosexual relationship causing outrage with up to five years' imprisonment, the version of the Civil Code adopted in 2011 still banned same-sex marriage and failed to recognise the domestic partnership contracts of couples signed by Romanian or other citizens abroad, irrespective of whether these were between different- or same-sex partners.

The following table shows in which Member States same-sex marriages and/or registered domestic partnerships are recognised.

SAME-SEX MARRIAGE and/or	*REGISTERED DOMESTIC PARTNERSHIP*	*REGISTERED DOMESTIC PARTNERSHIP IS NOT RECOGNIZED*	*THE CONSTITUTION RESTRICTS MARRIAGE TO DIFFERENT-SEX COUPLES*
ENGLAND/WALES (2013) SPAIN (2005) SWEDEN (2009) BELGIUM (2003) THE NETHERLANDS (2000) PORTUGAL (2010) FRANCE (2013) DENMARK (2012) SLOVENIA (2015)	UNITED KINGDOM LUXEMBOURG SPAIN SWEDEN BELGIUM THE NETHERLANDS FINLAND GERMANY CZECH REPUBLIC AUSTRIA SLOVENIA HUNGARY IRELAND ITALY (IN CERTAIN REGIONS)	SLOVAKIA ROMANIA ITALY GREECE ESTONIA BULGARIA CYPRUS LATVIA LITHUANIA MALTA POLAND CROATIA	POLAND LATVIA LITHUANIA CROATIA+ ROMANIA (AMENDMENT PLANNED)

5.2 European Union law

In view of the above the question is how EU law itself responded to the changes that have taken place in the social acceptance of de facto partnerships and homosexual relationships and in the relevant regulations of Member States amended as a consequence of the former.

As it was mentioned above already it can be boldly stated that the *Treaty* adopted last century and the related *secondary legislation* were based on a traditional family model, which social unit is organised on a patriarchal basis where the man is the breadwinner, the woman the housekeeper and their relationship is based on heterosexual marriage.

5.2.1 The relevant EU regulations

Regulation 1612/68/EEC[120] *on freedom of movement for workers within the Community* adopted at an early stage of the integration is an excellent reflection of the above model. With reference to 'other family members', thus including

120 Reg. 1612/68/EEC has now been replaced by Reg. 492/2011.

non-spouse dependants, the regulation prescribed only the obligation to 'facilitate' the admission of such persons – with regard to the residence of such persons to cohabit with immigrant workers – and even that provided that certain conditions were met, only.[121] This in practice meant that Member States were not obliged to grant the same rights with reference to a domestic partner as with reference to a spouse; what is more, since the term 'facilitate' is rather vague, attempts to refer to this regulation failed.

Directive 2004/38/EEC *on the right of the citizens of the Union and their family members to move*, partly replacing Regulation 1612/68/EEC, brought about what only appeared to be a change in this respect: as an exception making it possible for those living in a *registered partnership* to exercise the rights stipulated in the Directive under certain conditions.[122] The directive thus essentially continues to follow the family concept based on marriage. The idea that s*ame-sex marriage*, too, could be considered to be in the scope of the directive led to serious debates.

So some of the Member States, whose constitution recognises only the marriage between a man and a woman as a valid marriage, refuse, with reference to the above concept of marriage and to exceptions of public order, the residence of same-sex pairs in their territories under the legal title 'family reunification'. At the same time the *Commission Communication* facilitating the enforcement of the directive by Member States stipulates: 'marriages *validly contracted anywhere in the world* must be in principle recognized'; what is more it declares that the directive must be applied in accordance with the non-discrimination principle.[123] Following from the above, rejecting qualification as 'spouse' merely on the basis of gender may violate *discrimination on the basis of sexual orientation* under Article 21 of the fundamental rights charter.

As regards de facto partnership, Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States did not bring about a meaningful change in this respect, either. A *partner continues not to qualify as* a family member enjoying the same rights as a spouse or even as a family member alone, since the directive provides for dependants and partners not automatically enjoying residence in a separate section.

121 If they were 'dependant on the worker referred to above or living under his roof in the country whence he comes'.

122 Even parties to registered partnerships may exercise the right of family reunification incorporated in the directive under certain conditions only, i.e. if the regulations of the host country consider registered partnership to be equivalent with marriage.

123 Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM/2009/0313 final 2.1.1, p. 4.

Not even by virtue of Directive 2003/86/EC on the right to family reunification of third country nationals are Member States obliged to extend the right to family reunification to registered or non-registered domestic partnerships. By virtue of the Directive *Member States may decide themselves* whether or not to grant the same treatment to partners as to spouses with respect to family reunification.

As a main rule it can be established thus that the EU legislation does not devote special attention to non-traditional types of partnership, including registered or *de facto* partnerships. The only exception to this is the recent Commission proposal explicitly on the jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.[124]

5.2.2 The case law of the Luxembourg Court

5.2.2.1 Opinion on *de facto* partnerships

As has been mentioned above, the case law of the CJEU is based, beyond doubt, on the concept of family based on marriage, by this excluding, as a main rule, partnerships of other types from the protection granted by EU law. A good example for the above is the Case *Netherlands v. Reed*,[125] in which the Court *expressis verbis* rejected extending the concept of spouse specified under Article 10 (1) of Regulation 1612/68/EEC[126] to partners and chose another way to grant the right of residence to parties to stable partnership, qualifying it as a *social advantage* enjoyed by migrant workers by virtue of Article 7 (2) of the Regulation.[127]

A particularly interesting case in the area of judgements on partnerships is the *Eyüp Case*[128] of a pair of Turkish nationals living in a 'neither with nor without you' relationship. They got married and later got divorced, and a few years later they got married again. In the period between the two marriages they continued

124 COM/2011/127 Considering the unique features of registered partnerships and marriage and the different legal consequences of these forms of cohabitation the Commission put forward two separate proposals for regulation: one on the jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, and regarding matrimonial property regimes, respectively.

125 Judgment of 18 June 1987 in Case 59/85, Netherlands v Reed, [1986] ECR 1283.

126 This regulation made it possible for the spouse of the migrant worker of another Member State to gain residence in the territory of the host country.

127 From the requirement of the ban on discrimination based on nationality it clearly follows that, if the right to residence in a country is granted to the spouses of own nationals, it cannot be denied from the unmarried companions of migrant workers from the Community, either. Case C-59/85 Netherlands v. Reed, p. 1283.

128 Judgement of 22 June 2000 in Case C-65/98, Eyüp v. Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg, [2000] ECR 4747.

to live together in the host country Austria, while they had four children. The Court had to decide whether the scope of the provision on the family members of Turkish workers enacted in Decision No 1/80 of the EEC-Turkey Association Council on the rights of Turkish workers extended to the worker's partner who did not live in a formal marital bond with the person concerned but did live with the worker in a way meeting the content criteria of a dependant. Austrian authorities took the view that only a wife could be qualified as the family member specified in the decision, i.e. only a spouse would have the rights laid down in it.[129]

In CJEU's ruling on the case it must have played special significance that the mother gave birth to four of the seven children the couple had in the period of cohabitation outside marriage. In the meantime, the husband provided not only for the children but for his companion as well. In its ruling the Court, although *rejected the general recognition* of extramarital relationships as family relations, with regard to this *particular case* it was ready to reinterpret the provisions of Decision No 1/80 of the EEC-Turkey Association Council as if they extended to the protection of de facto families, without specifically referring to the relevant case law of the ECtHR.

While the above case is a step forward compared to the Reed Case it must be seen that it was merely the *unique circumstances* of the case that led the Court to a decision different from the previous one.

5.2.2.2 Opinion on same-sex partnerships

The first case worth mentioning is the *Grant Case*,[130] in which the Court ruled that the employer's decision not to grant to the same-sex domestic partner the same travel concessions that were otherwise granted to *spouses as well as to different-sex domestic partners* did *not qualify* as the violation of Article 119 of the Treaty on equal pay for men and women (currently Article 157 of the TFEU). The above provision explicitly states the equality of men and women, i.e. that men and women shall be paid equal pay for the same work or for work of the same value. According to the Court of the European Union since the exclusion of same-sex couples refers to men and women equally, there was no gender discrimination in the actual case.

129 In Austrian authorities' view only the spouse – and not the cohabitee – of a Turkish worker should be regarded as a member of the latter's family within the meaning of the first para. of Art. 7 of Dec. No. 1/80.

130 Judgment of 17 February 1998 in Case C-249/96, Lisa Jacqueline Grant v. South West Trains Ltd., [1998] ECR 00621.

In the case of *D and Kingdom of Sweden v Council*[131] a Swedish official working for the European Union cohabiting in a *registered partnership* recognised by Swedish law applied for a family, i.e. so-called household allowance granted to spouses. His application was *rejected* considering that he did not live in marriage but in a *registered partnership with a same-sex person*.

In its judgement the Court stipulated that, according to the definition generally accepted in the legislation of Member States, *family meant a bond*, a union, *between two persons of the opposite sex*. Although there was a growing number of Member States where same-sex partnership was regulated on, it was clearly *not the same as marriage* in these countries, either.

Therefore, people living *in marriage and in registered partnership* were *not in comparable situations*, considering which *discrimination could not be spoken of*. The basis for granting the allowance was matrimonial relationship; partnership was no basis for eligibility. Thus the decision did not violate the above Article 141 of the Treaty (currently Article 157 of the TEFU) since it was not the sex of the applicant but the nature of the bond between them that was governing.

A decision different from the above judgements was made by the Court in its ruling in the case *K. B. v. National Health Service*[132] in which it had to formulate a stance in the case of the *marriage of persons changing sexes*. According to the judgement, the British law that prohibits a couple one of whom had a female to male surgery from getting married, even though the survivor's pension would not be paid to him without that, was *incompatible* with Article 141 of the Treaty (currently Article 158 of the TFEU).[133]

In its justification of the judgement the Court referred to the case law of the ECtHR, i.e. the decision made in the case *Goodwin v. United Kingdom.*[134] It was namely established in the latter decision that the fact that a person who changed sexes should not be allowed to marry a person of the sex that the former belonged to before his/her operation *violated Article 12 of the ECHR on the right to marry and establish a family.* As a result of the case the United Kingdom amended the rules on the registration of marriages recognising the right of persons changing sexes *to a new sexual identity*. This means that, even if Member States have the right to determine the conditions of concluding marriages, they *cannot act without restrictions* when exercising this competence. The Court made it clear that, when exercising the above competence, the right to marriage

131 Judgment of 31 May 2001 in Cases C-122/99 and C-125/99 D. and Sweden v. Council, [2001] ECR 4319.

132 Judgment of 7 January 2004 in Case C-117/01, K. B. v. National Health Service, [2004], ECR 541.

133 As a main rule, according to Art. 141 of the EC Treaty, acts which, contradicting the European Convention on Human Rights signed in Rome on 4 November 1950 on the protection of human rights and fundamental freedoms prevent couples like K.B. and R. from one of them meeting the condition related to marriage on the basis of which the other could get part of the pay, are contradicting.

134 Case Christine Goodwin v United Kingdom, App No. 28957/95.

enacted in Article 12 of the ECHR must be observed, which was thus granted to *transsexual persons as well*. However, a regulation that makes the determination of sex dependant on the sex at the time of birth and provides no opportunity for changing sexes may violate the essence of the right to marriage in the case of transsexual persons. In this respect it must be emphasised that the ECtHR was already aware of the change of trends at the international level that was reflected in the growing social acceptance of transsexuals.

Finally, mention must be made of the decision recently adopted by the CJEU in the *Maruko Case,*[135] which seems to supersede, to some extent, the Court's above described stance in the *Grant* and the *D and Kingdom of Sweden v Council Cases*. It must be emphasised that in this case, the Court interpreted Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation,[136] which specifically bans discrimination based on gender orientation already. We must see, however, that, with a legal twist, the Court essentially confirmed the earlier practice of respecting Member States' solutions in this sensitive area. According to the state of affairs in this case, Maruko established *lawful domestic partnership* with a theatre costume designer and after the death of the latter, he applied for a survivor's pension. German authorities rejected his application with reference to the regulation that lawful domestic partners were not entitled to allowances enjoyed by surviving dependants. During the preliminary decision-making procedure the national forum sought to answer the question, among others, whether denying an allowance for surviving dependants to a lawful partner qualified as *a discrimination based on sexual orientation during employment and occupation,* prohibited by *Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.*

According to the Court's stance, Germany, while it continues to keep the institution of marriage for persons of the opposite sexes, has introduced the opportunity of lawful domestic partnership for persons of the same sex, the conditions of which have gradually been made similar to the conditions of marriage. On the basis of this the Court came to the conclusion that the denial of a survivor's allowance to the lawful domestic partner was an act of direct discrimination based on sexual orientation insofar as a *surviving spouse and a surviving domestic partner were in a similar situation with respect to the allowance*. At the same

135 Judgment of 1 April 2008 in Case C-267/06, Tadao Maruko v Versorgungsanstalt der deutschen Bühnen, [2008] ECR 1757. The reason why the justification of the decision made in the Maruko case is so short is probably that the Strasbourg Court had not ruled on cases with a similar subject before. Cf. Case 11313/02 M.W. v. United Kingdom and the Case Schalk & Johann Kopf v. Austria referred above.

136 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303, pp. 16–22.

time, the Court left it to the national forum to examine whether this was actually so. Thus, the concept of open discrimination based on sexual orientation is applied only if marriage and registered domestic partner-ship are comparable, which is up to the national court to establish in the first in-stance.

The Court followed the track of the judgement in the *Maruko* Case in its decision made in the *Römer Case*[137] in May 2011, when declaring that paying complementary retirement pension to a partner living in lawful *domestic partnership* of a lower amount than the amount of complementary retirement pension paid to a spouse might qualify as negative discrimination based on sexual orientation.

Jürgen Römer was employed as an official by the municipality of Hamburg and he *entered into lawful domestic partnership with his partner.* Römer informed his employer of this fact and asked them to recalculate the amount of the complementary retirement pension he received by applying another, more favourable taxation category applicable for persons eligible for retirement pensions for married spouses.[138] The municipality of Hamburg rejected this, however, by establishing that only *persons eligible for allowances for married spouses not living separately on a permanent basis* were entitled to receive this allowance.

The Court of Justice of the European Union established, first of all, that the allowance in question fell *under the scope of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*. After that it stipulated that, in order to establish that negative discrimination based on sexual orientation occurred in a case it was necessary that the situations concerned be *especially and specifically similar* with reference to the allowance in question. As regards the requirement of 'permanently cohabiting spouses' laid down in the German regulation, the Court came to the conclusion that the two situations, i.e. *marriage and registered domestic partnership were similar.* While German law continues to reserve the institution of marriage for persons of the opposite sexes exclusively, since the regulation on registered life partnership has been gradually approximated to regulations governing marriage, *there is no longer any significant legal difference between these two types of family status* in German law.[139] The advantage of the allowance in question not only requires that the partner be married but in addition also that s/he *should not live permanently separately from his/her spouse* since the aim of this allowance is to serve

137 Judgement of 10 May 2011 in Case C-147/08, Jürgen Römer v Freie und Hansestadt Hamburg, [2011] ECR 03591.

138 This would have meant Euro 300 extra income for Römer per month.

139 'Germany adapted its legal system to allow persons of the same sex to live in a union of mutual support and assistance which is formally constituted for life. Having chosen not to permit those persons to enter into marriage, which remains reserved solely to persons of different gender, that Member State created for persons of the same gender a separate regime, the registered life partnership, the regime of which has been gradually made equivalent to that of marriage. Para. 44 of the Judgement.'

not only the beneficiary but, indirectly, also the person cohabiting with the beneficiary. According to the German law on registered domestic partnership partners are required to *mutually care for each other the way spouses are required to care for each other*. It can thus be established that the cases in question qualify as *similar* with reference to the allowance concerned.

In the *Maruko* and *Römer* Cases, the Court seems to have moved away, to some extent, from its earlier firm position as regards assessing the partnership of same-sex couples.

Contrary to what was formulated in the justification of the judgement in the Case *D and Sweden v Council* it is clear that in the *Maruko* and *Römer* Cases the Court *no longer requires general comparability*; the only requirement it poses is that the two institutions, i.e. marriage and domestic partnership, *should be comparable from the point of view of application for survivor's allowance*.[140]

It must be emphasised at the same time that the Court explicitly stipulated in the justification of its judgement that it was the Member States' competence to legislate on marital status and the allowances based on that and Community law did not violate this competence of the Member States.

It must not be forgotten either, that the Court established the applicability of the ban on discrimination based on sexual orientation in relation to a case where that was explicitly stipulated in the *secondary legislation*, i.e. Directive 2000/78/EC.

It is a question furthermore how the future development trend of the *case law in Strasbourg* in the above field will affect the legislation of the Union, especially considering the Union's joining the Convention in the near future.

5.2.3 The relevant case law in Strasbourg

In the interpretation of the European Court of Human Rights (ECtHR), similar to the approach of the CJEU, the concept of right to family life is *based*, as a main rule, *on heterosexual relationship*, so same-sex couples can only refer to *the right to private life*, which provides much more vague protection. This, however, seems to be changing in the light of the Court's latest case law. In the *Fretté Case*[141] in 2002, the Court had still made the decision that the French authorities' denial of the right to adoption for a man who was openly homosexual was in accordance with the protection of the child's rights, i.e. the French state had not violated *Article 14 of the Convention on the prohibition of discrimination.*

140 In the case D and Sweden v Council the Court simply declared, on the basis of a formalist approach, that couples living in registered partnership are not in a situation comparable to that of spouses.

141 Case Fretté v. France, No 36515/97 (of 26 February 2002).

In its judgement made in the case of *E.B. v. France*[142] in 2008, the ECtHR arrived at a different conclusion already. The case was about a lesbian woman had complained against French authorities' rejection of her application for adoption on the grounds that the male figure in the family was missing and it was not quite clear whether the partner lady had the intention to adopt, either. The Court ruled that *the refusal to grant authorisation to adopt due to the lady's sexual orientation was discriminatory on the basis of Article 14 of the ECHR in relation to Article 8.* Thus it seems that the EB v France Case opened the way towards a homosexual family concept. In the E.B. v France Case the ECtHR made an implicit suggestion for adapting the concept of family life to same-sex partnerships since in the justification of the judgement the fact that the applicant 'lived in a stable and permanent same-sex relationship', unlike the applicant in the Fretté v. France Case, was given special emphasis.[143]

Adoption by homosexual persons raises serious questions from both the legal and the social aspects since the Convention in itself does not guarantee a right to adoption. By granting the right to adopt to *single persons*, the French law essentially points beyond the Convention. Yet, if the national legislation has such provisions, thus irrespective of the rights granted by the Convention, the state party concerned must grant this right free of discrimination.

Unsurprisingly, the above ECtHR decision does not say anything about *joint adoption* by homosexual couples. The most essential question in relation to adoption procedures, i.e. whether these serve the interests of the children concerned, must be examined by the court case by case. In this respect Member States continue to have absolute discretion.

Sticking to the question of adoption, the Case *X and Other v Austria*[144] with the question of adoption by the partner in the focus, where the parties did not live in marriage, similarly caused a great storm. It was the Austrian authorities' decision rejecting the application for the adoption of the same-sex partner's biological child that served as the basis for the case. According to the ECtHR's decision, the Austrian government had been unable to support by sufficient arguments why a regulation banning second-parent adoption in the case of same-sex couples, while allowing it in the case of non-married heterosexual couples, served the interests of a child. Such differentiation was discriminative according to the Court, violating Article 14 with reference to Article 8 of the Convention.

Mixed feelings similar to the above case were caused by the ECtHR with its *Judgement in the Case Schalk*[145] in 2010. According to the state of affairs,

142 Case E. B. v. France, No. 43546/02 (of 22 January 2008).

143 At the same time, the special opinion of Judge Mularoni about the case, who thinks that the decision violates the rights of heterosexual persons, prompts one to think further.

144 X and Others v. Austria (Application 19010/07) (of 19 February 2013).

145 Case Schalk and Kopf v. Austria, No. 30141/04 (24 June 2010).

Schalk and Kopf lived in Vienna as a *homosexual couple*. In 2002 they wished to get married, which was rejected by the competent authority considering that Austrian law allowed the marriage of different-sex persons only. When the complaint was lodged, *the institution of registered domestic partnership was unknown in Austrian law*; it was introduced on 1 January 2010 only.[146] The couple finally appealed to the ECtHR maintaining that *the Austrian state violated their right to marriage granted under Article 12 of the ECHR, as well as Article 14 with reference to Article 8 of the ECHR with regard to the right to respect for family life.*

In its judgement, the ECtHR found that the Austrian state had *not violated* Article 14 with respect to Article 8 because, *although the cohabitation of same-sex couples was protected under the right to respect for family life,* the date from which *Austria granted the recognition of this right to them was in compliance with the development schedule of the states party to the ECHR.*

At the same time, in its judgement the Court recognised '*gay couples' as families to some extent and established*: 'it would be artificial to sustain the stance that, contrary to heterosexual couples, the concept of "family life" enacted in Article 8 of the Convention did not include same-sex partnerships'.[147] Even though *the Court did not establish any violations in relation to the right to marriage granted under Article 12* of the Convention, many believed it made a significant *step* when remarking that 'the right to marriage formulated under Article 12 *should not be restricted to marriage between a man and the woman under any circumstances*.'

Establishing that the recognition of the right to marry under Article 12 of the ECHR was not necessarily applicable to different-sex couples exclusively was a new stage in the development of law when some European states allowed homosexual couples to marry.[148] This certainly does not mean at all, however, that the ECHR demands that same-sex couples be granted the right to marry.

There is currently a case pending before the Court, namely Orlandi and Others v. Italy, on the incapacity of same-sex couples to contract marriage or any other type of civil union in Italy.[149]

---

146 The act on registered partnerships, which granted very similar rights to same-sex couples to those enjoyed by married spouses but made the conclusion procedure, the regulations on married names and the rules of adoption and artificial insemination different, took effect on 1 January 2010.

147 Cf. the judgement in the Case Schalk and Kopf, Point 94.

148 From the forty-seven states that are currently parties to the ECHR there are just a few countries that allow same-sex marriage, which are: Belgium, the Netherlands, Norway, Portugal, Spain and Sweden. See: Cs. Tordai, 'A Schalk ügy', *Jogesetek Magyarázata*, 2010/4, p. 92.

149 Application No. 26431/12, Orlandi and Others v. Italy. The six same-sex couples were all married abroad and complain about the refusal of the Italian domestic authorities to recognise their marriage. However, Italy does not provide any recognition of same-sex relationships, either by way of civil partnership or marriage. All of the applicants complain that they are being discriminated against, in the enjoyment of their rights protected by the Convention, on the basis of their sexual ori-

In any case the above shows that the Convention is a '*live tool'* developing in parallel with social changes, in the development of which the Strasbourg Court itself has a very important role.[150]

entation. They complain, specifically, about the authorities' refusal to register their marriage contracted abroad and more generally about the impossibility of obtaining recognition of their relationship in Italy. They invoke Articles 8, 12 and 14 of the Convention.

150 This is well reflected by the fact that the ECHR recognised transsexual persons' right to marriage in 2002 already, with reference to the fact that, under current social conditions not only biological characteristics but other factors, too, like the opportunity to change sexes, must be considered when determining gender. Cf. Christine Goodwin v. the United Kingdom Case, No. 28957/95 (11 July 2002).

MANAGING LINGUISTIC DIVERSITY IN THE EU: HIERARCHY AND *LINGUA FRANCA* IN THE EUROPEAN LANGUAGE REGIME

Petra Lea Láncos

1 Introduction

Made up of 28 member states, it is a commonplace to state that the European Union is culturally and linguistically diverse. Historically, this diversity has been accommodated by an extraordinarily permissive language regime in the framework of European integration – international organizations normally restrict the number of their official languages to a minimum in order to guarantee efficient functioning.[151] This permissive approach to languages notwithstanding, with the entry into force of the Lisbon Treaty we witnessed a proliferation of further guarantees promoting linguistic diversity: ranging from the negative obligation to safeguard linguistic diversity[152] and the principle of non-discrimination[153] to the positive obligation of the Union to promote its linguistic diversity.[154]

2 Languages of the Union

Seven percent of the world's population is resident in the European Union, yet the indigenous languages of the EU – about 60 languages – only account for one

151 Adrienn Károly, 'Language Policy in the European Union', *Eger Journal of English Studies*, Vol. 8, 2008, p. 130.; Jörg Witt, *Wohin steuern die Sprachen Europas?* Stauffenburg Verlag, 2001, pp. 69–70. Keeping the number of official languages in international organizations and other entities for transnational cooperation actually serves the gate-keeping efforts of national governments that seek to determine which pieces of information and how it should be transferred to the national public. Archiburgi points out that pressures for democratization, transparency and accountability of intergovernmental entities have intensified forcing such typically closed organizations to rethink their language policies. Daniele Archiburgi, 'The Language of Democracy: Vernacular or Esperanto? A Comparison between the Multiculturalist and Cosmopolitan Perspectives', *Political Studies*, Vol. 53, 2005, p. 541.

152 Art. 22. ChFR.

153 Art. 21. ChFR.

154 Art. 3 para. 3. TEU and Art. 165. para. 1-2. TFEU. Whether or not the linguistic diversity of the Union and the Member States encompass immigrant languages remains a question. Grin makes a good case for including immigrant languages into the policies related to linguistic diversity and language rights, François Grin, 'Combining immigrant and autochthonous language rights: a territorial approach to multilingualism', in: Tove Skutnabb-Kangas & Robert Phillipson (eds.), *Linguistic Human Rights*, de Gruyter, 1995, pp. 31–34.

percent of the world's languages.[155] Although these numbers are necessarily imprecise for the lack of common criteria for identifying languages and delimiting them from mere dialects, we may safely state that a relatively large number of authochtonous language groups cohabit the European Union. There is a great diversity when it comes to the number of speakers of the individual language groups. According to *Juaristi et al.* we may classify languages into three groups based on the number of speakers. The first group includes languages spoken by 10 million native speakers covering 85 percent of the EU's total population. The biggest language group is the group of German speakers (18 %),[156] while French takes the second place (13 %),[157] with English – the *lingua franca* of the Union – coming in third (12 %).[158] The second group includes languages spoken by 1 million to 10 million speakers, such as Catalan, Galician, Slovak and Swedish.[159] Finally, languages with less than 1 million speakers include for example Maltese,[160] Irish and Serbian. Thus, most langua-ges of the EU are spoken only by few speakers and only a handful of indigenous European languages are widely spoken.[161]

Around 10 percent of union citizens speak a minority language as their mother tongue.[162] Although the German speaking language community is the largest in the Union, English has become the *lingua franca* of the EU: 38 percent of union citizens speak English as their first foreign language.[163] Around 50 percent of union citizens speak no foreign languages at all,[164] and the language skills of those who do are extremely varied.

---

155 Rita Felföldi, *A kisebbségi nyelvek helyzetének változása az Európai Unióban*, 2011. www.btk.ppe.hu/uploads/files/felfoldirita.doc. p. 3.

156 Patxi Juaristi, Timothy Reagan & Humphrey Tonkin, 'Language Diversity in the European Union', in: Xabier Arzoz (ed.), *Respecting Linguistic Diversity in the European Union*, John Benjamins Publishing Company, 2008, p. 52. Germany, Austria, Belgium, Czech Republic, Denmark, Hungary, Italy, Luxemburg and Poland.

157 Ibid., p. 52. Typically France, Belgium, Italy and Luxemburg.

158 Ibid., p. 51. Typically in the UK, Ireland, and Malta.

159 Ibid., p. 55.

160 Antoinette Camilleri, 'Crosslinguistic Influence in a Bilingual Classroom: The Example of Maltese and English', *Edinburgh Working Papers in Linguistics*,Vol. 2, 1991, p. 101.

161 Iñigo Urrutia & Iñaki Lasagabaster, 'Language Rights as a General Principle of Community Law', *German Law Journal*, Vol. 8, No. 5, 2007, p. 479.

162 Henrik Lax, *Minority Languages in Europe – Importance and Future*, Speech – Brussels (2008. 10.15), p. 4.

163 See also 'creeping anglification', Peter J. Weber, Kampf der Sprachen, Krämer, 2009, p.6.

164 László Gados, 'A nyelvpolitika es a közös közvetítő nyelv kérdése az Európai Unióban', in: Géza Balázs & László Grétsy (eds.), *Az Európai Unió és a nyelvek (Válogatás)*, Nemzeti Kulturális Örökség Minisztériuma, 2004, p. 101.; Albert Raasch, 'Europaische Sprachenpolitik – bottom up. Persönliche Erfahrungen und subjektive Perspektiven', in: Rüdiger Ahrens (ed.), *Europäische Sprachenpolitik*, Heidelberg, Universitätsverlag Winter, 2003, p. 258.

3 Europe and linguistic diversity

As linguists never cease to remind us, the linguistic diversity of Europe is relative, as it 'is the linguistically poorest continent', comprising only about 3 per cent of the world's languages.[165] In a broad sense, linguistic diversity may be defined as 'the range of variations exhibited by human languages.'[166] Linguistic diversity is an expression of the variety of languages, however, it is also a relative term in the sense that any assessment of linguistic variety has to take place with reference to a particular territory or confined community.

Taking the territorial aspect as a starting point, Skutnabb-Kangas asserts that linguistic diversity can be defined from two perspectives. The first perspective relies on ascertaining the number of languages in a given territory or community (e.g. Europe, Member State, region, etc.). Thus, any reduction that takes place in the number of languages on the territory/community under examination results in a loss of its linguistic diversity (*richness*). Another approach would be to consider the number of speakers of the different languages spoken in a given territory/community and their relative proportion to each other (*evenness*). This approach stipulates that linguistic diversity should be measured on the basis of the percentages of the population speaking the different languages present in the area/group under examination. From this perspective, linguistic diversity is high in regions, Member States, etc. where the largest language group represents the smallest proportion of the population.[167]

---

165 Tove Skutnabb-Kangas, *Why Should Linguistic Diversity be Maintained and Supported in Europe?* Reference Study – Council of Europe, 2002, http://www.coe.int/t/dg4/linguistic/Source/SkutnabbKangasEN.pdf, (18.03.2011), p.7. At the same time, thanks to colonization European languages had a lasting impact on indigenous languages of other continents and are still the official language in numerous non-European states.

166 Durk Gorter et al., *Cultural Diversity as an Asset for Human Welfare and Development*, position paper, http://www.susdiv.org/uploadfiles/RT1.2_PP_Durk.pdf, (2009), p. 2.

167 Skutnabb-Kangas 2002, p.9. For a better understanding, the two approaches are illustrated by Philippe Van Parijs: 'Take a population A consisting of three communities, each of them speaking only one language, and another population B consisting of five communities, each of them also speaking only one language. The *richness* of B is then said to be greater than that of A, as the number of distinct *types* — whether species, races or, in this case, native languages —, is larger in B than in A. It may therefore be tempting to infer that population B is linguistically more diverse than population A. But this would be premature. Why?

Suppose that the three communities that make up population A are of about equal sizes, whereas in population B one of the five languages is the native language of 99% of the population? In the light of this additional information, we shall have no difficulty agreeing that population A is, after all, linguistically more diverse than the nearly homogeneous population B. Diversity, we conclude, cannot be only a matter of richness, i.e. of number of types, but also of *evenness*, i.e. of how equally the population is spread between those types, or of how little the members of the population are concentrated in one or few types. Just as richness will not do without evenness, evenness will not do without richness.' 'Linguistic Diversity – What is it? And does it matter?' *Eurodiv Paper*, Vol. 26, December 2006, www.susdiv.org/uploadfiles/ED2006-026.pdf, p. 1.

Linguistic diversity is therefore measurable and as such, may increase or decrease due to different factors of influence. One such comprehensive factor of influence is language policy. The toolkit of language policy[168] is diverse, language policies – be it on the state or the European level – may serve different aims, from rationalization and the restriction of language use to protecting and promoting linguistic diversity and granting language rights to the speakers of 'endangered' languages.[169] With the commitment of the European Union toward preserving its cultural diversity, in particular in the field of languages, European language policy should be aimed at balancing out external and internal factors of influence that may result in a loss of linguistic diversity in the Union.

4 Reasons for introducing a European language policy

In contrast with international organizations such as the United Nations or the Council of Europe the Member States of the European Union have achieved an unprecedented degree of integration without creating a European State. The division of powers between the European institutions, the division competences between the Union and the Member State level, as well as the fundamental rights guarantees afforded to union citizens imply that the European Union is a constitutional order.[170] The extent of the different policy fields involved in integration, the enforceability of Member State obligations and union citizenship itself are evidence of the fact that a supranational organization of federal nature is evolving, at the heart of which lies a European political community.

The language policy and language regime of the Union is of considerable importance due to the fact that European law, reinforced by direct effect and supremacy, have a significant impact on the rights and obligations of union citizens.[171] Access to European legislation as well as the possibility afforded to union citizens to contact Union institutions in their native language is of decisive importance for the legitimacy of Union decision-making as well as legal certainty.[172] The values of the European Union expressly contain the respect for

168 For a comprehensive assessment of the term language policy, see: Witt 2001, p. 23–29. According to Witt, language policy may cover both national and foreign languages and regulate areas related to cultural, economic and even foreign policy.

169 Petra Lea Láncos, 'Részvételi jogok es nyelvi sokszínűség az Európai Unióban', *Miskolci Jogi Szemle*, Vol. 4, No. 2, 2009, p. 112.

170 Armin von Bogdandy, 'Grundprinzipien', in: Armin von Bogdandy & Jürgen Bast (ed.), *Europäisches Verfassungsrecht*, Springer, 2009, p. 30.

171 Gabriel N. Toggenburg, 'Die Sprache und der Binnenmarket im Europa der EU: Eine kleine Beziehungsaufstellung in 10 Punkten', *EDAP*, No. 1, 2005, pp. 10–11.

172 Isidor Marí & Miguel Strubell, The linguistic regime of the European Union: Prospects in the face of enlargement, Workshop: Linguistic proposals for the future of Europe 'Europa Diversa'- Barcelona, 31 May–1 June 2002, ww.europadiversa.org/eng/pdf/strubell_mari_eng.doc, p. 1. Brussel 22.11.

fundamental rights – including the rights of persons belonging to minorities (Article 2 TEU), while the goals of the EU also comprise the the protection and promotion of the cultural and linguistic diversity of the Union (Article 3 TEU).

In a Union composed of many Member States conducting very different language policies, international commitments of the Member States as well as primary law provisions are key to the formation of a European language policy. As regards international commitments,[173] the most important documents are the European Convention on Human Rights[174] as well as the International Convention on Civil and Political Rights, which affect Union legislation by reason of the fact that all Member States are signatories to these documents.

Besides the aspects of legal certainty and fundamental rights, the processes of the internal market also contributed to the introduction of a European language policy, since these put pressure on protectionist language policies of the Member States. As Toggenburg points out: 'de iure the 4 market freedoms may considerably constrain national language policies.'[175] The internal market established within the framework of European integration is based on the premise of free trade, where possible cultural justifications restricting the free movement of goods and services must be construed extremely narrowly.[176] Member States are not free to protect their cultural and linguistic diversity at their own discretion, but must adhere to the imperative of free movement.[177] Here, the threat does not

2005., COM (2005) 596 final, p. 12. http://ec.europa.eu/education/languages/archive/doc/com596_hu.pdf.

173 Erzsébet Szalayné Sándor, 'A nyelvhasználat jogi szabályozhatósága', *Magyar Tudomány*, Vol. 170, 2009, p. 1343.

174 Kristin Henrard, 'An investigation into the desirable, and possible role of the Language Charter in expanding on article 22 of the EU's Charter of Fundamental Rights', *II Mercator International Symposium: Europe 2004: A new framework for all languages?* Tarragona (27th February 2004); p. 8.

175 Toggenburg 2005, p. 15.

176 Petra Lea Láncos, 'A kultúra fogalmának es védelmének alakulása az UNESCO es az Európai Közösség jogforrásainak fényében', *Iustum Aequum Salutare*, Vol. III, No. 4, 2007, pp. 126–127.

177 For example although the ECJ adopts a seemingly strict approach to labeling by compelling shop owners to at least use 'languages easily understood' by the consumers of the Member State when selling products not labeled in the official language of the Member State, in essence, the ECJ and the Art. 14 of Council Directive 79/112/EEC of 18 December 1979 are opening the door to speculation about which languages are 'easily understood' in a Member State and more importantly: the possibility of not using native languages in e.g.: product labeling. In Piageme II the ECJ stipulated: 'The expression "a language easily understood" used in Art. 14 of the Directive is not equivalent to "the official language of the Member State" or "the language of the region." It is designed to ensure that the consumer is provided with information rather than to impose the use of a specific language.' This wide-reaching formulation would in practice typically result in a reduction of possible language versions. (Case C-85/94 Piageme v Peeters [1995] ECR I-2955; Case C-385/96. European Court reports [1998] p. I-04431). At the same time, it is difficult to ascertain which languages may be prescribed for labeling purposes by the members states in the individual cases. As Cosmas points out: 'If the easily understood language is neither the official language nor the language of the region, what language is it? (…) Are member states still authorized, or are they no longer authorized, to legislate on matters of language? Where an assessment is made by the national court on a case-by-case basis,

necessarily lie in the unimpeded spread of the English language and often it is not the official national language that is endangered, but the minority and regional languages of the different Member States. The commodification of cultural values and their impact on national, regional, minority and other cultural and linguistic communities is thus very apparent in the framework of the internal market.[178] In its jurisprudence the European Court of Justice maintained that 'in the context of a Community based on the principles of free movement of persons and freedom of establishment, the protection of the linguistic rights and privileges of individuals is of particular importance'.[179] Whereas in the Groener case the ECJ acknowledged the efforts of national governments to promote the use of a certain language expressing national identity and culture and recognized the legitimacy of policies aiming at 'the protection and promotion of a language of a Member State which is both the national language and the first official language',[180] it was silent on the question whether this also holds true for other, for example minority languages as well.[181]

It is interesting to note that the exercise of free movement and intra-Community migration may actually contribute to the flowering of linguistic diversity in the Member States.[182] For example in the Garcia Avello case, the ECJ found Belgian rules governing persons' surnames to be discriminatory and held: 'it is common ground that, by reason in particular of the scale of migration within the

---

who is the 'purchaser' to be taken into account when it assesses whether the language is easily understood?' (Opinion of Advocate General Cosmas in Case C-385/96 Goerres [1998] ECR I-4433 at 39). Thus, although members states are free to determine their individual language policies, these must conform to – among others – the imperative of free movement as the example of the Toubon law and the issues of French labeling show. See also: Case C-33/97 Colim v Bigg's [1999], ECR 1-3175; Case C- 366/98, Yannick Geffroy and Casino France [2000] ECR 1-6579.

178 'Processes of market integration in an unbounded economy have homogenizing consequences. (…) Thus, unsurprisingly, the identity of the citizens of the European Union largely coincides with the identity of market participants and consumers.' Peter A. Kraus, 'A one-dimensional diversity?', in: Arzoz 2008, p. 92. While the EU generally heralds itself as the guardian of cultural values, it attempted to introduce a so-called disconnection clause to the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions to rule out the effects of the agreement within the internal market to prevent Member States from invoking the Convention against European law.

179 Judgment of 11 July 1985 in Case C-137/84 Ministére Public v Mutsch [1985] ECR 2681 at 2695.; later also in Judgement of 24 November 1998 in Case C-274/96 Bickel and Franz [1998] ECR 7637.

180 Case C-379/87 Groener.

181 Niamh Nic Shuibhne, 'The European Union and Minority Language Rights', *International Journal on Multicultural Societies*, Vol. 3, No. 2, 2001, p. 71. Shuibhne points out that in the aftermath of the Kik judgement the position of non-official languages in the internal market seems particularly frail. 'Does the Draft EU Constitution Contain a Language Policy?' *II Mercator International Symposium: Europe 2004: A new framework for all languages?* http://www.ciemen.cat/mercator/pdf/simpshuibhne.pdf, p. 5.

182 Peo Hansen, 'A Common Market, a Common 'Problem': Migration and European Integration Before and After the Launching of the Single Market', 2005 Center for Ethnic and Urban Studies, p. 29.

Union, different national systems for the attribution of surnames coexist in the same Member State,'[183] a phenomenon which potentially increases the diversity of languages and linguistic traditions in the Member States.[184] In this sense the free movement of persons within the internal market is much rather a catalyst, than a constraint of linguistic diversity.

5 The development and goals of Union language policy

From the very beginning, as a multilingual political community the Communities had to determine their language policy in order to efficiently manage European political, social and economic processes.[185] To manage the language use of European institutions, Regulation 1/58/EEC was adopted, and gradually, 'a certain idea about the role and the use of Union languages as well as the necessity to influence language use or to refrain therefrom'[186] emerged. At the same time, Shuibhne quotes de Witt stating that right until 2003 the Union did not have a systematic and comprehensive language policy.[187] It much rather foresaw a 'language policy' held together by *ad hoc* solutions responding to urgent language policy issues.

The millennium saw the first steps toward the establishment of a veritable European language policy. Such steps included the European Year of Languages organized in cooperation with the Council of Europe in 2001,[188] as well as the creation of the mandate Commissioner for Multilingualism for the period between 2007–2010. Leonard Orbán was the first – and, as of yet, last – Commissioner for Multilingualism[189] entrusted with managing the area of multilingualism

183 Judgment of 2 October 2003 in Case C–148/02, Carlos Garcia Avello v.Etat Belge, [2003] ECR 11613, p. 42.

184 'Names are intensely individual and mark identity both of the unique person and of the person as a member of a group. (…) In regard to the public use of names, the state may recommend and more or less vigorously enforce that people register their children with names of a particular form in a language or with names only in certain langauges. (…) [H]uman rights are likely to be violated when the state intervenes in the relationship between individual's names and group identity.' Björn H. Jernudd: Personal Names and Human Rights, in: Skutnabb-Kangas 1995, pp. 121, 130.

185 Theo van Els, 'Language Policy of and for the European Union: Consequences for Foreign Language Teaching in the Member States', in: Rüdiger Ahrens (ed.), *Europäische Sprachenpolitik*, Universitätsverlag Winter 2003, p. 45.

186 Gados 2004, pp. 89–122; Márta Fischer: 'Az európai uniós fordítás és terminusalkotás magyar vonatkozásai', *Magyar Nyelvőr*, Vol. 132, No. 4, 2008, p. 386. http://ec.europa.eu/education/languages/eulanguage-policy/index_en.htm.

187 Niamh Nic Shuibhne, 'EC Law and Minority Language Policy – Some Recent Developments', in: Xabier Arzoz (ed.), *Respecting Linguistic Diversity in the European Union*, John Benjamins Publishing Company, 2008, p. 126.

188 Decision 1934/2000/EC of the European Parliament and the Council of 17 July 2000, OJ 2000 L232/1.

189 http://ec.europa.eu/archives/commission_2004-2009/index_en.htm.

through the Multilingualism Policy Unit (EAC-C-5) established within the Directorate General for Education and Culture. Since 2010 the area has been reintegrated in the portfolio of the Commissioner responsible for Education, Culture, Multilingualism and Youth.[190]

Multilingualism projects gained impetus at the millennium and as a result of the resolution of the European Parliament regarding regional and lesser-used languages[191] the Commission issued an Action Plan[192] entitled Promoting Language Learning and Linguistic Diversity (2004–2006).[193] The Action Plan calls for the promotion of language learning in all levels of education including adult education[194] in order to acquire 'the skills to communicate with one another effectively and to understand one another better.'[195] The Action Plan briefly touches upon the issue of linguistic diversity and declares that 'linguistic diversity is one of the European Union's defining features. Respect for the diversity of the Union's languages is a founding principle of the European Union.'[196] At the same time the Action Plan approaches linguistic diversity exclusively from the aspect of language learning. What's more, it declares that 'regional and minority language communities do not seek support for the teaching of their languages as foreign languages,'[197] therefore, the promotion of language learning through EU programmes is restricted to official languages, while only speakers of regional and minority languages are eligible for support for learning their own native languages.

6 The 2005 Framework Strategy for Multilingualism

In 2005 the Commission issued its very first communication which dealt expressly with languages and multilingualism as a policy.[198] The Framework strat-

190 http://ec.europa.eu/commission_2010-2014/vassiliou/index_en.htm.

191 P5_TA(2003)0372 Regional and lesser-used languages – enlargement and cultural diversity European Parliament resolution with recommendations to the Commission on European regional and lesser-used languages – the languages of minorities in the EU – in the context of enlargement and cultural diversity (2003/2057(INI)).

192 Niamh Nic Shuibhne 2008, p. 127.

193 Brussels, 24.07.2003. COM (2003) 449 final Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Promoting Language Learning and Linguistic Diversity: An Action Plan 2004 – 2006 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0449:FIN:EN:PDF.

194 See: Commission Communication, 24th July 2003, COM(2003) 449 final, pp. 7–9.

195 Ibid, p. 3.

196 Ibid, p.12.

197 Ibid, p. 12.

198 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. A New Framework Strategy For

egy defines Union language policy as a policy pursuing three different goals: i) promoting the language learning of union citizens, contributing to maintaining linguistic diversity; ii) the promotion of a competitive, multilingual economy; finally, iii) to secure access to Union legislation and information to union citizens in their native languages. As such, Union language policy extends to the protection and promotion of cultural identity, competitiveness and the respect for fundamental rights.

Analysing the Framework Strategy we may conclude, that although the protection of linguistic diversity is put at the forefront of Union language policy, the Commission sees the key to protect and promote linguistic diversity in language learning. The Strategy recalls the 2002 Barcelona goals of the European Council according to which every union citizen should learn at least two foreign languages,[199] the realization of which is financed through EU funds.[200] It is important to see that the protection of linguistic diversity and the promotion of multilingualism are compatible only at first sight. This is because the gradual realization of multilingualism actually undermines linguistic diversity, due to the fact that multilingualism policies coupled with probability sensitive language learning tacitly endorse the spreading of 'popular' or 'big' European languages. As a result the linguistic distinctiveness of European regions reduces and the danger of language loss becomes imminent.[201] The language policy of the EU aiming at achieving the protection of linguistic diversity through the promotion of language learning is based on a serious misunderstanding which may actually contribute to reducing linguistic diversity.

The Strategy also takes into account the issues of the rationalization of language use in the ambit of the economy and European administration based on the need to further increase European mobility and mutual trust between investors,[202] as well as to reduce contacts with union citizens to official languages or working languages. At the same time the Commission also points out that consumer protection considerations, legal certainty and the democratic legitimacy of the Union require extensive labelling rules as well as access to documents and legislation in the official languages.[203]

Multilingualism, Brussels, 22.11.2005, COM (2005) 596 final, p. 2. http://Ec.Europa.Eu/Education/Languages/Archive/Doc/Com596_Hu.pdf.

199 Barcelona European Council Presidency Conclusions of 15–16 March 2002, Part I. 43.1

200 COM (2005) 596 final, p. 4.

201 Philippe Van Parijs, 'Linguistic Diversity as Curse and as By-product', in: Xabier Arzoz (ed.), *Respecting Linguistic Diversity in the European Union*, John Benjamins Publishing Company, 2008, p. 21.

202 COM (2005) 596 final, p. 8.

203 Ibid, p. 12.

When considering the main focus of the Strategy we may conclude that Union language policy is very ambivalent[204] including both restrictive and inclusive elements.[205] All in all the Strategy puts much greater emphasis on the achievement of a high degree of multilingualism than on the protection of the conflicting interest of linguistic diversity. As a result we cannot but agree with Kraus who arrives at the conclusion that although the European Union seems to glorify diversity on the abstract level, when it comes to concrete measures, activities of the institutions are messy and blurred.[206] While on the face of it Union language policy seems to protect linguistic diversity, the tacit message of the Strategy is that the main aspiration is a high degree of multilingualism, which, due to the tendencies of probability sensitive language learning with English as a dominant first language, may, on the long run, render considerations of linguistic diversity obsolete.

7 Regulation 1/58/EEC on language use in the institutions

The legal act central to the regulation of the language regime of the European Union is the very first piece of secondary legislation adopted by the European Economic Community: Council Regulation 1/58/EEC determining the languages to be used by the institutions.[207] The Regulation has been amended several times on the occasion of the accession of new Member States to the Communities and the Union respectively, it remains in force however and has been the basis of the language regime of the institutions for the past sixty years.

According to the preamble of the Regulation: 'Whereas each of the four languages in which the Treaty is drafted *is recognised as an official language in one or more of the Member States* of the Community.' Milian-Massana points out that the very wording of the paragraph in question implies that regional official languages may also be eligible for official status in the Union – this is substantiated by the fact that the paragraph employs the wording 'in' instead of 'of'.[208] However, Member States never made use of the possibility of adding minority languages to the official languages of the Union.

204 Jonathan Pool, 'Optimal Language Regimes for the European Union', *International Journal of the Sociology of Language*, Vol. 121, 1996, p.160.

205 Urrutia & Lasagabaster 2007, p. 500.

206 Peter A. Kraus, *A Union of Diversity: Language, Identity and Polity-Building in Europe*, Cambridge University Press, 2008, p. 10.

207 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31958R0001:EN:HTML.

208 Antoni Milian-Massana, 'Recognition of the Basque Language in EU Law: A Pending Issue?', in: Gloria Totoricaguena & Iñigo Urrutia (eds.), *The Legal status of the Basque language today: one language, three administrations, seven different geographies and a diaspora*, Cenarrusa, 2008, p. 96.

Member States determine on the occasion of the accession to the Union in their Act of Accession the languages they wish to use as official languages in the European Union.[209] This rule does not expressly exclude the possibility of determining more than one official language by the Member State – moreover, the status of a Member State language may be modified even after accession. According to Article 8 of the Regulation 'If a Member State has more than one official language, the language to be used shall, at the request of such State, be governed by the general rules of its law.' This means that the Regulation expressly foresees the possibility to elevate various languages to the status of Union official language in case a Member State has more than one official language. Since 1 January 2007 Irish has become an official language of the Union,[210] while Cyprus was the only Member State not to introduce a new language to the scope of official languages of the Union in 2004 – however, based on Article 8 of the Regulation, this possibility remains open for the country.[211] Altogether, we may conclude that the Member States gave a restrictive interpretation of the Regulation and did not make use of adding further languages to the scope of official languages of the Union other than those languages which are the dominant – or, in the case of Irish, are sought to be made dominant – languages in their respective states. With this, the secondary status of minority languages is reproduced on the Union level, cementing their minority status on the long run.

Based on Regulation 1/58/EEC the institutions (with the exception of the European Court of Justice) must use the official languages when communicating with union citizens, other citizens resident in the Member States as well as in their communication with the Member States (Articles 2-3.). Furthermore, regulations and other documents of general scope as well as the Official Journal of the European Union must be published in the official languages (Articles 4-5.). The language regime prescribed by the Regulation may be justified by the requirements of legal certainty:[212] Union legislation must be accessible and comprehensible to those governed by it.[213] The relationship between language use, comprehensibility and legal certainty[214] has been affirmed in the jurisprudence of the European Court of Justice;[215] furthermore, besides the requirement of legal

209 Láncos 2009, p. 123.; Jan Fidrmuc, 'The Economics Multilingualism in the EU', *Economics and Finance Working Paper Series*, No. 11-04, 2011, p. 2.

210 Council Regulation 920/2005/EC which came into force on 1 January 2007 deemed the Irish language an official language of the EU, OJ L 156, 18.6.2005.

211 Michele Gazzola, 'Managing Multilingualism in the European Union: Language Policy Evaluation for the European Parliament', *Language Policy*, 2006, p. 393.

212 Marí & Strubell 2002, p. 4.

213 Henry G. Schermers & Denis F. Waelbroeck, *Judicial Protection in the European Union*, Aspen Publishing, 2002, p. 83.

214 Gazzola 2006, p. 397.

215 Judgment of 18 February 1975 in Case 66/74, Alfonso Farrauto v Bau-Berufsgenossenschaft, [1975] ECR 00157, quoted Schermers & Waelbroeck 2002, p. 83.

certainty as a general principle of law, the language use aspects[216] of information rights guaranteed under Article 41 paragraph 4 of the Charter of Fundamental Rights have been reinforced by fundamental rights guarantees as well.

According to Article 1 of the Regulation official languages are also the working languages of the Union. Although the Regulation makes no distinction between official languages and working languages,[217] Gazzola defines these as follows: while working languages are used in the internal communication and inter-institutional communication, official languages are used in the external communication of the institutions.[218] The fact that official languages are also working languages of the Union does not mean that the institutions use all official languages in their internal and inter-institutional communication. The scope of working languages much rather serves as the basis from which the respective institutions may select languages for internal and inter-institutional use. According to Article 6 of the Regulation 'The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases.'[219] However, the institutions have failed to do so,[220] as such, the 'working language regime' employed by the institutions in the last few decades was finally defeated in the recent Italy v Commission case.[221]

8 The multilevel language regime

Based on the Regulation 1/58/EEC on language use, the different languages may be used in different spheres of official communication within the Union, furthermore, EU funding for the protection and promotion of the different languages varies.[222]

---

216 Schermers & Waelbroeck 2002, p. 83.

217 Király 2007, p. 39.

218 Gazzola 2006, p. 396.

219 Niamh Nic Shuibhne, 'Case C-361/01', *Common Market Law Review*, Vol. 41, 2004, pp. 1095–1096.

220 According to the Opinion rendered by Advocate General Maduro in the Spain v Eurojust case, the Council is entrusted with the task of determining the language regime of the institutions, while 'Union institutions and bodies enjoy only a limited discretion for the implementation of that regime. They must not be allowed to use it otherwise than for the purposes of their internal operational needs' and only in compliance with the principle of non-discrimination. Opinion of AG Maduro [ECR I-2093-94], points 48-49.

221 Joined cases T-124/13 and T-191/13, Italian Republic and Kingdom of Spain v European Commission, judgment of of 24 September 2015, not yet published; Petra Lea Láncos, 'Egy tagállam harca a nyelvi egyenjogúságért: az uniós versenyvizsgák nyelvhasználati szabályainak újrahangolása', *Pázmány Law Working Papers*, 2015/13. http://plwp.eu/legfrissebb/151-lancos-petra-lea-egy-tagallamharca-a-nyelvi-egyenjogusagert-az-unios-versenyvizsgak-nyelvhasznalati-szabalyainakujrahangolasa-nr-2015-13

222 This situation changed with the new rights introduced in Art. 21 and 22 of the Charter.

8.1 Official languages

According to Article 55 paragraph 1 TEU 'This Treaty, drawn up in a single original in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, the texts in each of these languages being equally authenti[c]'. Neither the Treaty, nor the Regulation makes any differentiation between the Treaty languages and the official languages, therefore, certain scholars arrived at the conclusion that the 'principle of the equality of languages' forms part of the European constitutional order.[223] This principle seems to be further substantiated by the jurisprudence of the European Court of Justice, according to which, when interpreting the meaning of European law, all authentic language versions of the Treaties must be taken into account.[224] Finally, in the Kik judgement the Court expressly negated the existence of such a principle.[225] Article 6 of the Regulation actually reinforces the assumption that a differentiation between the official languages is legitimate when stipulated in the rules of procedure of the institutions. Therefore, Article 6 of the Regulation may serve as the basis for the restriction of the scope of official languages used by the institutions in their internal and inter-institutional communication.[226] Furthermore, the Regulation only applies to institutions of the Union, thus, bodies, offices and agencies of the Union are not covered by it. As a result, these Union actors are not obliged to use all official languages in their communication with the citizens and may legitimately restrict their interaction with third parties to certain working languages.[227]

These considerations notwithstanding, it is important to note that although the institutions make use of the possibility of nominating a limited set of working languages for the purposes of internal and inter-institutional communication, none of the institutions actually stipulated such languages as official languages in their rules of procedure as foreseen under Article 6 of the Regulation. This means that there is no legal basis for the European Commission to invoke English, French and German as its working languages.

223 Bruno De Witte, 'Language Law of the European Union: Protecting or Eroding Linguistic Diversity', in: Crauford Smith (ed.), *Culture and European Union Law*, 2004, p. 221.

224 Mayer 2005, p. 372., E.g.: Judgment of 3 March 1977 in Case 80/76, North Kerry Milk, [1977] ECR 425., Judgment of 6 October in Case C-283/81, Cilfit, [1982] ECR 3415.

225 Judgment of 9 September 2003 in Case C-361/01, P. Kik v OHIM, [2003] ECR 8283, item 87.; Király 2007, p. 46.

226 de Witte 2008, p. 179; Arzoz 2008, p. 178.

227 de Witte 2008, p.179.; Case C-361/01. P. Kik v OHIM.

8.2 Non-official languages spoken in the EU

As the official languages of the Union are all official and majority languages of the respective Member States it would seem logical that the minority languages of the Union are non-official languages. However, the picture is much more varied. According to Felföldi, minority langugages may be classified as follows:

i) Officially recognized language which is not an official language of the Union (eg.: Letzeburgesch);
ii) Minority language spoken in only one Member State or a region thereof (eg.: Sorbian in Germany);
iii) Minority languages spoken in various Member States (eg.: Catalan);
iv) Minority languages with a kin-state (eg.: Hungarian);
v) Deterritorialized languages (eg.: Romani, Yiddish).[228]

As regards the fourth category, although for example Hungarian is a minority language in certain Member States, it is at the same time an official language of the Union and the majority language in Hungary.[229] There are other minority languages that have a kin-state, such as Turkish or Russian, these states are however not members of the Union. We may conclude that the non-official languages of the Union constitute a complex category which is difficult to define, since it comprises autochthonous minority, regional and deterritorialized languages as well as immigrant languages. The Union has a varied approach towards these languages: some may achieve a sort of 'semi-official status', others may be eligible for funding, while the rest are largely neglected, such as the immigrant languages in general.[230]

8.3 Privileged non-official languages and other, lesser used languages

The first category of non-official languages is that of the 'privileged non-official languages' which comprise according to Lanstyák all non-official languages of the Union which are co-official or regional official languages in a Member State.[231] Following the Lisbon amendment Article 55 paragraph 2 of the Treaty on the European Union, the '[T]reaty may also be translated into any other languages as determined by Member States among those which, in accordance with

228 Felföldi 2011, p. 3.
229 Nelu Bradean-Ebinger, 'Kisebbségi és regionális nyelvek az EU-ban', *Dél-Kelet Európa*, Vol. 2, No. 2, 2011, p. 4.
230 Skutnabb-Kangas 2002, p. 10.
231 István Lanstyák, 'Az Európai Unió nyelvpolitikája es a Szlovákiában beszélt nyelvek', *Társadalomtudományi Szemle*, Vol. 6, 2004, p. 49.

their constitutional order, enjoy official status in all or part of their territory. A certified copy of such translations shall be provided by the Member States concerned to be deposited in the archives of the Council.' Based on the administrative agreement concluded between the Spanish government and the Union institutions,[232] certain acts adopted in ordinary legislative procedure shall be translated to Catalan, Galician and Basque. Speeches may be held in these languages in certain institutions and in order to facilitate the communication between speakers of these languages and the Union institutions, Spain shall appoint intermediary bodies. All costs incurred as a result of the 'semi-official status' of these langauges shall be borne by Spain (paragraph 11 of the administrative agreement) and the Council shall not be liable for the precision of the translations made (paragraph 1 item c).

It is important to note that it is only the Member States that may initiate affording a 'semi-official status' to a language, that is, the Union level emancipation of a language is dependent on Member State action. At the same time the eligible language groups are also restricted, as non-autochthonous languages (such as the case of most immigrant languages) are excluded from this possibility). As regards the concrete administrative agreement already in force, the agreement is only applicable to Spanish citizens, therefore, those French citizens, who speak Basque for example as their mother tongue (in the Pyrénées-Atlantiques) cannot make use of this possibility.

The translations made in these languages are not deemed authentic, the Union has no relationship to these languages and all related costs are borne by Spain.[233] Milian-Massana points out that this form of recognition may therefore not be deemed a novel institutional status,[234] however, it may be a starting point for the future delimitation of such autochthonous languages from other non-official languages and for the institutional recognition of the same on the Union level.[235] According to Bradean-Ebinger there is an increasing pressure on the Union to recognise such languages on the EU level, since they are spoken by more the 10 million union citizens.[236]

The category of other, lesser used languages includes languages which are not official languages of either the Union or the Members States, however, and the protection afforded to these languages vary greatly. According to Lanstyák there are three possible categories of such languages: languages protected by law, languages not recognized by law and prohibited languages. Languages protected by

232 OJ C 40/2. 2006.02.17.
233 Ibid., pp. 218–219.
234 Milian-Massana, 'Languages that are official in part of the territory of the Member States', in: Arzoz 2008, p. 203.
235 Ibid., p. 219.
236 Bradean-Ebinger 2011, p. 4.

law are those, which are afforded some level of protection, potentially also supported institutionally or through education.[237] Languages not recognized by law have no status whatsoever, however, their use is tolerated by the state.[238] Today, there are no languages that are prohibited in the Member States of the EU.

8.4 Immigrant languages

In the second half of the 20th century the Member States of the European Communities became target countries for immigration.[239] According to their mother tongue, immigrants may be categorized into two groups: i) immigrants who speak a European language as their native language and ii) immigrants who speak a non-European language. The latter are put at a great disadvantage due to the fact that their languages are not recognized neither on the Union level, nor – as is usually the case – the Member State level.[240] According to some studies, the proportion of immigrants may reach 8 percent in certain Member States.[241] Extra and Verhoeven point out that while the majority of Western European states supported the language use of immigrants in the media or education during the eighties, the situation changed in the nineties where many Member States introduced assimilationist policies with the justification that the linguistic adaptation of immigrant groups is actually in their own best interest.[242]

The emerging immigration policy of the Union seems to fall in line with this trend: in the Vichy Declaration[243] the European Commission stressed that comprehensive integration strategies must be adopted including language programmes and courses on the history, instituions and values of the Union. [244] Not only does this mean that the cultural and linguistic heritage of such immigrants are neglected for the purposes of successful integration, immigrants who become union citizens but speak a non-official language of the EU are at a disadvantage compared to other union citizens when it comes to political participation. Finally, immigrant languages are only supported from EU funds when such funding serves the competitiveness of the European market. Therefore, the

237 Lanstyák 2004, p. 51.
238 Ibid. For example minority languages in France before 2008.
239 Guus Extra & Ludo Verhoeven (eds.), *Immigrant Languages in Europe*, Multilingual Matters, Clevedon, 1993, p. 3.
240 Jan Fidrmuc, Victor Ginsburgh & Shlomo Weber, 'Economic Challenges of Multilingual Societies', *Working Paper*, No.11/04, 2006, p. 9.
241 Extra & Verhoeven 1993, p. 6.
242 Ibid., pp. 10–11.
243 Vichy Declaration 14898/8, 9 December 2008. Brussels.
244 European Commission, Strengthening actions and tools to meet integration challenges, Report to the 2008 Ministerial Conference on Integration, Commission Staff Working Document, SEC(2008) 2626, Brussels, 8 October 2008(b).

learning of only those widely spoken non-European languages shall be financed, the kin-states of which are important commercial partners of the EU.[245]

Based on the language regime of the Union, different categories of languages emerge, amounting to a hierarchy between the languages spoken in the territory of the EU. Consequently, we may state that the multilevel language regime of the Union is based on the model of 'restricted multilingualism',[246] since only a fraction of the languages spoken in the territory of the Union is represented in the internal and external communication of the institutions, bodies and agencies of the Union.

9 Concluding remarks

An overview of the language policy of the EU reveals that although the primary law of the Union puts the respect for linguistic diversity to the forefront of European language policy aspirations, the Commission sees the key to securing linguistic diversity in multilingualism and language learning. Furthermore, the language regime of the Union conceived sixty years ago, coupled with the respective jurisprudence of the European Court of Justice and the practice of the institutions and bodies of the European Union result in a hierarchical language regime based on restricted multilingualism. It is at the discretion of the Member States to determine which languages they wish to include in the scope of official languages of the EU. As Member States interpret Regulation 1/58/EEC restrictively and only nominate majority official state languages as official languages of the Union, the secondary status of minority languages is reproduced on the EU level notwithstanding the fact that certain regional or minority languages have more speakers than some official languages of the European Union. The category of non-official languages is a heterogeneous group comprising both autochthonous and immigrant languages, the possibilities for the funding of which is very varied, moreover, whereas the speakers of privileged non-official languages may receive certain linguistic service, this is not possible in the case of immigrant languages.

Member States play an interesting role in determining the status of languages in the European Union: while certain states, namely Italy and Spain have made several attempts to challenge the prominence of English (French and German) before the European Court of Justice in the European language regime; Member States in general restrict official language status to their state languages exclud-

245 See: section 8.2.

246 Mattias Derlén, 'In Defence of (Limited) Multilingualism: Problems and Possibilites of the Multilingual Interpretation of European Union law in courts', in: Anne Lise Kjaer (ed.), *Linguistic Diversity and European Democracy*, Ashgate, 2011, p. 156–157.

ing minority languages therefrom. Finally, not only do Member States pursue a wide range of language policies, the European Union itself has a varied approach to languages in the context of integration and linguistic assertion, since the individual institutions and bodies of the EU assume different – at times even opposing – roles in this process. For example, whereas the European Parliament takes on the role of self-appointed representative of the cultural diversity of Europe[247] and regularly adopts resolutions for furthering linguistic diversity,[248] the Commission is adamantly opposed to all attempts to expand the range of internal working languages.[249] And while the European Ombudsman suggests that good administrative practice entails due consideration of the linguistic endowments of citizens,[250] the European Court of Justice denies that European law 'confers a right on every citizen to have a version of anything that might affect his interests drawn up in his language in all circumstances.'[251]

247 'Whereas Parliament itself, as the Community institution which has been democratically elected and therefore represents the cultural diversity of Europe', Resolution on racism, xenophobia and anti-semitism and the results of the European Year against Racism (OJ C 55/17, 24.2.97).

248 Resolution on Measures in Favour of Linguistic and Cultural Minorities (OJ C 68 11.2.1983), Resolution on the Languages and Cultures of Regional and Ethnic Minorities in the European Community (OJ C 318 30.10.1987), Resolution on Linguistic and Cultural Minorities in the European Community (OJ C 61, 29.2.1994).

249 Judgment of 20 November 2008 in Case T-185/05, Italian Republic v Commission of the European Communities, [2005] ECR 10217.

250 3191/2006/(SAB)MHZ, 2.5.

251 Most recently reiterated in Judgment of 31 March 2011 in Case T-117/08 Italy v European Economic and Social Committee [2011] ECR 00000 at 71.

Regulatory Policies of the Union

THE COMMON COMMERCIAL POLICY OF THE EUROPEAN UNION

Marcel Szabó and Dorottya Pedryc

1 The European Union in the global economy

The European Union fulfills an extraordinarily significant role in the global economy. The total population of the Union reaches almost 500 million[252] (which exceeds the total population of both the United States and Russia), which makes up 7% of the world's population. However, the Union produces more than a quarter of the world's total wealth.[253]

The goal of the founding fathers was to establish a single market, an economic integration. As a result, goods, labor, services and capital could freely move between the member states, without any restriction. The creation of a single market allowed the Union to act in unison on the scene of global trade and to grow into a strong economic power in the global economy.

Before we set out to discuss the Union's common commercial policy, it is vital to get a holistic view of where and how the Union is positioned in the system of the global economy.

After the Second World War, it was vital to stabilize the economy as soon as possible. As a result of this endeavor, two key institutions were established: the International Monetary Fund (hereinafter referred to as: IMF) and the International Bank for Reconstruction and Development (hereinafter referred to as: the World Bank).[254] Besides these institutions, it was a step of extraordinary importance from the aspect of trade activities that the General Agreement on Tariffs and Trade (hereinafter referred to as: GATT)[255] was signed by as many as 23 countries in Geneva in 1947. GATT is a multilateral agreement regulating international trade. In the first place, GATT regulated the international trade in goods, and it liberalized commerce by reducing customs tariffs. The goal set by the signatories was to reduce the customs tariffs that had been applied towards each other, to eliminate trade barriers, and as a result of these, to increase living

252 Eurostat: Table about the population of the European Union on 1 of January (http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tps00001).

253 *The EU explained: Commercial Policy*, The Publications Office of the European Union, Luxembourg, 2014, pp. 3–4.

254 International Monetary Fund: Factsheet – the IMF and the World Bank (http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tps00001).

255 Robert E. Hudec, 'GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade', *The Yale Law Journal*, Vol. 80, No. 7, 1971, p. 1299.

standards, to achieve full employment, as well as to increase the production of, and trading in goods. It is unnecessary to mention that in the political situation existing at the time, neither the Soviet Union[256] nor any of its member states joined the agreement but they established their own economic cooperation based on planned economy.

The signatories of GATT agreed that in order to liberalize trade between each other, they will hold further customs conferences.[257] The following seven customs conferences were organized in the framework of GATT: Annecy, Torquay, Geneva, Dillon, Kennedy, Tokyo, Uruguay.[258] Initially, the goal of these rounds was to further reduce the customs tariffs. It was at the Dillon Round that the European Economic Community first represented itself informally but it was not a signatory to the closing document of this round. Then a significant step for the Union followed, as the Community already had an independent presence at the Kennedy Round.[259]

It was the closing document of the Uruguay Round, i.e. the Marrakesh Agreement[260] that established the World Trade Organization (hereinafter referred to as: WTO).[261] By approving WTO, the member states established a system of institutions which was meant to support GATT, so it can be stated that WTO became the institutionalized form of GATT, which continues to represent the principles of GATT. The signatories of GATT and the European Communities became the original members of the WTO.[262] With regard to the fact that the original signatories of GATT were at the same time the member states of the European Communities, the following situation emerged in decision-making: as long as the European Communities exercised their voting rights, the number of their votes was the same as the number of those of their member states which were members of the WTO.

256 Christina L. & Davis Meredith Wilf, *Joining the Club: Accession to the GATT/WTO*, Princeton University, 2013, pp. 22–25, https://www.princeton.edu/~cldavis/files/joiningtheclub_DavisWilf.pdf.

257 Patrick Love & Ralph Lattimore, 'Trade Rounds and the World Trade Organization', in: *International Trade: Free, Fair and Open?*, OECD Publishing, 2009, p. 79.

258 World Trade Organization: Understanding the WTO – Basics https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

259 Alberta Sbragia, 'The EU, the US, and the trade policy: competitive interdependence in the management of globalization', in: Wade Jacoby & Sophie Meunier (ed.), *Europe and the management of globalization*, Journal of European Public Policy Special Issue, Taylor & Francis, 2013, p. 73.

260 Marrakesh Agreement establishing the World Trade Organization (with final act, annexes and protocol), Marrakesh on 15 April 1994, [UN Vol. 1867, 1-31874, No.: 31874].

261 Patrick M. Moore, 'The Decisions Bridging the GATT 1947 and the WTO Agreement,' The American Journal of International Law, Vol. 90, No. 2, 1996, p. 317.

262 Art. XI: Original Membership – 1. Those parties which are signatories to GATT 1947 on the date of effect of this Agreement, as well as the European Communities will become the original members of WTO, as long as they accept this Agreement and the Multilateral Trade Agreements, furthermore, if they attach their Lists of Preferences and Commitments to GATT 1994, and their Specific Commitment Lists to GATS.

Thus, the WTO is an organization which provides a platform for the governments of its participating states to conduct trade negotiations. The objective scope of the treaties entered into under WTO is wide. However, there are some general principles that permeate the treaties concluded under the aegis of WTO. The most important principles include those of the most favoured nation, national treatment and reciprocity.[263] According to the principle of the most favoured nation, the contracting parties will be obliged to give those preferences that they give or will give to third countries to each other as well.[264] The point of the principle of national treatment is to ensure the same treatment to the legal entities and citizens of the contracting parties as provided to the local legal entities and citizens.[265] Thus, they have the same rights and obligations as the local citizens. The purpose of all these principles is to ensure equal, non-discriminative trading conditions to all parties.

The trade conferences held under the aegis of the WTO continued. In the 21 points on the agenda of the Doha Round, the regulation of agricultural and textile industry products[266], as well as the definition of rules concerning developing countries, and their involvement in the economic activities regulated by WTO[267] are of critical importance.

In view of all these, we can see that the trade regulation of the Union is strongly determined by the fact that it is a member of the WTO and it recognizes all the rules accepted in the framework of the WTO as effective for themselves.

2 The evolution, legal grounds and competence issues of the common commercial policy of the European Union

The endeavor to establish tighter economic integrations has always been present in world history. Let us just think about the above-mentioned GATT agreement, the WTO, which was developed from the regulatory system of the latter, the EFTA states, the NAFTA agreement in North America, and so on. As a result of these agreements, a tighter economic integration was formed between the contracting parties. From the very beginning, it emerged as a clear need that the Eu-

263 World Trade Organization: Understanding the WTO – Basics – Principles of the trading system https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

264 Hector Gros Espiell, 'The Most-Favored-Nation Clause', *Journal of World Trade*, 1971, Issue 1, pp. 29–44.

265 Michael J. Trebilcock & Shiva K. Giri, 'The National Treatment Principle in International Trade Law', in: E. Kwan Choi & James C. Hartiga (ed.), *Handbook of International Trade: Economic and Legal Analyses of Trade Policy*, Blackwell, Oxford 2004, pp. 185–186.

266 World Trade Organization: Committee on Trade and Development: developmental aspects of the Doha Round of Negotiations. WT/COMTD/W/143/Rev. 5, 28 October, 2010.

267 See also: Andrew H. Charlton & Joseph E. Stiglitz, 'A Development-friendly Prioritization of Doha Round Proposals', *The World Economy*, Vol. 28, No. 3, 2005, pp. 293–312.

ropean Union should act in unison not only with regard to the internal market but also in its external economic relationships. It is this policy that the common commercial policy of the Union wishes to regulate, which is basically the external aspect of the internal market.

The legal grounds and the scope of the common commercial policy were laid down in Articles 110-115 of the Treaty of Rome (1957), according to which, in harmony with the goals of GATT, the external purpose of establishing the customs union is to promote the harmonious development of world trade, to gradually eliminate the international trade barriers, as well as the to gradually reduce the customs barriers.[268] Initially, the common commercial policy of the Union clearly concerned the goods, with regard to the fact that the primary goal of the Community was to establish a tighter economic union, where the barriers to imports and exports between the member states were meant to be broken down. The basis of the common commercial policy is the regulation of customs tariffs, as well as the reduction of the barriers to trade.[269]

On July 1, 1967, the Merger Treaty came into effect, which merged the European Atomic Energy Community, the European Coal and Steel Community, as well as the European Economic Community, and from this point on, the three supranational organizations acted jointly as the European Community on the international scene. On July 1, 1968, the customs union between the six founding countries was realized earlier than expected. The customs borders between the member states were eliminated and the formation of the common customs rules began. After the 12-year transitional period that followed the signing of the founding treaties, the single market came into existence within the European Community on December 31, 1969, so the free movement of goods, persons, services and capital became a reality.

Up to 1970, the member states entered into commercial agreements with third countries outside the Community in their own competence. However, the Community as a legal entity acting independently on the international scene also concluded bilateral agreements at the same time with third countries, for example, with Israel in 1964, and then it also acted autonomously at the Kennedy Round in 1963–1967. From January 1, 1970, the Council was authorized to make its own decisions with qualified majority on issues concerning the common commercial policy.[270]The issues of competence between the member states and the

268 Dr. Egon Dienes-Oehm, 'Kereskedelempolitika (Commercial Policy)', in: Miklós Király (ed.), *Az Európai Közösség Kereskedelmi Joga* (The Commercial Law of the European Community), KJK-KERSZÖV Jogi és Üzleti Kiadó Kft, Budapest 2003, pp. 134–135.

269 Eur-lex: Summaries of EU legislation: Common commercial policy (http://eur-lex.europa.eu/legal-content/HU/TXT/?uri=URISERV:a20000).

270 Eur-lex: Summaries of EU legislation: Common commercial policy (http://eur-lex.europa.eu/legal-content/HU/TXT/?uri=URISERV:a20000).

European Communities regarding the common commercial policy remained unclear in many cases,[271] so this situation was settled by the Court of Justice of the European Union in its opinion No. 1/75[272] in connection with the Low Cost Standard case[273] in 1975.

In the above-mentioned case, the Court declared that pursuant to Article 113 of the EEC Treaty, the common commercial policy is one of the tools of realizing the functioning of the single market.[274] The establishment of a single market is a common interest of the member states, so it is these common interests of the member states that should be reflected in the common commercial policy as well, hence, there should be cooperation in this field. Thus, it will become impossible for the member states to enforce their own interests with regard to commercial policy in their foreign relations, by keeping their own competence and thus, jeopardizing the interests of the Community.[275] In its opinion, the Court declared that the member states are not authorized to enter into international agreements, or to serve justice on commercial policy, even if the Community has not acted yet.[276] Thus, it became clear that the Community has exclusive competence on these issues but in exceptional cases, the Court continued to allow the member state to act in its own competence in commercial policy issues.[277]

Although the 1975 court decision clarified the exclusive competence of the Community in the field of common commercial policy, it was still not clear what constitutes the internal content of the Community's common commercial policy. With regard to the fact that the primary goal of economic integration was to establish an internal market, the first step of which was to form the customs union, it was doubtless that it was exclusively the Community that would act in any international agreements on goods. However, it again became the responsibility of the Court to answer the question whether intellectual products, services and direct investments were part of the common commercial policy.

In its opinion No. 1/78, the Court had yet another opportunity to take a stance on the Community's competence in common trade activities, as well as the scope of application of the common commercial policy. The case focused on the

271 Panos Koutrakos, *EU International Relations Law*, Hart Publishing, Oxford, 2006, p. 11.
272 Opinion No. 1/75 on OECD's understanding on a local cost standard, ECR [1975] 1355.
273 Dorota Leczykiewicz, 'Common Commercial Policy: The Expanding Competence of the European Union in the Area of International Trade', *German Law Journal*, Vol. 6, No. 11, p. 1674.
274 Dr. Ildikó Bartha: *Az Európai Közösség és a tagállamok nemzetközi szerződéskötési hatáskörei az európai bíróság esetjogában. PhD értekezés* (The competences of the European Community and the member states to conclude international agreements in the case law of the European Court of Justice. PhD dissertation), Miskolc 2010, p. 47.
275 Bartha 2010, p. 48.
276 Case 1/75, Low Cost Standard, [1975] ECR, 1355; Case 41/76, Suzanne Criel, neeDonckerwolcke and Henru Schou v. Procureur de la Republique, [1976] ECR, 1921.
277 Piet Eeckhout, *External Relations of the European Union – Legal and Constitutional Foundations*, Oxford University Press, 2004, p. 16.

issue of competence in concluding an international agreement on natural rubber.[278]

The competence of entering into the agreement became questionable because this international agreement did not only involve commitment by the Community but it would also have imposed an individual financial burden on the member states. Finally, the Court declared that the exclusivity of the competence of the Community depends on whether it would like to finance its contributions from their own, i.e. community budget, or these amounts would directly burden the member states. In the latter case, the member states will participate in the agreement jointly with the Community.[279] By this, the earlier statement, i.e. that in certain cases, there was no accurate decision concerning the exclusive competence of the Union, was confirmed. Furthermore, the Court expressly acknowledged that the provisions set out in Article 113 of the EEC Treaty should be interpreted expansively, i.e. the scope of application of common trade will not take the form of an exhaustive list.

Neither the Single European Act (1986) nor the Maastricht Treaty (1992) brought a significant change in the common commercial policy of the Union.

It should be mentioned what effect the GATT regulation and the GATT rounds had on the extension of the scope of application of the common commercial policy.[280] During the Uruguay Round, as mentioned earlier, an agreement on the establishment of the WTO was concluded. Furthermore, the General Agreement on Trade in Services (hereinafter referred to as: GATS), as well as the Agreement on the Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as: TRIPS) were accepted.[281] In relation to this, the Court repeatedly explained its stance on the competences of the member states, in its opinion No. 1/94, in which the competence of the Communities to conclude the GATS and TRIPS agreements was specifically discussed. Finally, the Court declared in its opinion that the objective scopes of both agreements affected such areas which do not belong to the scope of application of the Community's common commercial policy, so the conclusion of the GATS and TRIPS agreements is the shared competence of the member states and the Community.

The substance of this opinion was incorporated into primary law by the Amsterdam Treaty. Based on this, 'the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend

278 Bartha 2010, pp. 54–57.

279 Opinion No. 1/78 (International Natural Rubber Agreement) [1979] ECR 2871.

280 Bartha 2010, p. 59; Péter Balázs, 'Közös kereskedelempolitika (Common Commercial Policy)', in: Tamás Kende & Tamás Szűcs (ed.), *Az Európai Unió politikái* (The Policies of the European Union), Osiris, Budapest 2000, pp. 29–46; p. 37.

281 Marrakesh Declaration of 15 April 1994; Annex 1B: General Agreement on Trade in Services (GATS), Annex 1B: Trade-Related Aspects of Intellectual Property Rights (TRIPS).

the application of the common commercial policy to international negotiations and agreements on services and intellectual property.'[282]

The Nice Treaty (2001) clarifies the competence issues of the member states and the Community with regard to the conclusion of international agreements. According to the amendment, the Community was only authorized to conclude international agreements in the field of the common commercial policy 'if the mandate does not exceed its internal competence, or does not surpass its competence in legal harmonization.'[283]

In the Lisbon Treaty (2009), the rules of common commercial policy were incorporated into a single system. The Reform Treaty determines and makes it clear that the common commercial policy is in the exclusive competence of the European Union. It is in Part Five of the Treaty on the Functioning of the European Union that the legal grounds of the common commercial policy are laid down (Articles 206-207). In the Treaty, the objectives and scope of application of the commercial policy are defined (which we will explain later). It is here that the procedural rules of the Union on the conclusion of international agreements are clarified, furthermore, it is made clear that in the case of agreements on services, intellectual property, as well as direct foreign investments, the Council should act unanimously if the agreement contains such provisions where unanimity is required even in the case of the internal rules.[284]

3 The principles and objectives of common commercial policy

The principles and objectives of the common commercial policy should be distinguished from the comprehensive general principles and goals that cover all the external activities of the Union, which are explained in Articles 21-22 of the Treaty on European Union, and also from the specific principles and objectives of the common commercial policy discussed in Articles 205-207 of the Treaty on the Functioning of the European Union. The general and specific principles are connected by Article 205 of the Treaty on the Functioning of the European Union, in which it is declared that the Union strives to accomplish the principles and goals defined in the Treaty on European Union, in harmony with the general provisions on the common commercial policy.

The *fundamental principles that determine the external activities* of the Union include those basic principles that drove the establishment, development and extension of the European Union: these are democracy, the rule of law, the univer-

282 The Treaty of Amsterdam, Art. 133; Dienes-Oehm 2003, p. 137.
283 Dienes-Oehm 2003, p. 137.
284 Treaty on the Functioning of the European Union, Arts. 206-207.

sal and indivisible nature of human rights and fundamental freedoms, the respect for human dignity, equality, solidarity and the observance of the principles declared in the UN Charter and international law. It is these fundamental principles that determine the external activities of the Union and these are the ones that the Union wishes to enforce in its external relations.[285] Among *the goals to be achieved in the course of the external activities* of the Union, one can find, among others, the goal of protecting the fundamental values that the Union represents, its security, independence, integrity; that of consolidating and strengthening democracy, which is a significant objective for us, as well as those of promoting the involvement of each country in the world economy, among others, through the gradual elimination of the barriers to international trade, and according to the norms defined by sustainable development.[286]

The enacting part of the Treaty on the Functioning of the European Union now identifies it *as a common interest* that the Union contributes to the balanced development of world trade, i.e. it is put not only as an endeavor but also as a commitment, both to the gradual elimination of the restrictions of international trade and foreign direct investments, and to the reduction of customs and other customs-type barriers. In the field of common commercial policy, there are two specific fundamental principles: the liberalization principle and the principle of uniformity.[287] Taking into account that the goal of common commercial policy is to ensure the harmonious development of world trade, to eliminate the restrictions of international trade, and to reduce customs barriers[288], it becomes clear that the Union is committed to the liberalization processes that take place in trading, which is also the consequence of the fact that the Union has been involved in the GATT-WTO agreements from the outset.[289] Furthermore, it is stated by the Treaty on the Functioning of the European Union that the common commercial policy is based on the principle of uniformity.

We should make special mention of the principle of parallelism in relation to foreign direct investments. The agreements on foreign direct investments have so far been typically built on the bilateral agreements between the member states of the European Union and the foreign partners. Listing foreign direct investments, trade in services and the trade aspects of intellectual property in an exclusive Union competence can be regarded as such a significant 'integration leap' which made it necessary to lay down the principle of parallelism in Article

285 The Treaty on European Union, Art. 21, Para. (1).
286 The Treaty on European Union, Art. 21, Para. (2).
287 Balázs Horváthy, 'A közös kereskedelempolitika alapelvei és célkitűzései az integrált uniós külkapcsolatrendszer tükrében (The Fundamental Principles and Objectives of the Common Commercial Policy, seen from the Integrated External Relations of the Union)', *Iustum Aequm Salutare*, Vol. X, No. 1, 2014, p. 64.
288 Horváthy 2014.
289 Horváthy 2014, p. 65.

207 of the Treaty on the Functioning of the European Union, which regulates the common commercial policy. Pursuant to the principle, the European Union is not entitled to harmonize a field of activities through international agreements, with regard to which the internal regulation of the European Union prohibits the creation of a common law. Thus, the commercial agreements on social security, health care, industry or culture should not affect the relevant competence of the member states.

According to the principle of parallelism, the agreements on social policy, health care, industry and culture should be concluded in the form of mixed agreements even after the Lisbon Treaty takes effect, so international agreements require the participation of both the European Union and the member states.

With regard to the fact that the common commercial policy is one of the Union's external activities, using the tools of the common commercial policy often contributes to the realization of the Union's other external activities (for example, providing humanitarian aid).

4 The objective scope and scope of application of the common commercial policy

It was not a question at the beginning either that the trade in goods with third countries and the related customs tariff regulations, as well as the conclusion of related agreements fall under the objective scope of common trading. In harmony with the above, we can see that the objective scope is expanded further and it will later extend to the conclusion of customs tariff and trade agreements related to trade in services, as well as the commercial aspects of intellectual property rights. The Reform Treaty adds a further scope of application to the objective scope, which is foreign direct investments.

4.1 Services and intellectual property

The regulation on the trade in services and the commercial aspects of intellectual products became the exclusive competence of the Union when the Lisbon Treaty became effective on December 1, 2009. It should be noted, however, that when the member states accepted the Treaty of Lisbon, the Union was only given exclusive competence in relation to the trade in services and the commercial aspects of intellectual products in such a way that unanimous decision-making was stipulated in these two areas. The requirement of unanimity practically ensures a right of veto to all the member states with regard to the Union regulation of the trade in services and the commercial aspects of intellectual products even after the Treaty of Lisbon takes effect. However, it can be regarded as a great stride

forward that in these areas, where the member states and the European Union earlier exercised shared competence, the member states assigned this decision-making competence to the Union.

When an international agreement was concluded on any issue related to the trade in intellectual property or in services with the participation of the European Union, so-called mixed agreements were entered into, i.e. the European Union and the member states concluded the agreement with the third parties at the same time. If this system had survived, then with regard to the international agreements on the trade in intellectual property or in services, the approval of a new agreement would have required 28+1 (EU) contracting partners from the part of the European integration. As consequence of this, the building of international relations would have been rather slow, cumbersome and sometimes contradictory in the case of such types of agreements. However, we can still find examples for the conclusion of mixed agreements regarding issues whose regulation was left to the member states by the European Union, in the framework of harmonization.

4.2 Foreign investments

By foreign investment, economic science means those capital flows the goal of which is to maintain and increase the capital portfolio.[290] We distinguish between two types of foreign investment, one is that of direct foreign investments, while the other one is the category of portfolio investments. In the case of direct foreign investments, which are also called working capital investments, the goal of the investor is to exercise control and management rights over the company through the ownership that they have acquired. However, in the case of portfolio investments, the foreign investor is not interested in the idea of managing the company, they acquire the securities of a company exclusively with a view to realizing capital income.

290 Arts. 206 and 207 of the Treaty on the Functioning of the European Union do not define the concept of direct foreign investments, it was explained in the judicial practice of the European Court of Justice. In the case called *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue*, the European Court of Justice defined three criteria for direct foreign investments: investments should be long-term, their size should reach at least 10% of the equity of the related company, furthermore, supervision over the operation of the related company should be ensured for the investor. This definition is in harmony with those of the OECD and the IMF. See: Judgment of 12 December 2006 adopted in Case C-446/04, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, [2006] ECR 11753.

4.2.1 Direct foreign investments

The structures that were developed for the regulation of the international trade in goods, such as GATT and the WTO, created traditional frameworks for multilateral cooperation in the trading of goods.[291] As regards the state regulations of investments, the principle of the most favoured nation, which is a fundamental GATT and WTO principle, was not applicable to the issues of investment protection, so the states replaced this by entering into bilateral agreements and so, they ensured the economic environment by which they were able to influence the volume of the investments between each other.[292]

4.2.2 Portfolio investments

While direct capital investments have been the direct competence of the European Union since December 1, 2009, the portfolio investments remained the competence of the member states. As consequence of this, with regard to those capital investment agreements which extend to both, it may be justified to conclude mixed agreements, in which both the European Union and the member states participate.

4.2.3 The new challenges posed by the integrated investment policy

The fact that investment protection issues are now the competence of the European Union will bring about quite a number of international law problems, since, as a consequence of this, a Union law that refers to direct capital investments will be developed, to which the investment protection agreements previously entered into between the member states and third parties cannot be contrary. Thus, this means that a new reason for the termination of contracts may be included in international contract law, namely those situations in which an international agreement, i.e. one that was concluded by and between a member state and a third country in an earlier stage of Union membership, will be terminated because the member state loses its competence to enter into contracts in this area and the investment protection agreements concluded earlier with third countries are contrary to the higher ranking Union law. The agreement of the Union member states in the Treaty of Lisbon, according to which they assign the competence in investment protection issues to the European Union, counts as a *pacta tertiis* agreement from the aspect of the third countries in public international

291 See: Joost Pauwellyn, 'The Transformation of World Trade', *Michigan Law Review*, Vol. 104, No. 1, 2005, pp. 1–66.; Hans van Houtte, *The Law of International Trade*, Sweet & Maxwell, London 1995.

292 The competence of GATT and WTO is related to international trade but it does not extend to investments. See: Stijn Billiet, 'From GATT to the WTO: The Internal Struggle for External Competences in the EU', *Journal of Common Market Studies*, Vol. 44, No.5, 2006, pp. 899–919.

law, as consequence of which a potential termination of a contract with such reference may be highly problematic in the sense of international law.

In the organization of the WTO, both the European Union and the member states have taken part to date but when they had to vote on an issue that belonged to the exclusive competence of the European Union, it was only the European Union that cast its vote, while the representatives of the member states did not participate in the voting. However, the Union could cast as many votes as was the number of its member states at the time of the voting. This system will definitely change in the future and it will probably not be justified that both the European Union and the member states be members of the World Trade Organization, as by now the Union has exclusive competence for all of WTO's competences, i.e. the customs regulations for trade in goods, the international trade in services, as well as the commercial aspects of intellectual products. Through this, the future participation of the member states in the WTO will actually become unjustified. This would make it a reasonable solution that the states of the European Union suspended their further participation as members, even if they did not leave the WTO, and instead, only the European Union would represent this group of countries. In this case, of course the European Union would only have one vote but this would not weaken the European Union on the international scene, since decision-making in the WTO is typically consensual.

5 The instruments of common commercial policy

The instruments of common commercial policy can be divided into two large groups: autonomous instruments and contractual instruments. Those general or individual acts which generally belong to secondary legislation and which are in the exclusive competence of the Union, and for the enforcement of which no other legal body is necessary, are considered to be autonomous instruments. The administrative tools of customs, the system of imports and exports, as well as the tools of protective commercial measures qualify as such autonomous instruments. However, for the enforcement of a contractual instrument, another contracting party besides the Union is clearly necessary. Contractual instruments include bilateral and multilateral contracts.

5.1 Autonomous instruments

5.1.1 European Union customs law

On July 1, 1968, a Common Customs Tariff was introduced within the European Community, through regulation (EEC) No. 950/68[293]. The Common Customs Tariff of European integration does not only mean the system of customs tariffs but it also involves the standardization of customs law, customs technical and customs procedural rules. Council regulation (EEC) No. 2913/1992 was adopted in 1992, then it took effect in 1994, which also included these customs rules in the broader sense of the word.

As regards the customs tariffs in the Customs Code[294] of the European Union, the most important conclusion is that the customs system of the European Union has two columns, which means that it contains autonomous and contractual tariff articles alike. Contractual tariff articles basically mean the agreements that are entered into in the framework of the WTO with regard to those tariff articles which have been negotiated for certain products by the member states of WTO. In the case of those states which are not members of the World Trade Organization and not participants of a system of international agreements on a certain product, the European Union applies its own tariff articles, which are significantly higher than the customs regulations that evolved in the framework of the WTO.[295] Autonomous tariff articles include the ones laid down in the European Union's own competence. Autonomous tariff articles used to have a much greater significance in the trade relations of the European Union, as the Union applied these customs rules against the countries that used to 'pursue state trading'.[296] The entire communist bloc, including Hungary was listed in this group by the Union. This resulted in a substantially less favorable economic environment for the members of this group of states when they wished to sell their goods in the territory of the European Union.[297]

---

293 Council regulation (EEC) No. 950/68 of June 28, 1968 on the Common Customs Tariff (OJ L 172, 22.07.1968, pp. 1–402).

294 Council regulation (EEC) No. 2913/92 of October 12, 1992 establishing the Community Customs Code (OJ L 302, 19.10.1992, pp. 1–50).

295 The contracting parties of GATT hold mutual responsibility for the continuous reduction of the customs tariffs applied towards each other. It is only possible to increase customs duties between the contracting states in exceptional cases, as a protective measure. Imports from GATT member states and other countries with the same category of market economies are regulated by Council regulation (EC) No. 3285/94.

296 It is Council regulation (EC) No. 519/94 that explains the rules of the autonomous import system applied towards the countries that 'pursue state trading'.

297 The special community import regulation applied towards the countries that 'pursue state trading' had political reasons. The reason for this was that the position adopted by Comecon (the Council for Mutual Economic Assistance) prohibited the recognition of the European Economic Community,

5.1.2 Instruments of the import-export system

Besides the customs, Council regulation (EC) No. 260/2009 stipulates the common rules on the import of products from countries outside the Union. According to the general rule, the regulation announces the principle of the free import of products but the Union may take protective measures. Textile products which fall under the effect of special import rules are not subject to this regulation, nor are those products for which the country in question can apply its own import regulations. Furthermore, in its regulation (EC) No. 625/2009, the Council settles the common rules on imports from the individual third countries.[298]

Council regulation (EC) No. 1061/2009 stipulates the rules on exports. It is in this regulation that the fundamental principle of the freedom of exports is defined, according to which exports from the Union to non-member states are free of quantitative restrictions. The Union may also approve potential protective measures here, as long as an emergency situation evolves due to the lack of critical products.

According to the law of the European Union, the system of export subsidies granted by the institutions of the European Union may become a tool of common commercial policy. Furthermore, the member states are also entitled to encourage and support the export of their products to international markets by financial means. The theory of international economy is basically against the system of export subsidies provided by the individual states or integration organizations, since it exerts a distorting effect on free market competition. Interestingly, while the European Union is rather permissive with regard to export subsidies in its own policy, it takes strong action against the competition distorting measures of third countries, as long as they try to place the products of their own companies in the market of the Union through this financial support.

Council regulation (EC) No. 717/2008 lays down the community's procedural rules for quantitative contingents. This regulation should be applied when the Union defines quantitative and import contingents.

5.1.3 System of protective commercial measures

5.1.3.1 Anti-dumping procedure

Dumping is listed among unfair commercial practices, the goal of which is to sell a product at a rate lower than the normal price applied in the country that exports to the European Union. By normal price, we mean the value that is paid for

which developed a specific import system including extra restrictions towards these countries as a response.

298 This refers to the following countries: Azerbaijan, North Korea, Belarus, Kazakhstan, Russia, Armenia, Tajikistan, Turkmenistan, Uzbekistan, Vietnam.

the goods by persons independent from the seller or the producer in the exporting country in normal trading operations. When dumping is applied, what we start out from is that in the country of production, it is the rules of demand and supply that determine the market rate of the product. As long as the producer or one of the distributors ships the product to the European Union and they sell the product there below the normal rate applied in the country of production, it can be rightly assumed that this person strives to achieve long-term market profits from distribution and they wish to dump an enormous amount of goods on the market of the European Union. It is through applying the dumping price that they endeavor to squeeze out the other producers from the target market, with a view to reaching extra profits after the economic decline of these producers, by exploiting the market positions that incorporate unique or significant advantages.

The Council is in the position to apply protective measures against dumping only if it is proven that such dumping causes damage in the territory of the European Union. The purpose of antidumping customs is to deter the economic association that applies dumping from any similar future activities and in order to ensure this, to approximate the value of the goods to the normal market rate applicable in the country of origin as closely as possible, by imposing customs duties. The application of antidumping customs is an administrative type of procedure and measure, in which the legal relationship exists between the European Union on the one hand and the economic association that applies dumping on the other hand. The background legislation on dumping is contained in regulation (EC) No. 1225/2009 of the Council.

5.1.3.2. Anti-subsidy procedure

The European Union is not only willing to be confronted with the economic associations but it also takes action against those states which subsidize exports to the territory of the European Union. Providing subsidies is defined as a situation in which the goods imported to the territory of the European Union receive direct or indirect production, transportation or export subsidies from the country where the export comes from. If as consequence of this, the export price of the product in question is lower in the territory of the European Union than the normal rate used in the country of production, it will qualify as a case of granting subsidy. The damage caused in the market of the European Union is a precondition for the Union to apply international law type sanctions against the country applying the subsidy.

The anti-subsidy procedure is very similar to the anti-dumping procedure, the legal basis of which is provided by Council regulation (EC) No. 597/2009. In the context of the anti-subsidy procedure, the European Union wishes to sanc-

tion the member state in which the export activities of an economic player directed to the European Union are supported by considerable financial means. As the European Union also has its own system of export subsidies in place, it would be unfair to try to punish other states for similar types of activities. It is exactly because of this that a measure taken by the Union against subsidized imports from a third country will only be justified if the state in question provides considerable financial means to a special group of businesses for the exports to the territory of the European Union, according to criteria which cannot be objectively measured. Subsidy as a procedure launched against another state cannot be initiated by the economic players operating in the territory of the European Union. Among others, it is possible to levy equalizing customs duties as a result of the anti-subsidy procedure.

5.1.3.3. Protection from trade barriers

It is Council regulation (EC) No. 3286/94 of December 22, 1994 that defines the rules of procedure to be followed in situations where trade is hindered as a result of the acts of other states. In such cases, a formal international consultation or dispute settlement may also come up as a solution, furthermore, retaliatory measures may also be applied by the European Union. For example, the trade preferences applied until the date in question may be suspended, customs duties may be introduced, or the Union may decide to apply quantitative restrictions. These measures are adopted by the Council by a qualified majority.

5.2. Contractual instruments

5.2.1. Multilateral agreements

The WTO-GATT system of contracts stands out from multilateral agreements. The Union was not a signatory to the GATT agreement but as it had exclusive competence over the common commercial policy, the presence of the Union, i.e. its 'virtual membership'[299] became tacitly accepted in the later rounds of negotiations, and the Union, in turn, regarded the agreements entered into during the GATT negotiations as mandatory for itself. It was the Geneva Protocol concluding the Kennedy Round that came to be a turning point for the participation of the Union, as here it was the Community itself that already took part as a contracting party and signed the agreement, besides the member states.[300]

299 Balázs Horváthy, *Közös kereskedelempolitika és tagállami külkereskedelmi igazgatás* (Common Commercial Policy and Foreign Trade Management by Member States), (http://mek.oszk.hu/02100/02127/02127.htm#n1).

300 Council regulation (EEC) 68/411 on the conclusion of a multilateral agreement signed at the trade conference of 1964–1967, OJ L 305, 19.12.1968.

5.2.2 Bilateral agreements

The Union may also enter into bilateral trade agreements. With regard to the fact that it would take very long to list these agreements, we only mention the Euro-Mediterranean Association Agreement as an example, which was concluded between the European Communities and its member states, as well as the Lebanese Republic, the People's Democratic Republic of Algeria, the Arab Republic of Egypt, the Hashemite Kingdom of Jordan, the State of Israel, the Kingdom of Morocco and the Republic of Tunisia.[301]

6 Competence of institutions

6.1 The measures defining the framework of the implementation of the common commercial policy

The measures defining the framework of the implementation of the common commercial policy are determined by the European Parliament and the Council in regulations that are adopted in a normal legislative procedure. As regards normal legislative procedures, the only thing that is worth mentioning here is that the Commission submits a proposal to the Parliament and the Council, which institutions then discuss the proposal in three readings, they suggest amendments and if the discussions prove to be successful, the regulation is adopted by a vote, in the third reading the latest.

6.2. Conclusion of international agreements

If the Union wishes to enter into an agreement with one or more countries or international organizations, or wishes to negotiate such agreements, then the rules of the Treaty on the Functioning of the European Union on international agreements should be applied, with regard to the special rules laid down in Article 207 of the Treaty on the Functioning of the European Union.

Based on these, the Commission submits recommendations to the Council, which authorizes it to commence the necessary negotiations. Furthermore, the Council may determine guidelines for the main negotiator, it may appoint a spe-

301 Council decision (EC) No. 2006/356, Council decision (EC) No. 2005/690, Council decision (EC) No. 2004/635, Council decision (EC) No. 2002/357, Council decision (EC) No. 2000/384, Council decision (EC) No. 2000/204, Council decision (EC) No. 98/238 concerning the conclusion of the Euro-Mediterranean Agreement establishing an association between the European Community and its Member States of the one part, and the Republic of Lebanon, the People's Democratic Republic of Algeria, the Arab Republic of Egypt, the Hashemite Kingdom of Jordan, the State of Israel, the Kingdom of Morocco and the Republic of Tunisia of the other part, respectively.

cial committee, with which the issues should be coordinated during the negotiations. The Council and the Commission should ensure that the international agreement is in harmony with the internal Union policy and rules. The Commission discusses these issues in the framework of the guidelines issued by the Council. The Commission has a regular reporting obligation to the special committee and the European Parliament.

All the agreements concluded by the Union with third parties in the field of common commercial policy should be submitted to the European Parliament and the opinion of the Parliament should be requested. In the five specific cased specified in Paragraph (6), Article 218 of the Treaty of Lisbon, besides the consultation obligation, approval by the Parliament is also required for the conclusion of an international agreement. This practically involves that approval by the Parliament is necessary for the conclusion of almost all international agreements.

EUROPEAN COMPETITION POLICY

Pál Béla Szilágyi and Botond Horváth

1 Definition and aim of competition policy

In a broad sense, competition policy means the state regulation of competition. The aim of competition policy is to prevent and remove the distortions of competition resulting from the actions of private companies or public authorities, thus enabling the markets to function more effectively. This aim is achieved through competition law. Therefore, one may say that competition law is the means by which competition policy is implemented with regard to firms operating in the market, though competition policy and competition law are often used synonymously. It should be noted, however, that competition policy is about applying competition law to make sure that undertakings compete fairly with each other, which has several positive effects such as it encourages enterprise, innovation and efficiency, results in a wider choice for consumers and helps reduce prices and improve quality.

Instead of entering into thorough theoretical arguments, in the light of the above, in respect of European competition law, the following fields should be mentioned:

- anti-competitive agreements;
- abuse of dominance;
- mergers;
- rules on undertakings providing services of general economic interest,

however, we are going to focus only on the first and second fields.

What the above-mentioned fields regulated by the European Union have in common is that each one aims at prohibiting certain conducts, and these prohibitions provide frameworks for the free market conducts of the undertakings and provide narrow exceptions for undertakings providing services of general economic interest.

2 Scope of competition law

2.1 Sources of law

At the level of the European Union, we might find the substantial rules in the primary and secondary sources of law. Article 101 of the Treaty on the Function-

ing of the European Union (hereinafter: TFEU) prohibits agreements amongst undertakings which restrict competition, Article 102 TFEU prohibits the abuse of dominant position, Article 106 TFEU concerns the rules governing undertakings operating a service of general economic interest.

Hereinafter, we are going to describe the common principles, except for Article 106 TFEU.

Besides TFEU, the Council of the European Union and the European Court of Justice also established secondary legislation which contains implementing or interpretative provisions. Two of the most relevant of these to the matter in hand are the Council Regulation which contains the rules on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU[302] and the Council Regulation on mergers.[303]

We must also mention the general principles of union law and human rights, and the case-law (Commission's decision, judgements of the General Court and Court of Justice) as sources of law.

2.2 Scope

The rules cited above apply to the market conduct of undertakings. The concept of undertaking, in the context of European competition law, covers any entity engaged in an economic activity, regardless of the legal status and of the entity or the way in which it is financed.[304] Any activity consisting of offering goods and services on a given market is an economic activity.[305] However, Treaty rules on competition do not apply to an activity whose aim, by its nature, and the rules to which it is subject do not belong to the scope of economic activity or which is connected to the exercise of the power of a public authority.[306]

When applying European competition, law the first question is, therefore, whether the entity at issue pursues economic activity. If it does, then it is considered an undertaking and is subject to European competition rules. The legal form in which the entity pursues its activity within national law (e.g. limited liability company, shareholding company, association, foundation, etc.) is irrelevant.

302 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, pp. 1–25.

303 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, pp. 1–22.

304 Judgment of 23 April 1991 in Case C-41/90, Klaus Höfner and Fritz Elser v Macroton GmbH, [1991] ECR 01979 at 21.

305 Judgment of 12 September 2000 in Joined Cases C-180/98 to C-184/98, Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten, [2000] ECR 06451 at 75.

306 Judgment of 19 February 2002 in Case C-309/99, J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, [2002] ECR 01577 at 57.

The so-called single economic unit is a special feature of competition law. The concept of undertaking extends beyond the limits stipulated by national laws and extends the notion of undertakings to economic entities. This is aimed at preventing the undertakings from following the same interests on the market, from hiding behind limited liability and thus infringing competition rules without any consequences. It follows from case-law that the concept of undertaking shall be interpreted as meaning one single economic unit, even if from a legal point of view this unit consists of more than one natural or legal persons.[307] It holds relevance not only when establishing the responsibility for infringing competition law but also when imposing fines.

3 Anti-competitive agreements

3.1 Elements

Article 101 (1) TFEU outlines general prohibition regarding anti-competitve agreements when it provides: *'The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object of effect the prevention, restriction or distortion of competition within the common market [...]'.*

Pursuant to the cited provision, it is easy to see that five conditions must be met in order to find that a conduct falls within the prohibition of restrictive agreements, namely:

1. must be an agreement or concerted practice between undertakings or a decision by associations of undertakings;
2. must be an agreement or concerted practice between undertakings or a decision by associations of undertakings;
3. have effect on trade between Member States;
4. its object or effect;
5. must be the prevention, restriction or distortion of competition within the common market.

Ad 1) We have already dealt with the concept of undertaking when we discussed the scope of competition rules in Chapter I, therefore at this point it should be noted that in order to speak about the prohibition contained in Article 101 (1) TFEU, it is required that there at least be two undertakings in the sense of competition law. The situation is that the nature of the prohibition is such that one single undertaking cannot commit the infringement. The undertakings are

307 Judgment of 15 September 2005 in Case T-325/01, DaimlerChrysler AG v Commission of the European Communities, [2005] ECR II-03319 at 85.

not deemed independent if one undertaking has no real freedom to determine its course of action on the market.[308]

Ad 2) The prohibition on agreements restricting competition laid out in Article 101 (1) TFEU might be infringed by undertakings in three forms, i.e. through an agreement, concerted practice or a decision by associations of undertakings.

Article 101 (1) TFEU distinguishes between concerted practice, an agreement between undertakings and a decision by an association of undertakings in order to extend the prohibitions stipulated in this provision to all the coordinations and collusions between undertakings.[309]

In order to classify an interaction between undertakings as an agreement , it is sufficient to have an agreement on that the undertakings concerned express their joint intention to conduct themselves on the market in a specific way. As regards the form in which this joint intention is expressed, it is sufficient for a stipulation to qualify as an expression of the parties' intention to behave on the market in accordance with its terms without its having to constitute a valid and binding contract under national law. It follows from this that the concept of an agreement within the meaning of Article 101 (1) TFEU centres around the existence of a concurrence of wills between at least two parties, where the form in which it is manifested is unimportant so long as it constitutes the faithful expression of the parties' intention.[310]

We speak of concerted practice when the coordination between undertakings, without having reached the stage where an agreement as such has been concluded, consciously substitutes practical cooperation between them for the risks of competition.[311] A concerted practice by its nature does not have all the elements of a contract but may arise out of a coordination which becomes apparent from the behaviour of the participants.[312] The prohibition of concerted practices includes any direct or indirect contact between undertakings, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor, or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.[313]

---

308 Judgment of 31 October 1974 in Case C-15-74, Centrafarm BV et Adriaan de Peijper v Sterling Drug Inc., [1974] ECR 01147 at 41.

309 Judgement of 23 November 2006 in Case C-238/05, Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc), [2006] ECR11125 at 32.

310 Judgement of 26 October 2000 in Case T-41/96, Bayer AG v Commission of the European Communities, [2000] ECR II-03383 at 67–69.

311 Judgement of 14 July 1972 in Cases C-48, 49, 51-57/69, Imperial Chemical Industries Ltd. v Commission of the European Communities, [1972] ECR 00619 at 64.

312 Ibid., at 65.

313 Judgement of 16 December 1975 in Cases C-40-73-48-73., 50-73., 54-73-56-73., 111-73., 113-73. and 114-73, Coöperatieve Vereniging 'Suiker Unie' UA and Others v Commission of the European Communities, [1975] ECR 01663. at 174.

Decisions by an association of undertakings mean any independent market decisions made (in the absence of any explicit order from state law) by an association of undertakings, whether mandatory, recommended or even apparent in a less strict form. This includes e.g. recommending a price, information sharing, or even the statutes of a civil society organization.

Ad 3) An agreement, concerted practice or a decision by an association of undertakings (hereinafter jointly referred to as 'agreement') must appreciably affect trade between Member States. The effect on trade criterion confines the scope of application of Articles 101 and 102 TFEU to agreements having a minimum level of cross-border effects within the European Union.[314]

The requirement implies that there must be an impact on cross-border economic activity involving at least two Member States.[315]

It should be noted that the concept of trade is a wide concept, since it covers all cross-border economic activities. If an agreement interferes with the pattern of trade between Member States,[316] or with the structure of competition in the common market,[317] then it might be qualified as one that affects trade. In order to determine that an agreement might affect trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.[318]

Ad 4) The object or effect of an agreement must be the restriction of competition. Object and effect are alternative requirements, which means that if either of them is fulfilled, it is possible to establish the infringement.

On the basis of the separation of object and effect, we divide anti-competitive agreements into hard-core cartels and other agreements. In the case of hard-core restrictions, it is not necessary to prove that the agreement at issue has actually restricted competition, but it is sufficient if the agreement has been concluded.

The following is considered hard-core anti-competitive agreements (cartels or horizontal hard-core anticompetitive agreements) between competitors:

- price-fixing;
- output restrictions of limiting production;
- market sharing;

314 Guidelines on the effect on trade concept contained in Arts. 81 and 82 of the Treaty [OJ C 101 of 27.4.2004], para 13.

315 Ibid., para 21.

316 Judgement of 30 June 1966 in Case C-56/65, Société Technique Minére v Maschinenbau Ulm GmbH, [1966] ECR 00235.

317 Judgement of 6 March 1974 in Joined Cases C-6-7/73, Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities, [1974] ECR 00223 at 32.

318 Case C-56/65 Société Technique Minére v Maschinenbau Ulm GmbH.

- collective boycott; and
- information sharing on actual or future prices.

Hard-core anti-competitive agreements between non-competitors (so-called vertical hard-core anticompetitive agreements) are the following:

- resale price maintenance;
- absolute territorial protection;
- export ban.

From the above, it is evident that in these cases it is sufficient to prove the existense of the agreement, in other cases – in the case of the so called effect-based cases –, however, the actual anti-competitive effect shall also be proved. In this regard, it can be said that agreements between competitors are more likely to be anti-competitive than agreements between non-competitors, thus agreements between undertakings at a different level of the production or distribution chain are less likely to be anti-competitive. It can be stated as a general principle that while inter-brand competition (e.g. competition between TV producers) is strong, vertical agreements are less likely to be actually anti-competitive, as if inter-brand competition were weak. In this case, therefore, intra-brand competition (e.g. competition between the distributors of the same producer) is less important. It does not mean that these later agreements in the case in question cannot be anti-competitive.

Ad 5) An agreement should be such that prevents, restricts or distorts competition on the common market. There is no substantial difference between the three concepts. In each case, we are examining whether there is restriction of competition or not, or if an agreement is theoretically capable of having such effect. Consequently, these three terms are used in conjunction in practice.

3.2 Exemptions

The fact that an agreement restricts competition within the meaning of Article 101 TFEU implies that it is forbidden. It does not mean, however, that it is necessarily illegal because an agreement which falls under the cited provision might be legal if it is exempted from the ban.

There are two grounds on which exemption is possible:

- under Article 101 (3) TFEU (individual exemption);
- under a Block Exemption Regulation.

Under Article 101 (3) TFEU the provisions of paragraph 1 may, however, be declared inapplicable in the case of[319]

319 See also: Guidelines on the application of Article 81 (3) of the Treaty, OJ C 101, 27.4.2004, pp. 97–118.

- an agreement or category of agreements between undertakings,
- a decision or category of decisions by associations of undertakings,
- a concerted practice or category of concerted practices,

contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

In the case of block exemptions, the legislature has created a set of conditions under which there is an automatic presumption that the conditions of Article 101 (3) TFEU are met. The Commission has issued several block exemptions, for instance, certain vertical agreements or research and development agreements are exempted under block exemptions. Some block exemptions are general,[320] while others relate to special sectors.[321]

Deciding whether an agreement is exempted under individual exemption or block exemption is the task of the undertaking concerned.

In concluding that an agreement is anti-competitive, the burden of proof is on the European Commission, i.e. it is them who have to prove that the conditions of Article 101 (1) TFEU are met, while the undertakings concerned shall prove that despite that, the agreement is legal, since the conditions of Article 101 (3) TFEU or the conditions of a block exemption are met.

4 Abuse of dominant position

4.1 Elements

Under Article 102 TFEU, any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

To establish the abuse of dominance, the following is required:

320 E.g. Commission Regulation 330/2010 of 20 April 2010 on the application of Art. 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, pp. 1–7.

321 E.g. Commission Regulation 461/2010 on the application of Art. 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 129, 28.5.2010, pp. 52–57.

- 1) the underlines must be committed by undertakings in the context of competition law;
- 2) one or more undertakings must have dominant position;
- 3) the dominant position must be held within the internal market or a substantial part of it;
- 4) the undertaking or undertakings must abuse this dominant position;
- 5) effect on inter-State trade.

Ad 1) We have already covered the concept of undertaking in Chapter I, therefore we are now just repeating the definition, namely any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed, is an undertaking.

Ad 2) A dominant position is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.[322] Such a position does not preclude some competition, which it does where there is a monopoly or a quasi-monopoly, but enables the undertaking which profits from it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will evolve, and in any case, to act largely in disregard of it, so long as such conduct does not operate to its detriment.[323]

Two or more undertakings hold a collective dominant position if the undertakings involved, because of factors giving rise to a connection between them, are able to adopt a common attitude and act on the market to a considerable extent independently of their competitors, their customers, and also of consumers.[324]

Three cumulative conditions must be met in order to establish collective dominance: firstly, each member of the dominant oligopoly must have the ability to know how the other members behave in order to monitor whether or not they are adopting the common policy. Secondly, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market; thirdly, the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardise the results expected from the common policy.[325]

---

322 Judgement of 14 February 1978 in Case C-27/76, United Brands Company and United Brands Continental BV v Commission of the European Communities, [1978] ECR 207. at 65.

323 Judgement of 13 February 1979 in Case C-85/76, Hoffmann-La Roche & Co. AG v Commission of the European Communities, [1979] ECR 00461. at 39.

324 Judgement of 31 March 1998 in Joined Cases C-68/94. and C-30/95, France and Société commerciale des potasses et de l'azote (SCPA) and Entreprise miniere et chimique (EMC) v Commission of the European Communities, [1998] ECR 1375. at 221.

325 Judgement of 26 January 2005 in Case T-193/02, Laurent Piau v Commission of the European Communities, [2005] ECR II-00209. at 111.

A dominant position must be distinguished from parallel courses of conduct which are peculiar to oligopolies in that in an oligopoly, the courses of conduct interact, while in the case of an undertaking having a dominant position, the conduct of the undertaking is to a large extent determined unilaterally.[326]

In order to establish the existence of dominant position, the first step is to define the relevant market.[327] The relevant market combines the product market and the geographical market. The relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use, while the relevant geographical market is the area in which the undertakings concerned are involved in the supply and demand of products or services and in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.[328]

Once the relevant market has been defined, the assessment of dominance will take into account the competitive structure of the market, and in particular the following factors:[329]

a) absolute and relative market share: the higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position;[330]

b) barriers to entry or expansion: the potential impact of expansion by actual competitors or entry by potential competitors, including the threat of such expansion or entry, is also relevant when assessing dominance because an undertaking can be deterred from abusing its position if expansion or entry is likely, timely and sufficient;[331]

c) buyer power: even an undertaking with a high market share may not be able to act to an appreciable extent independently of customers with sufficient bargaining strength.[332]

Ad 3) A substantial part of the internal market is not only a matter of geographical size. When determining whether a territory is large enough to qualify

326 Judgement of 13 February 1979 in Case C-85/76, Hoffmann-La Roche & Co. AG v Commission of the European Communities, [1979] ECR 00461. at 39.

327 See also: Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372, 9.2.1997., pp. 5–13.

328 Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372, 9.2.1997., paras. 7–8.

329 See also: Guidance on the Commission's enforcement priorities in applying Art. 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45, 24.2.2009., pp. 7–20.

330 Ibid., para 15.

331 Ibid., para 16.

332 Ibid., para 18.

as a substantial part of the internal market, the pattern and volume of the production and consumption of the given product or service, as well as the habits and economic opportunities of customers and vendors must be taken into account.[333] The territory of a Member State is likely to be a substantial part of the internal market within the meaning of Article 102 TFEU.[334] It should be noted that even a part of the territory of a Member State might be sufficient to conclude that the condition is met.

Ad 4) A finding that an undertaking has a dominant position is not in itself an infringement but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.[335]

Abusing dominant position – provided there is a casual link – is, however, forbidden. Abuses can be grouped in two ways. According to the first one, we can group them as price-based and non price-based abuses, while according to the second classification, we can group abuses as exploitative and exclusionary abuses.

Price-based abuses are for instance: a) discounts and rebates; b) certain forms of tying; c) predatory pricing; d) margin squeeze; e) price discrimination; f) other price-based abuses hindering the integration of the internal market; g) predatory pricing.

Non price-based abuses are typically: a) single branding; b) tying; c) refusal to supply; d) other non price-based abuses hindering the integration of the internal market.

It should be noted that the above-mentioned lists are just illustrative lists. Abusing dominant position might be realised in any form of conduct which, as result of abusing dominant position, is capable of restricting competition or exploiting consumers.

ad 5) Article 102 TFEU applies when the abusive conduct of the dominant undertaking appreciably affects trade between Member States. Since we already covered this topic when we dealt with restrictive agreements, at this point we only repeat that trade between Member States might even be affected potentially, it is sufficient for the condition to be met.

---

333 Judgement of 16 December 1975 in Cases C-40-73-48-73., 50-73., 54-73-56-73., 111-73., 113-73. and 114-73, Coöperatieve Vereniging 'Suiker Unie' UA and Others v Commission of the European Communities, [1975] ECR 01663. at 371.

334 See e.g.: Judgement of 27 March 1974 in Case C-127/73, Belgische Radio en Televisie and Société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior, [1974] ECR 00313., where Belgium was held to be a substantial part of the common market.

335 Judgement of 9 November 1983 in Case C-322/81, NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities, [1983] ECR 03461. at 57.

4.2 Exemptions

Unlike in the case of Article 101 TFEU, Article 102 TFEU does not contain an explicit exemption provision. Case-law, however, developed the so-called objective justification and efficiency claim by which abusive conducts infringing Article 102 TFEU may escape.

The question of whether the given conduct is objectively necessary and proportionate must be determined on the basis of factors external[336] to the dominant undertaking.[337]

The undertaking holding dominant position might, for instance, justify its conduct leading to the foreclosure of competitors on the grounds of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise. In this context, the dominant undertaking will generally be expected to demonstrate, with a sufficient degree of probability, and on the basis of verifiable evidence, that the following cumulative conditions are fulfilled:

a) the efficiencies have been, or are likely to be, realised as a result of the conduct. They may, for example, include technical improvements in the quality of goods, or a reduction in the cost of production or distribution;

b) the conduct is indispensable to the realisation of these efficiencies: there must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies;

c) the likely efficiencies brought about by the conduct concerned outweigh any likely negative effects on competition and consumer welfare in the affected markets;

d) the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition. Rivalry between firms is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence, the dominant firm will lack adequate incentives to continue to create and pass on efficiency gains. Where there is no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process outweigh possible efficiency gains. In the Commission's view, exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.[338]

It is incumbent upon the dominant undertaking to provide all the evidence necessary to demonstrate that the conduct concerned is objectively justified.[339]

---

336 For instance: health or safety considerations.

337 Guidance on the Commission's enforcement priorities in applying Art. 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45, 24.2.2009., para. 29.

338 Ibid., para 30.

339 Ibid., para 31.

COMPETITION POLICY – STATE AID MONITORING

Zsuzsanna Remetei Filep

State aid control is one of the main pillars of EU competition law. State aid influences the level playing field on the markets by favouring certain undertakings and thus they cause serious losses for their competitors within their own Member State or even on EU level. In order to minimise the possible negative effects of state interventions the EU is committed to lower the amount of State aid so it obliged Member States, when granting State aid, to prefer horizontal objectives which promote social and economical cohesion, employment, environmental protection, the research and development just as the promotion of small and medium-sized enterprises. Member States are allowed to intervene only to remedy market failures, they are obliged to control the efficiency of the aid granted and to avoid undue distortion of competition without any justification.

State aid is in general prohibited. Article 107 paragraph 1 TFEU says that save as otherwise provided in the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as the it affects trade between Member States, be incompatible with the internal market. All of the previous conditions have to be fulfilled in order to qualify a measure as State aid.

However, certain aid categories are exempted. Accordingly, Article 107 paragraph 2 and 3 TFEU defines the aid categories which may automatically be compatible with the internal market, or which are compatible after the approval of the European Commission. The European Commission has exclusive power to control State aid measures and declare them as compatible with the EU competition rules and therefore with the internal market.

Beside these, there are several situations where the previous conditions are only seemingly fulfilled therefore the measure do not qualifies as State aid: (a) when the State acts like any other market player (private investor or creditor) would have done; (b) when the measure is a general measure; (c) the measure stems from the nature of the system.

State resources include the aid awarded by central, regional or local governments, municipalities or state owned companies as well. Moreover, a private company where the members of the board are designated by the State or where the decisions taken are controlled by the State may also qualify as part of the State and aid given by this company may equally qualify as State aid coming under Article 107 paragraph 1 TFEU.

The recipients of aid must be *undertakings*, which can take the form of not just conventional companies but any natural or legal persons engaging in economic activites which are capable to take independent economic or commercial decisions. Any entity which is active on the market or even a church active in the hotel business may qualify as undertaking. Even local governments or foundations may qualify as undertakings in case they pursue in economic activity. The Treaty itself does not define the notion of undertaking so one have to take into account the settled case law of the European Commission and the EU Courts. There is no need for the companies to always pursue profitable activities in order to be considered as undertakings.

In case the given measure, under normal market conditions, would not come to the same result or the recipient of the aid does not have to provide anything commensurate in return, the measure could favour the recipient. Any advantage of monetary nature qualifies as state aid if it lowers the operational costs of the recipient undertaking and the recipient would not have obtained it under normal market conditions. The aid shall affect the central or the regional or the local budget, i.e. it shall take the form of transfer of state resources or forgone revenues.

Article 107 paragraph 1 TFEU applies to any form of state aid so it includes all kind of advantage of monetary nature conferred by the State or state resources that could not have been obtained under normal market circumstances. These advantages are not only grants or state guarantees but tax allowances, tax deferrals, preferential loans or social security contributions which the state failed to collect, etc. Thus the actual form of aid is irrelevant for the purposes of Article 107 paragraph 1 TFEU, even the objective of the aid has to be set aside, only the actual or potential effect of the measure which counts.

General measures do not constitute state aid. Article 107 paragraph 1 TFEU speaks about favouring certain undertakings or certain products. There is no concrete definition either in the Commission's practice or in the EU courts' jurisprudence for it. For instance, measures designed to reduce the taxation for labour for all firms active within the labour-intensive industries might favour undertakings comparing with those active in capital-intensive industries. However, these general rules often defined in obligatory legal acts with a nationwide scope relating to indefinable amount of beneficiaries do not qualify as state aid within the meaning of Article 107 paragraph 1 TFEU. Similarly, tax incentives for environmental, R&D or training activity favour only those firms which undertake such an activity, without however necessarily constituting state aid.

Measures stemming from the nature of the system do not qualify as state aid within the meaning of Article 107 paragraph 1 TFEU either. Examples can easily found among the tax measures. For example, as to the income taxes there is no obligatory harmonisation within the EU, so the pure fact that the tax burden dif-

fers in the different Member States does not result in state aid favouring undertakings within those countries where the tax level is lower.

Selectivity may based on any criterion, such as the size of the beneficiary undertakings, their seat, activity or any other criterion.

There is neither definition, nor threshold or quantitative measure which indicates that aid indeed affects trade, it shall only be traceable. Based on the settled case law aid may affect the intra-EU trade even if it is only of relatively small amount. Accordingly, the effect on trade is presumed int he case of all aid measures, unless it qualifies as *de minimis* aid or it has *de facto* domestic effect or the transaction is wholly outside the EU, provided that there is no indirect impact on the internal market.

In order to qualify as State aid, an aid measure shall be able to distort the competition. During its examination, the Commission shall not define the quantitative degree of the distortion, it is enough only to declare that the measure threatens to distort the competition on the relevant market. The Commission shall not examine the declared object of the measures but the factual or the possible, the direct or the indirect effect of it. Effect on trade seems to be evident for the Commission, Member States hardly ever managed to prove the contrary against the arguments of the Commission.

Article 107 paragraph 2 TFEU defines certain categories of aid which are automatically compatible, while paragraph 3 authorises the European Commission, provided that certain conditions are fulfilled, to declare certain aid categories as compatible with the internal market. Furthermore, according to Article 107 paragraph 3 point e) TFEU the Council may approve certain aid measures upon the proposal of the Commission. Consequently, any aid plan is prohibited if it does not meet the requirements set by the exemptions defined in Article 107 paragraph 2 and 3 TFEU.

Aid having a social character and granted to individual consumers shall automatically compatible with the internal market provided that such aid is granted without discrimination related to the origin of the products concerned. Aid to make good damages caused by natural disasters or exceptional circumstances shall also be compatible with the internal market. This automatic compatibility does not mean that any aid granted for these purposes escapes from the obligatory ex ante notification to the Commission. Upon notification such a measure, the Commission examines whether the aid plan comes under the scope of Article 107 paragraph 2 TFEU and if so, whether the possibility of overcompensation in ensured, i.e. the planned aid amount is confined to the minimum necessary.

Article 107 paragraph 3 TFEU lists the possible exemptions which may be compatible with the internal market. Based on its wide exclusive power and after a thorough investigation procedure, aid granted for these purposes may be approved by the Commission. Member States are obliged to notify any aid plan

to the Commission before putting them in force in order to get its prior approval. Until the positive decision of the Commission aid cannot be awarded (standstill clause). Even if a Member State does not share the opinion of the Commission, it cannot grant the aid but it can challenge the decision of the Commission at the European Courts.

According to Article 107 paragraph 3 point a) TFEU regional investment aid can be granted in the eligible regions of the Member States where the standard of living is abnormally low or where there is serious underemployment compared to the EU average, where the GDP – based on the spending power parity – Is less than 75% of the EU average. Article 107 paragraph 3 TFEU refers to eligible regions which are disadvantaged in comparison to the national average. The list of these regions is decided by the Commission on the proposal of the Member State concerned.

The objective of regional aid measures, typically regional investment aid measures is to promote the setting-up of a new establishment in the region concerned, the extension of an existing establishment, newly created jobs linked to an investment. Beside these, there are also other aid categories like the promotion of environmental protection or research and development activities where the aid intensity is differentiated on a regional basis.

The detailed rules are within the guidelines on regional aid and within the General Block Exemption Regulation. The maximum aid intensity for the different regions are defined in the so called regional aid map which is approved by the Commission based on the proposal of the Member State concerned.

Article 107 paragraph 3 point b) TFEU refers to the promotion of the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State. Certain environmental projects may belong to the former category and under this point was approved the so called Airbus project as well, when the company tried to enter the market dominated by Boeing. The aid measures dealt with cases to remedy the financial crises started in 2008 were also approved by the Commission according to this exemption of the Treaty. Several Member State took measures to ensure the financial stability in order to restore the trust in the financial markets and in order to minimise the risk of serious credit constrains.

As the wording of the cited provisions of TFEU are rather general and these rules have a very wide scope to ensure that the Commission uses its discretionary power in a transparent and predictable manner, the Commission published in the Official Journal several notices, guidelines, frameworks and similar documents. This secondary legislation sets the conditions followed by the Commission during its investigation. Although these rules have no direct effect on Member States it is advisable to follow them as the approval of the Commission is likely in these cases. This set of rules define for example the method of calcu-

lating aid intensity, the beneficiaries or the maximum aid intensity, i.e. which percentage of the eligible costs of a project can be subsidised through state resources.

The primary objective of Commission's control is to let the market forces drive the activity of undertakings and to minimise the market distortion caused by state intervention, to minimise the negative effects on the internal market. Accordingly, even when an aid measure comes under the scope of Article 107 paragraph 3 TFEU but confers undue benefit to certain undertakings, the aid measure concerned will not get the approval of the Commission. An approved aid measure shall remedy either a market failure or a regional or structural handicap. The aid shall encourage the beneficiary to do such an activity which it would not have conduct under normal market circumstances. Costs of everyday operation cannot be financed through state resources.

Where the possible beneficiary undertakings would act in the same manner or would do the same activity by using solely their own resources without any state aid, the approval/positive decision of the Commission is unlikely. Accordingly, the first step of the investigation is to scrutinize the necessity of the aid measure, whether the aid promotes the aims defined in Article 107 paragraph 3 TFEU. In those cases when the notified aid measure is in line with the conditions set by the secondary legislation, the Member State generally shall not prove the necessity of the measure.

Second question is whether the aid is proportional to the problem to be solved. The amount of aid may never exceed the minimum necessary. Considering that the majority of the aid measures – irrespectively of its purpose – distorts competition, it is the control of proportionality which makes it possible to reach the intended balance between the distortion and the purpose of the aid. In order to ensure proportionality, legal provisions contain regulations for aid intensity and cumulation, i.e. overall aid amount admissible from several resources for the same project.

Aid intensity is the ratio expressed in the form of percentage of the aid element and the present value of the eligible costs of the subsidised project.

The Council empowered the Commission to declare, in accordance with Article 87 EC Treaty (currently Article 107 TFEU) that under certain conditions aid to small and medium sized enterprises (SMEs), aid in favour of research and development, aid in favour of environmental protection, employment and training aid, and aid that complies with the map approved by the Commission for each Member State for the grant of regional aid is compatible with the internal market and not subject to the notification requirement of Article 88 paragraph 3 EC Treaty.

The aim of the block exemption regulation is to decrease the workload of the Commission and to standardise the conditions of aid granting activity within the

Member States. It defines general compatibility criteria based on the settled case law of the Commission thus it waives its exclusive rights to control and approve the aid measures coming under the scope of the Regulation and it assigns this right to the Member States. Consequently it simplifies the procedure though Member States shall not notify the aid plans coming under the scope of the Regulation, they shall not wait for the prior approval of the Commission and the Commission can allocate its capacity to major cases. Of course the possibility of an ex post control executed by the Commission still exists however its incidence is much smaller and in general the length of the procedure is shorter.

The General Block Exemption Regulation replaces the former block exemption regulations (the regulation for SMEs, for research and development aid for SMEs, for training, for employment and for regional aid) and it also widens the scope of the block exempted aid categories so it applies to the transparent aid measures like certain regional aid measures; investment and employment aid measures for SMEs; aid measures favouring undertakings established by female entrepreneurs; certain environmental protection aid measures; aid to SMEs for consultancy and participation in fairs; risk capital measures favouring SMEs; research, development and innovation measures; training aid; as well as aid for recruiting disabled or disadvantaged workers.

Within the meaning of Article 108 TFEU the European *Commission has the sole responsibility* to supervise the aid plans and assess the compatibility of them with the internal market and it keeps under constant review all systems of existing aid measures within the Member States. The Commission continuously cooperates with Member States when reviewing the existing aid measures.

The EU State aid control system is an ex ante control system, i.e. until the approval of the European Commission no aid measure can put into effect, no aid may be granted, otherwise it qualifies as illegal aid with all of its consequences.

The procedure of the Commission has two main parts: the preliminary examination of the notification and the formal investigation of the measure concerned. These procedural steps differ according to the different aid categories like new or existing aid, individual aid or aid scheme.

New aid means any aid measure which is not existing aid. These are the new aid schemes, the new individual aid measures including the alterations of existing aid measures and those aid measures which are awarded individually under an approved aid scheme.

Existing aid shall mean such an aid measure which were put into effect before and are still applicable after the establishment of the European Union and also those measures which were put into effect before the Member State concerned joined to the EU. Existing aid shall mean also those measures which have been authorised by the Commission or by the Council, aid measures about which the Commission did not take its decision within the two-month time limit and also

those illegal aid measures according to which the ten years limitation period elapsed. Finally, aid that at the time when they were put into effect was not considered aid, or subsequently became aid due to the evolution of the relevant market without having been altered by the Member State in order to meet the provisions of the new legislation, can be also existing aid. The Member State concerned may implement the existing aid measure up until the Commission raises its doubts as to the compatibility of it, however any modification of these existing aid measures creates new aid thus notifiable to the Commission in order to get its approval.

Both new and existing aid measures can be individual aid or aid scheme. *Individual aid* means any aid measure, which is not awarded on a basis of a notified aid scheme, or such a measure which is granted from an aid scheme though but due to the secondary legislation (e.g. the project or the aid to be granted exceeds a certain threshold), it has to be notified to the Commission. An *aid scheme* shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner. In order to introduce an aid scheme only the scheme itself has to be notified to the Commission and upon the approval it can be implemented without further control of the individual aid decisions or aid contracts by the Commission. In case of individual aid measures all of them need the approval of the Commission.

Member States are obliged to notify the Commission any new aid plan in sufficient time. If any doubt raises as to the applicability of Article 107 paragraph 1 TFEU, Member States have to make the notification. If the notified measure does not qualify as State aid according to Article 107 paragraph 1 TFEU, the Commission also takes its decision on it. Aid notifiable shall not be put into effect before the Commission has taken a decision authorising it (standstill clause). What do we mean by put into effect the measure? According to the settled case law, it means if there is no further procedural or legal step needed to take the advantage of the benefit.

Preceding the official notification of an aid plan any contact between the Commission and the Member State concerned makes them possible to have an unofficial and confident discussion about the legal and economical aspects of the measure. The so called prenotification phase, by discussing the questions, improves the quality of notifications, make them more complete thus enabling a quicker decision making process.

Member States shall aim to compile a complete notification, i.e. it shall provide the Commission all necessary and available information in order to enable the Commission to decide on the compatibility or incompatibility of the aid with the internal market. The official notification shall be complete for the purposes

of both the preliminary examination and the formal investigation procedure. Where the Commission considers that information provided by the Member State is incomplete, it shall request additional information from the Member State and the latter should provide these within the prescribed time-limit. The notification shall be deemed to be complete when the Commission does not request any further information within the two months from its receipt or from the receipt of any additional information requested. In practice, due to the enormous workload, the Commission request further information in almost every case, thus the two months period to take its decision restarts so. It is not only the Commission who can prolong the deadlines, but the Member State concerned may also request for prolongation. Member States may withdraw their notifications or in cases when a Member State does not provide the requested additional information within the prescribed period, the notification shall be deemed as withdrawn.

The Commission shall examine the notification made by a Member State as soon as it received the complete notification and within two-months it shall come to a decision. However a preliminary examination can be started upon a complaint of a competitor or *ex officio* as well. In these cases the two-months time limit is not relevant, however the examination should start at the earliest and should terminated as soon as possible (additional information may be requested from the Member State also in these cases).

As a result of a preliminary procedure the Commission may come to the following decisions: the notified measure does not constitutes state aid within the meaning of Article 107 paragraph 1 TFEU or the measure is compatible with the internal market or it communicates its doubts as to the compatibility of the aid plan and decides to open a formal investigation procedure.

Where the Commission has not taken any of the above decisions within the period set by the law, the Member State concerned shall inform the Commission about the date of enter into force of the aid measure in question and it can even implement it unless the Commission takes a decision within 15 working days following the receipt of this notice of the Member State.

Whenever the Commission finds, as the result of a preliminary investigation of the notified aid plan, that there are doubts or serious problems as to the compatibility of the measure, it opens a formal investigation procedure. The decision to open a formal investigation procedure is communicated to the Member State concerned by letter, whereas other Member States and interested third parties are informed by notice in the Official Journal.

The Commission may open a formal investigation procedure also in those cases when it considers that the aid in question can be authorised only with conditions. In these cases the experts of the Commission and the Member State are encouraged to cooperate well before the decision of the Commission is taken in

order to modify the notified measure and thus avoid an opening or a conditional decision.

The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the internal market. Thus the classification of the aid measure set by the opening decision is temporary, the Commission is not obliged to give its thorough reasoning in this part of the procedure so the decision closing the formal investigation can alter.

After communicating the opening decision on the formal investigation procedure both the Member State concerned and third parties are given the possibility to submit their comments to the Commission within the time-limit set by the decision. However it is in the interest of the beneficiary and the Member State concerned that the procedures come to the end as soon as possible. In case of complex cases, where more authorities are involved, they often ask for prolongation of the deadlines set by the Commission. There are no absolute time limits to the Commission's investigation, although it is expected to be concluded right after its doubts are dissolved and not later than 18 months after the arrival of the notification.

Unless the notified aid plan is withdrawn, the Commission may take – with proper reasoning – the following decisions in order to terminate its investigation:

- the proposed aid measure *does not constitute state aid* pursuant to Article 107 paragraph 1 TFEU (either because it is not granted by a member State or through state resources or it does not confer any advantage to the recipients or it does not affect trade between Member States or it is not selective i.e. it does not favour certain undertakings or economic activities or it does not distort competition in the internal market);
- *positive decision* i.e. the measure is compatible with the internal market. in this case the Commission shall specify which exemption under the Treaty has been applied.
- rarely a *conditional decision* where it specifies requests of changes or restrictions and only after completion of these can the aid measure be implemented.
- *negative decision*, i.e. the denial of the notification, in case the Member State cannot eliminate the doubts of the Commission (ca. 7% of the notifications will be closed by a negative decision).

Any new aid scheme or individual aid granted in breach of Article 108 paragraph 3 TFEU qualifies as unlawful aid. Unlawful aid means any aid measure

which entered into force or granted before the approval of the Commission, the unnotified aid measures or those which were granted contrary to the decision of the Commission.

The procedure concerning the unlawful aid measures is similar to that for the notified measures with the exception of those consequences which are stemming from the unlawfulness of the measure. As in these cases there were no notification to the Commission, the examination procedure starts upon a complaint by a competitor or *ex officio*.

The Commission is empowered to issue a so called information injunction in case the Member State concerned does not provide information or the information provided is incomplete. The Commission may issue also a suspension injunction requiring the Member State to suspend any unlawful aid until the Commission has taken a decision of the compatibility of the aid with the internal market. Commission may also adopt a decision requiring the Member State to provisionally recover any unlawful aid if there are no doubts about the aid character of the measure concerned and there is urgency to act due to serious risk of substantial and irreparable damage to a competitor.

The Commission may issue the same type of decisions in case of any unlawful aid when closing an examination (non aid; compatible aid; opening decision; injunction decision).

In cases of unlawful aid – as a sanction to unnotified aid measure – the Commission is not bound by any time-limits or deadlines to reach its decision, so both the two-month period for the preliminary examination and the 18-months period of maximum length of procedures are irrelevant.

In cases of unnotified aid measures national courts may order recovery even before the Commission decides on the compatibility of the aid measure. Unlike the national courts, the Commission cannot order state aid to be repaid solely on the ground that it has not been notified in accordance with Article 108 paragraph 3 of the Treaty. National courts must offer to competitors and individuals that in accordance with their national law, all the necessary steps will be taken in order to protect them from possible losses in case of an infringement of the last sentence of Article 108 paragraph 3 TFEU. The initiation of procedure by the Commission under Article 108 paragraph 2 and 3 TFEU does not relieve national courts of their duty to safeguard rights of competitors and individuals in the event of a breach of the requirement of prior notification and granting unlawful aid to an undertaking. Due to the direct effect of Article 108 paragraph 3 TFEU, national courts shall proceed solely on the ground of procedural regulations, without examining the compatibility with the internal market of the debated measure. The national authorities may also ask for the repayment of the sums granted in case of unnotified aid measures, beneficiaries may be ordered to recover the unlawful aid.

In case the Commission finds that the aid plan is incompatible with the internal market, it takes a negative decision and the Member State cannot put the measure into effect. In this case the Commission shall decide that the Member State concerned shall take all necessary steps to recover the aid including interest from the beneficiary. Recovery shall be affected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision.

Beneficiaries can only avoid recovery of an unlawful aid if this would be contrary to a general principal of EU law. Beneficiaries can rely on the doctrine of lawful expectations only in those cases where the Member State concerned notified the aid plan concerned in advance to the Commission. Beneficiaries cannot argue that they had no information about the qualification of the measure or about the failure of prior notification. A diligent businessman shall control the existence and content of the Commission decision, a diligent businessman should normally be able to determine whether the necessary procedure has been followed. However, the unreasoned lagging of the Commission can support its lawful expectations that the aid granted by the Member State was lawful. Furthermore, after the elapse of the 10 years of limitation period recovery shall not be required. Limitation period starts on the day of the aid granting decision was taken irrespectively that the decision concerns an aid scheme or an individual aid. After the limitation period elapsed the aid measure qualifies as existing aid.

Any negative or recovery decision of the Commission can be challenged at EU courts, however according to Article 263 TFEU this application has not an automatic suspension effect as to the implementation. The suspension of such a decision can be claimed according to Article 278 TFEU.

According to the national law, any aid measure coming under Article 107 paragraph 1 TFEU ordered to be recovered by the Commission shall be qualified as a claim to be collected like taxes.

State Aid Monitoring Office (SAMO) was established in 1999 within the Ministry of Finance, currently it is part of the Ministry of the Prime Minister's Office. Before Hungary's accession to the EU the SAMO had similar role than the EU Commission, it had controlling and approving functions. In order to establish a centralised control system for aid measures, a government decree has been adopted though certain aid measures has to be notified to the SAMO well before entering into force. In 2001, Article 15 of the Act on Central Budget introduced the general aid granting ban and a new government decree introduced the major provisions of secondary EU state aid legislation and it also widened the type of measure which had to be notified. Due to the thorough activity of the SAMO, due to the successful enforcement of the national State aid legislation, almost all of the Hungarian state aid measures designed before

Hungary's accession have been introduced in conformity with the relevant part of the EU acquis.

Hungary's accession to the EU did not cause major changes as to the content of the applicable State aid rules, however due to the discretional power of the EU Commission and to the direct affect of the EU acquis, the role and duties of the SAMO has changed a lot.

According to the above, aid plans are under continuous control by the SAMO as the ex ante notification obligation remained for all type of aid measures. The procedure of SAMO is different, it depends on the content of the aid measures. In case of aid plans which have to be notified also to the Commission, SAMO gives its prior opinion – with modification proposals if necessary – whether the aid plan is suitable to notify it to the Commission. Aid plans eligible for official notification to the Commission will be sending to it by the SAMO. SAMO also represents the national opinion and acts during all communication with the Commission. Commission should only be informed about aid plans, aid measures coming under the general block exemption regulation, however these aid measures also have to get the prior approval of SAMO.

Calls for application based on aid schemes approved by the Commission can enter into force only after notification and approval of the SAMO.

The central role of the State Aid Monitoring Office remains even after accession to the EU, SAMO is the official link between the EU Commission, the aid grantors and the beneficiaries. Beneficiaries should cooperate with SAMO ensuring the successful communication with the EU Commission. The experts of SAMO represent the Hungarian position both when acting at the Commission procedures and at the advisory meetings held by the Commission.

INTELLECTUAL PROPERTY IN THE LAW OF THE EUROPEAN UNION

Áron Márk László

It is almost impossible to discuss intellectual property rights in the law of the European Union within a single presentation, or in a single chapter. Thus, the purpose of this lecture and these notes is to focus on these issues in this broad area, which on the one hand exert the strongest influence on the everyday work of the lawyers, and on the other hand, help the listeners understand those landmark changes which were brought about by the law of the European Union in the field of intellectual property.[340]

Among the forms of intellectual property, it is perhaps trademarks through which we can best show the effect of Community law on intellectual property to the students, this is why we will deal with trademarks in more detail than with the other forms of intellectual property when discussing the development of law in this lecture and in these notes. In the work indicated in the footnote, the other forms of intellectual property are also discussed in more detail.

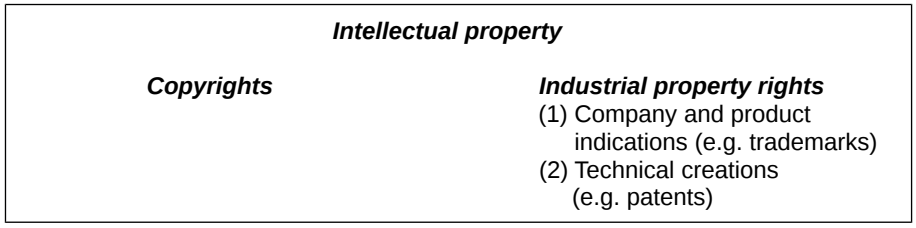
1 Intellectual property – definition of concept

The rights that are called 'intellectual property' ('geistiges Eigentum', 'propriété intellectuelle') in many legal systems, including EU law, were earlier called 'intellectual creation' in the Hungarian civil law, i.e. this word was used in Article 86 in Part II Title IV of Act IV of 1959 (the old Hungarian Civil Code, Hungarian acronym: Ptk) ('*Civil Law Protection of Persons*'). The concept of 'intellectual property' describes the economic and ownership aspect of the properties meant to be protected, while in the concept of 'intellectual creation', the personal elements of creation are regarded as primary. Thus, in the previously effective Hungarian Civil Code, the intellectual activity of the persons who produce intellectual creations was put in the foreground, contrary to the practice followed by the other legal systems, where the focus is placed on the 'immaterial' (intan-

340 In presenting this extraordinarily broad topic, in my notes I greatly relied on Dr. György Boytha, 'Iparjogvédelem, szerzői jog' ('Industrial Property Rights, Copyright'), in: Dr. Miklós Király (ed.), *Az Európai Közösség kereskedelmi joga* (The Commercial Law of the European Community), KJK-KERSZÖV, Budapest 2003, which was authored by Professor Dr. György Boytha, who deceased in 2010. This work is also recommended reading for those who are interested in the topic, and it is definitely indispensable in preparing for the examinations.

gible) assets that are created as a result of intellectual work.[341] In the old Hungarian Civil Code, trademarks and geographical indications are listed under intellectual creation, despite the fact that in this scope, the use of the concept of 'intellectual creation' is actually not accurate, as in the strict sense of the word, trademarks and geographical indications do not qualify as intellectual products, as no actual act of creation is related to their production. The effective Hungarian Civil Code (Act V of 2013), however, has brought about a change, as the expression 'right of intellectual creation' has disappeared from the new Civil Code.[342]

Intellectual property rights can be divided into two main groups according to their object: copyrights and industrial property rights. Copyrights mainly ensure the protection of works created in the area of arts, literature and science but they also cover some areas that are less tightly related to the above, so they provide protection for e.g. software and databases, as well as the related rights. Industrial property rights encompass a more heterogeneous area, the works that they safeguard are more of an industrial, technical, economic nature (e.g. patents, trademarks, designs). Some authors[343] are concerned that assigning certain areas of competition law to this field may not be the right thing to do. Although the author of this article agrees that there are some similarities between certain fields of competition law and certain forms of industrial property rights, in his opinion, competition law is not to be discussed in the scope of industrial property rights.



In Hungary, the main areas of copyrights and industrial property rights are regulated on the level of laws, which laws also serve Hungary's compliance with a number of bilateral and multilateral international agreements and European

341 Cf. Dr. Anikó Grad-Gyenge, 'Búcsú a szellemi alkotások jogától? - A szerzői jog és az iparjogvédelmi oltalmi formák polgári jogi védelme a magyar magánjogban' (A Farewell to the Right of Intellectual Creation? – Civil Law Protection of Copyright and the Forms of Industrial Property Rights in Hungarian Private Law), in: *Szerzői jog és iparjogvédelem a magyar magánjogban* (Copyright and Industrial Property Rights in Hungarian Private Law), Patrocínium, Budapest 2012.

342 Cf. Dr. Grad-Gyenge 2012, Section II.1.

343 Cf. Endre Lontai, Gábor Faludi, Péter Gyertyánfy & Gusztáv Vékás, *Magyar Polgári Jog – Szerzői jog és iparjogvédelem* (Hungarian Civil Law – Copyright and Industrial Property Right), Eötvös Kiadó, 2012, p. 13.

Union law. Hungary committed itself to the adoption of EU law on the basis of the European Agreement (Act I of 1994) that took effect on February 1, 1994, and this goal was accomplished by May 1, 2004 when Hungary acceded the EU. Of course, EU law is regularly amended, so the Hungarian laws must continuously follow the changes in EU norms.

2 International agreements and the Treaty of Rome

The right to intellectual property is on the one hand *territorial*, on the other hand it has an *international character* as a result of the international trade in goods with inherent intellectual property. The protection of intellectual property is territorial, i.e. it is dependent on the territory of the state in question, since the subject matter of the protection of intellectual property and the relevant legal protection are determined by the laws of the individual states. Also, according to the general rule, the courts of the individual states only have jurisdiction over the territory of the state in question. At the same time, intellectual property rights belong to a field of international law, as long as the different forms of intellectual property, as intangible assets, move more easily between the states than material assets do – let us just think of the musical pieces, films, literary works of our days, or even the goods supplied with trademarks, or the technical devices with patents.

In order to ensure the international protection of intellectual property, such international agreements which, through defining mandatory minimum rules for the signatory states, ensure the uniform and broad protection of intellectual property in the individual member states, were entered into relatively early. For example, in the field of copyright, the Berne Convention was signed as early as 1886, which has been of critical importance ever since, while in the field of industrial property rights, the Paris Convention concluded in 1883 has also exerted great influence up to the present. Since then, numerous other international agreements have been signed in the individual areas of law.[344]

The Treaty of Rome, which established the European Economic Community in 1957, primarily has economic objectives, and it does not contain any meaningful provisions on intellectual property, which then had less economic significance than in our days. In the Treaty of Rome, mention is only made of this field of law in Article 36, where it allows *exceptions* from the free movement of goods, namely, it allows those member state prohibitions or restrictions which

344 The TRIPS Agreement on the commercial correlations of intellectual property rights can only be mentioned as an example, along with some further agreements discussed later in the notes (e.g. the Washington Patent Cooperation Treaty (PCT) of 1970, or the Paris International Convention for the Protection of New Varieties of Plants (UPOV) of 1961, etc.).

are justified by the '*protection of industrial and commercial property*'. According to the provisions set out in Article 36, '*such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States*'.

This means that at that time, there was no Community regulation in place concerning copyrights, nor was there any answer to the question on how the territorial protection of industrial property rights registered on the basis of national laws can be reconciled with the free movement of goods. It was the judgments of the European Court of Justice[345] that first answered these questions, then this was done by normative Community regulation.

3 Ensuring the free movement of goods and free competition

The issues not regulated by the Treaty of Rome led to an intense dispute soon after the treaty had been signed. In 1962, five years after the Treaty of Rome was signed, the European Commission had to interpret Article 36 of the Treaty of Rome on the patent licence agreements dividing the markets.

The problem lies in the following: a patentee often has patents of the same object in several member states. The patentee has obtained these in procedures before the national patent offices of the individual member states. The patentee determines by free choice who they permit the use of the national patent in question to (who they give a licence to). If the patentee gives a patent licence to 'X' in member state 'A', while to 'Y' in member state 'B', then the product which is covered by the patent cannot be taken from member state 'A' to member state 'B', as in member state 'B' it is licensee 'Y' that will be entitled to use the patent, and they can prevent the imports directed to member state 'B' on the basis of their licence. By this, the fundamental Community interest related to the free movement of goods will be violated.

In its communication issued on December 24, 1962 (the commonly known title of which is the '*Christmas message*'), the Commission took the stance that the patent licence agreements that divide the markets do not run counter to the cartel prohibition provided in Article 85 of the Treaty of Rome (currently Article 101 of the Treaty on the Functioning of the European Union), '*because such restrictions are the expressions of the patentee's exclusive right, and they serve the protection of the latter by involving the licensee*'.[346]

345 The current name of the European Court of Justice (ECJ) is the Court of Justice of the European Union (CJEU). In this note, I have consistently used the expression European Court of Justice, or the Court.

346 Boytha 2003, p. 347.

As it turns out, the conflict between *the interest of ensuring absolute rights related to intellectual property* and *the interest related to the free movement of goods and services* manifested itself rather soon. On the one hand, the absolute, property right type protection of intellectual property ensures the monopoly of the person who creates the object of the intellectual property right, i.e. the creator of intellectual property obtains an exclusive right to use the intellectual property, generally for a limited time. This is required for ensuring the recovery of the investments of the creator of the intellectual property, as it is through this that the creation of ever newer works can be encouraged. On the other hand, however, intellectual rights, through their territorial nature, are suitable for restricting trade between the member states, according to the above.

The approach taken by the *Christmas message* would have significantly jeopardized the free, unrestricted movement of goods and free competition with regard to the goods that have inherent intellectual property. The situation is that on the basis of the licences, the distributors chosen by the right owners could have prevented that the products are imported cheaper by third parties from other member states to the member state affected by the licence. As it turns out from the legal cases to be presented below, this is why the exception mentioned in Article 36 of the Treaty of Rome was interpreted in a restrictive way by the European Court of Justice, contrary to the interpretation of the Commission. This is why Articles 85 and 86 of the Treaty of Rome that prohibit any and all agreements that restrict competition (currently Articles 101 and 102 of the Treaty on the Functioning of the European Union), as well as the prohibition of any and all measures that stipulate quantitative restrictions, or those which exert the same effect as provided in Articles 30 and 34 (currently Articles 34 and 35 of the Treaty on the Functioning of the European Union) were referred to.

The European Court of Justice eliminated the contradiction between ensuring the absolute rights related to intellectual property and the free movement of goods and services by having distinguished between the *existence of intellectual property* and the *exercise of intellectual property.* Thus, the absolute rights existing on the different forms of intellectual property should be respected in the single market, however, the exercising of these by the right owner can be restricted in certain cases, in order to establish the single market.

In its judgments, the European Court of Justice pointed it out several times that intellectual property has a specific subject matter, while it proceeded step by step to the elaboration of the so-called *principle of the exhaustion of Community rights*, which has been a part of normative regulation since then. The actual meaning of the exhaustion of Community rights is that when the the goods with inherent intellectual property are *first* put into the market, the approval of the right owner will be necessary (the latter will be entitled to prohibit such, or make it dependent on counter-value) but as long as the goods are put into the

market within the Community, the right owner will not be entitled to prohibit the free movement of such goods, i.e. they are not in the position to prohibit the imports or exports of the goods between the member states based on their intellectual property rights.

The following case law illustrates how the principle of the exhaustion of Community rights was arrived at by the judgments adopted by the European Court of Justice.

4 Judgments adopted by the European Court of Justice – the principle of the exhaustion of Community rights

The judgment adopted by the European Court of Justice in the *Consten and Grundig cases (Court judgment adopted in the joint cases No. C-56/64 and C-58/64 of July 13, 1966, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*) was of critical importance. In the case under review, the German company Grundig entered into an exclusive distribution contract with the French company Consten for the exclusive distribution of the German company's product of the brand GINT (Grundig International) in France. Grundig agreed not to transport any GINT brand products to France either directly or through third persons, what is more, to oblige their distributors active in third countries to refrain from doing so. On the other hand, Consten agreed not to ship the products forward to any third countries. The parties confirmed the exclusivity regarding the territory of France that was ensured in the contract by Grundig's having authorized Consten to have the GINT trademark registered in its own name in France. Consten, already as the owner of a French trademark, could thus prevent the import of the goods with the GINT trademark to France (this is called parallel imports). By doing so, the parties wished to ensure that the goods with the brand GINT are exclusively distributed in France through Consten, which put the French company in a monopoly position in the domestic market of the GINT brand.

However, another French company called UNEF purchased GINT products cheaper from German traders, which UNEF in turn put into the market in France below the prices applied by Consten. This violated the interests of Consten, this is why they launched a trademark infringement case against UNEF. UNEF turned to the Commission, which qualified the agreement on the registration of the trademark in favor of Consten an absolute territorial restriction that runs counter to the rule set out in the Treaty of Rome and this is why the Commission declared the distribution agreement null and void. Then Consten and Grundig consulted the European Court of Justice for the review of this Commission decision, which was unfavorable for them. The Court upheld the decision of the

Commission with regard to the parts of the distribution contract that ran counter to Community law, including the instructions regarding trademark registration in France, and it confirmed that the contract was null and void in this respect.

The European Court of Justice declared that the single market cannot be divided along the national borders even by national trademarks, i.e. the exercising of rights arising from trademark protection shall not lead to the prohibition of the imports of the goods parallel to the domestic distribution of the goods supplied with the same trademark. The restriction of competition is prohibited both in the forms of horizontal and vertical cartels. Accordingly, the restriction of competition is prohibited not only in the case of goods supplied with different trademarks *(inter-brand competition)* but also, in the case of goods with the same trademark *(intra-brand competition)*. By this, the Court basically created the *principle of the exhaustion of Community rights* and it allowed parallel imports within the Community. It did not question the existence of member state trademark rights, however, it restricted their exercise in order to allow the free movement of goods.

In 1974, in the *Centrafarm vs. Winthrop case (Court judgment No. C-16/74 of October 31, 1974, Centrafarm BV and Adriaan de Peijper v Winthrop BV*), the European Court of Justice declared that trademark rights concern the permission of the first release of the trademark into the market within the Community. What it means in practice is that the free trade in the products supplied with the trademark became possible within the Community without regard to the national (member state) trademark rights, i.e. if a merchant is able to procure the goods in question in a certain member state cheaper, they can sell them freely in another member state. This will, in turn, greatly contribute to the reduction of price differences between the individual member states and to the increased trade in branded goods within the Community.

Later the principle of the exhaustion of Community rights *also* appeared *in normative Community regulation*. According to Article 7 of the first directive of the Council (December 21, 1988) (No. 89/104/EEC) on the approximation of the trade mark laws of the Member States:

> 'Exhaustion of the rights conferred by a trade mark
> 1. The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent.
> 2. Paragraph 1 shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialization of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market.'

After the declaration of the principle of the exhaustion of Community rights, several cases were brought to the Court in which the manufacturers, perhaps

partly in order to prevent parallel imports, put their products (generally medicines) on the market in a different packaging (sometimes under a different name) and at a different price in each member state, which were bought cheaply by some smart traders in one member state, repackaged according to the appearance that was common to the consumers of the target country, then put on the market in this member state at a lower rate than the local price. The question that arose in these cases was whether the trademark owner's approval of putting the products to the market extended to the permission of repackaging. On the one hand, such repackaging allowed the parallel imports of the same products which originally had a different packaging and name but on the other hand, it violated the interests of trademark owners.

In the first case of this kind (this is the *Hoffmann–La Roche case*) (*Court judgment on case No. C-102/77 of May 23, 1978, Hoffmann-La Roche & Co. AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH)*, the German company Hoffmann-La Roche released the tranquillizer called Valium to the German market at a higher price and in a different packaging than in England. The company Centrafarm, which was also German, purchased the medicine in England, repackaged them into a package that was common in Germany, and then distributed them in Germany supplied with the trademark of Hoffmann-La Roche. The owner of the German trademark stood up against Centrafarm and said that the original condition of the goods cannot be guaranteed as a result of the repackaging, with regard to which the use of the original trademark is unlawful. In making its decision, the European Court of Justice started out from the function of the trademark that it considered the most important, i.e. guaranteeing the origin of the product supplied with a trademark, and came to the conclusion that the consumer should be certain that no one during distribution could have influenced the original condition of the goods purchased by them. However, the Court also made it clear that on the basis of the reference to repackaging, the action against parallel imports would qualify as a concealed restriction of trade between the member states if

- the distribution system of the owner of the trademark involves the artificial division of the market;
- repackaging is not such that would damage the original condition of the product;
- the right owner has received preliminary notice on the distribution of the repackaged product, and
- the fact of repackaging is indicated on the new packaging.

Striving to draw a general conclusion, the Court defined in this judgment the conditions of *repackaging* for the future as well. Due to the ever newer solutions of the traders, which were pushing the earlier defined limits, the judicial body of

course further clarified the rules of repackaging in some further judgments (*Pfizer vs. Eurim case [judgment No. C-1/81 of December 3, 1981 adopted by the Court (First Chamber), Pfizer Inc. v Eurim-Pharm GmbH]*; *Centrafarm vs. American Home Products case [Court judgment on case No. C-3/78 of October 10, 1978, Centrafarm BV vs. American Home Products Corporation])*, which included some cases in the area of alcoholic beverages as well – see the *Loendersloot vs. Ballantines case (Court judgment on case No. C-349/95 of November 11, 1977, Frits Loendersloot, trading as F. Loendersloot Internationale Expeditie vs. George Ballantine & Son Ltd and Others*).

In European trademark law, the *Silhouette case (the Court's judgment on case No. 1998 C-355/96 of July 16, 1998, Silhouette International Schmied GmbH & Co. KG v Hartlauer Handelsgesellschaft mbH), which established the geographical limits of the exhaustion of Community rights*, counts as a milestone. In this case, the Austrian company Silhouette that manufactures premium eyeglasses frames shipped sunglasses supplied with a Silhouette trademark, which had come from earlier collections and which were out of fashion, to the Bulgarian company Union Trading on condition that it was only authorized to distribute them in Bulgaria, which was not a member of the European Union at that time, and in the ex-Soviet member states.

Another Austrian company called Hartlauer, however, bought these eyeglasses frames, took them back to, and put them on the market in Austria. Hartlauer said that the owner of the trademark had earlier agreed to putting the product on the market, this is why the right owner is not in the position to prohibit them from importing the products and putting them on the market, irrespective of in which country the owner of the trademark had originally permitted the release of the eyeglasses frames to the market. Based on the inquiry of the Austrian court, the European Court of Justice declared that the importing of products that are put on the market outside the territory of the Community can be prevented on the basis of the trademark registered under the law of the member state in question. According to the principle of the exhaustion of Community rights (and the respective directive norm), the right of the owner of the trademark will only be exhausted, i.e. they will not be in the position to prevent the further distribution of the goods only if the goods were put on the market within the Community (in this case, more accurately, in the territory of the EEA) with the approval of this right owner. In this very case, the approval granted by Silhouette concerned the territory of Bulgaria, so no permission was given for distribution in the territory of the Community.

This interpretation of the *limitation of the exhaustion of Community rights* was later *confirmed* by the European Court of Justice in the *Davidoff cases (Court judgment adopted in the joint cases No. C-414/99–C-416/99 of November 20, 2001, Zino Davidoff SA v A & G Imports Ltd and Levi Strauss & Co.*

and Others v Tesco Stores Ltd and Others). In this case, the trademark owner entered into an agreement on the distribution of perfume products outside the EEA with a company from a non-EEA country. A certain A & G Imports Ltd, however, purchased the perfumes which were meant to be distributed outside the EEA and imported them to the United Kingdom. In this case again, the European Court of Justice declared that the right of the owner was not exhausted, despite the fact that it was not indicated on the goods that they were meant to be distributed outside the EEA.

Another aspect of the exhaustion of Community rights has recently been analyzed by the European Court of Justice in the case entitled *Coty Prestige Lancaster Group vs. Simex Trading (Court [Fourth Chamber] judgment on case No. C-127/09 of June 3, 2010, Coty Prestige Lancaster Group GmbH v Simex Trading AG)*. The company Coty Prestige manufactures and distributes various perfumes under its own name (e.g. Joop!, Lancaster) and the brand names of third parties (e.g. Davidoff, Calvin Klein). Coty Prestige supplies its contractual partners with so-called testers, i.e. product samples not meant for sale, in a packaging different from the original, whose ownership rights remain with Coty Prestige. Simex Trading distributed such product samples, i.e. ones supplied with labels 'sample' or 'not to be commercially distributed' in Germany. Simex Trading referred to the exhaustion of rights but the European Court of Justice declared that in this case, the trademark owner did not give its consent to commercial distribution, this is why they trademark right is not exhausted and they are entitled to prevent the distribution of the testers.

By introducing the principle of the exhaustion of Community rights, it was first the European Court of Justice, then EU legislation that broke the territoriality of national trademark rights and their dependence on the state territories. Similarly, the issue of transit goods comes up as one related to the limits of trademark rights tied to geographical areas, i.e. whether the legal measures based on national or EU trademarks are applicable against goods which are only in transit in the territory of the EU. A local customs authority in the United Kingdom found and then seized some undoubtedly fake Nokia mobile phones when they searched a cargo heading from Hong Kong to Columbia. Later, however, with regard to the fact that the goods were only in transit, it was ordered that the seizure of the goods be released. Nokia lodged an appeal, finally the case was brought to the European Court of Justice (*case No. C-495/09 called the Nokia case, Nokia Corporation v Her Majesty's Commissioners of Revenue and Customs*). The Belgian customs authorities seized fake Philips products in transit in a similar case, then decided to release the seizure (*case No. C-446/09 called the Philips case, Koninklijke Philips Electronics N.V. v Lucheng Meijing Industrial Company Ltd, Far East Sourcing Ltd, Röhlig Hong Kong Ltd and Rohlig Belgium N.V.*). This case was also brought to the European Court, which joined

the cases. Thus, the European Court of Justice had to answer the question what should be done about goods originating from third countries and only staying in the territory of the EU temporarily, whether any legal measures can be applied against any goods which are only in transit in the territory of the EU. In its judgment of December 1, 2011, the Court declared that the goods 'in transit' can only be held up by the customs authorities if they hold some evidence on that the goods concerned may eventually be put on the market of the EU.

During all this time, the European Court of Justice dealt with the contradictions between the free movement of goods and services, and the territorial monopolies provided by intellectual property in the fields of patent rights, the protection of plant varieties, related rights and copyrights. Besides the trademarks, the principle of the exhaustion of rights was developed by the Court for the other forms of intellectual property rights as well, and it was also defined in which cases it is possible to enter into valid exclusive licence agreements.

Thus, *the exhaustion of Community rights* means, *in summary*, that the owner of the exclusive right that exists on the various forms of intellectual property shall not restrict the distribution, through alienation, of the samples of the tangible products that were produced by using the intellectual property and were put on the market, in the territory of the EEA after their first release into the market with the permission given by the right owner itself or by another person with the right owner's permission in one of the EEA member states.[347] This right is known in the law of the United States as the *right of first sale*. Thus, the right owner may not prevent the further movement of the product that was put on the market with their permission in the territory of the EEA, this is why the traders can procure the goods in the member state that offers them at the lowest rate and distribute them arbitrarily in any member state.

There are also some material *exceptions* from the principle of the exhaustion of Community rights, so the right owner may prevent the distribution of the goods if the condition of the goods was changed or impaired after their having been put on the market (e.g. they were repackaged, damaged, or their warranty has expired). Furthermore, the exhaustion of Community rights only extends to tangible products, so the right owner e.g. is not in the position to prevent the distribution in another member state of the sound records that it put on the market in an EEA member state but this does not extend to e.g. the rent of the audio disk or the public presentation of the piece of music on the disk (*Court judgment of April 9, 1987 on case No. C-402/85, G. Basset v Société des auteurs, compositeurs et éditeurs de musique (SACEM), as well as Court judgment of May 17, 1988 on case No. C-158/06, Warner Brothers Inc. and Metronome Video ApS v Erik Viuff Christiansen)*.

347 Boytha 2003, p. 357.

5 Normative Community regulation of industrial property rights

In the above, we explained the development of law that was triggered by the judgments of the European Court of Justice in the area of intellectual property. In parallel, the legislatory bodies of the European Communities were continuously involved in the elaboration of those norms which take ever newer steps towards the creation of a globally competitive internal single market partly through the harmonization of the member state branch regulations (directives), partly through the establishment of independent Community institutions (regulations). Due to the different member state laws, different conditions of competition may evolve in the markets of the individual member states, which prevents the development of an internal single market. These directives, based on which the member states are obliged to adopt the rules into their national laws, are suitable for avoiding such situations, this is how member state regulations will be standardized.

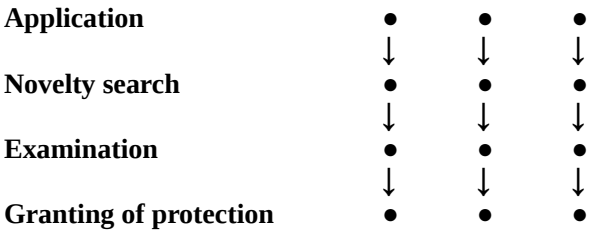
According to the EU directives, the member states are obliged to harmonize their own national laws in line with the goals of the directives. Hungary committed itself to the adoption of EU law on the basis of the European Agreement (Act I of 1994) that took effect on February 1, 1994, and this commitment was fulfilled by Hungary's accession to the European Union on May 1, 2004. In the period since then, of course, quite a number of new directives have taken effect, based on which the law of Hungary is continuously changing. On the issues related to the interpretation of the directives, the member state courts may turn to the European Court of Justice in order to launch a preliminary ruling procedure. In the context of the preliminary ruling procedure, the European Court interprets the provision of the directive in question in the form of a judgment, which interpretation will be mandatory for each member state court. Thus, as an interesting novelty, the Hungarian courts adopt their judgments not only by taking the respective laws into account but also, by considering the legal practices available from the judgments passed by the European Court. The judgments of the Court adopted in the context of the preliminary ruling procedure continuously and greatly contribute to the standardization of the law enforcement of the member states.

Through the regulations that are to be enforced directly, as opposed to the directives mandatory for the member states, it is possible to establish such legal institutions that are valid for the entire territory of the EU and that are suitable for the establishment of independent and uniform instruments of legal protection besides the diverse legal systems of the individual member states. The European Union has established several of its own EU legal institutions through these

regulations as norms that are directly applicable (e.g. EU trademark, Community design protection, geographical indication, protection of plant varieties), and it has also created several other directly applicable norms (e.g. customs regulations). The regulations also fundamentally define the enforcement of the laws on intellectual property by the member states, as these laws are directly enforced by the courts of the member states. The European Court has a review competence over the Community industrial property rights, so it makes direct decisions e.g. on the registration and cancellation of EU trademarks, Registered Community Design protection, geographical indications, as well as the protection of plant varieties. Since in the framework of these regulations, the Court frequently decides on issues which basically emerge in the same form in relation to one of the directives as well, this activity of the Court also greatly contributes to the standardization of the law enforcement of the individual member states.

5.1 Patents

Initially, after the formation of the national patent systems, those market players which pursued their activities in several member states (e.g. pharmaceutical companies) had to get their inventions registered and maintained separately in each affected state, on the basis of the individual national laws, which involved a substantial level of costs. This can be illustrated as follows:



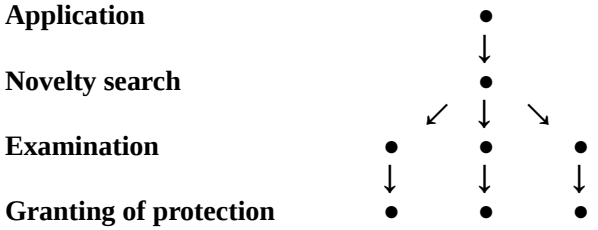
Since then, quite a number of international agreements have been concluded with a view to making international patent application easier.

In order to reduce costs and establish a uniform system of patents, the *European Patent Convention (EPC)* was signed in 1973, and it took effect in 1977. Under the EPC, a single procedure was sufficient for obtaining a patent in the member states indicated by the applicant. *EPC is not an EU legal institution, it is based on an international agreement* rather than on a regulation and although each EU member state is its member, it also has non-EU members (e.g. Norway, Albania, Turkey). The subject matter of the European patent is not uniform, it is divided to national patents after it has been granted, the subject matter of the

patent is then defined by the patent laws of the individual national member states. Similarly, it is the national laws that govern the maintenance or cancellation of the European patent.

The procedure under EPC can be illustrated by the following flowchart:

The *Patent Cooperation Treaty (PCT)* signed in 1970 also contributes to the international registration of patents. Under PCT, it is simpler to obtain national patents in several states by a single international application. Below is the diagram showing the PCT procedure:



Quite peculiarly, it is partly the success of the European patent and the PCT that hinders the creation of a unitary patent that would ensure a single right for the entire EU.[348] Based on the European patent, an invention enjoys different patent protection in the individual member states on the basis of the patent law systems of the member states, what is more, it is conceivable that this is not even applied for with regard to some of the member states, so the invention enjoys no protection in these member states. This is why it emerged as early as in 1949 that a patent with uniform content, independent from the laws of the member states, uniformly valid for Europe as a whole would be necessary. This unitary patent would be based on a Community norm, on a regulation, so it would

348 The planned legal institution was first called *Community patent*, then after the Lisbon Agreement took effect, it was renamed as *Union patent*. For the reasons to be explained below, the name of the planned legal institution is currently *unitary patent*.

provide uniform protection both with regard to subject matter and geography. The pattern of such uniform patent would be as follows:

Application ●
↓
Novelty search ●
↓
Examination ●
↓
Granting of protection ●

Although quite significant progress has been made, the member states were not able to reach a unanimous agreement even after several decades of disputes on the detailed rules of the unitary European patent, so the case of the unitary European patent failed in a number of cases. Due to the lack of a necessary compromise, the member states would currently like to establish the legal institution now called unitary patent within the framework of the so-called '*enhanced cooperation*'[349] (the name '*EU patent*' cannot be used because of the states that are absent).

The *two main disputed issues were those of the language* regime and the regime of *law enforcement*. If the requirements and description that define the subject matter of the EU patents were to be translated to all the official languages of the European Union, the patent would definitely be deemed to failure because of the high translation costs, a uniform application would not be worth the effort for the applicants. If, however, the requirements and the description were not available in several official languages of the EU, this would violate the rights of the people speaking the language in question to legal security, since, as the case may be, they would not have free access to the requirements and description that define the subject matter of the patents in a language that they understand. After lengthy coordination talks, with the absence of Italy and Spain, an agreement on the language regime was finally reached in 2012, and in the context of *enhanced cooperation, a regulation on the creation of unitary patent protection*,[350] as well as *the language regime*[351] was adopted.

349 The European Agreements allow, as an exceptional solution, that as long as the member states are unable to reach a unanimous agreement within a reasonable time, an *enhanced cooperation* should be established with the participation of at least 9 member states.

350 Regulation (EU) 1257/2012 of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection. OJ L 361/1, 31.12.2012.

351 Council regulation (EU) 1260/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, OJ L 361/89, 31.12.2012.

As regards the issue of law enforcement, as long as the courts of each member state are authorized to act on issues related to the EU patents, the interest related to a uniform interpretation of the law may be violated and the large industrial corporations will not risk that their patent is cancelled by e.g. a Hungarian, Maltese or Finnish court. If only certain member state courts or perhaps a specific court organization acted on issues related to patents, the right of the citizens of all those member states to turn to the court would be violated in the territory of which there is no competent court.

In July 2009, the Council requested the opinion of the European Court on the compatibility of the proposed regulation on a Unified Patent Court with the law of the European Union. In its opinion No. 1/09 issued by the European Court on March 8, 2011, the Court found the draft international agreement on the court regime incompatible with the EU Treaties. The objections raised by the Court were studied by the European Commission, as a result of which a new draft agreement on a Unified Patent Court (hereinafter referred to as: UPC) was prepared by June 2011, and on February 19, 2013, the Agreement on a Unified Patent Court and Statute (hereinafter jointly referred to as: UPC Agreement) were ceremonially signed. The agreement (which is an international contract and not an EU law) was signed by as many as 25 EU member states (including Italy, which did not take part in enhanced cooperation in the area of a unitary European patent). Spain, however, did not join the agreement, while Poland announced that, by taking the 'wait and see' approach, they were not signing it for the time being. In the UPC Agreement, only the substantial frame of cooperation was defined, the detailed rules have not been elaborated to date. In order for the UPC Agreement to become effective, what is necessary, beyond the condition that the earliest that this can happen is January 1, 2014, is that it should be ratified by at least 13 signatory member states (including the United Kingdom, Germany and France).

The situation is made even more complicated by that Spain has launched a procedure against the regulation on both the creation of the unitary patent and the language regime,[352] and these procedures are still in progress.[353] Thus, despite the open questions about the detailed rules of court activities and the claims filed by Spain, it seems to be probable now that the declaration of unitary patents will become possible in the near future.

It is partly due to the secondary law standardization effect of EPC that the EU, differently from the trademarks, has not created a directive harmonizing the general rules of patents. This, however, does not mean that some EU norms do not

352 Cases C-146/13 and C-147/13, Spain v European Parliament and Council, judgement of 5 May 2015, not yet published.

353 The motion filed by the Advocate General on November 18, 2014 suggests that Spain would not be successful, since the Advocate General proposed that the Spanish claims be rejected.

affect some partial areas of patent law. Thus, directive (EC) No. 98/44 of the European Parliament and of the Council *on the legal protection of biotechnological inventions*[354] was also transposed into Hungarian patent law. The directive, among others, allows the possibility to patent biotechnological inventions and prohibits the cloning of human beings.

Furthermore, the Hungarian patent holders are directly affected by the Community regulations on the supplementary protection certificate for medicinal products and plant protection products, as well as on the compulsory licensing of patents related to pharmaceutical products manufactured for exports to countries with public health problems.[355] It should be mentioned that the proposed directive (‘*Com 2002 (92) final’*) of 2002 on the patentability of *computer-implemented inventions* failed at the 2005 European Parliament voting. The directive would have made it easier to register as patents those technical achievements which are accessible through computer programs and would have standardized the currently divergent legal practices of the individual member states. According to the critics of the proposed directive, the draft would have extended the scope of patentability under cover of standardization on the one hand, and copyright already provides appropriate protection for computer programs, on the other hand.

5.2 Trademarks

The first step in the harmonization of member state trademark laws was the adoption of the *First Trademarks Directive* (89/104/EEC).[356] The directive did not extend to the issues of official procedures and law enforcement. The directive was later incorporated in a consolidated structure with all the amendments under number 2008/95/EC.[357] The directive was interpreted by the European Court in a number of cases in the scope of a preliminary ruling procedure (e.g. such significant judgments were adopted on the registrability of color, sound and

354 Directive (EC) 98/44 of the European Parliament and of the Council, 1998 on the legal protection of biotechnological inventions, OJ L 213 , 30.7.1998.

355 Regulation (EC) 469/2009 of the European Parliament and of the Council concerning the supplementary protection certificate for medicinal products (codified version) (text with EEA relevance), OJ L 152/1, 16.6.2009.; regulation (EC) 1610/96 of the European Parliament and of the Council concerning the creation of a supplementary protection certificate for plant protection products, OJ L 198, 8.8.1996.; regulation (EC) 816/2006 of the European Parliament and of the Council on compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems, OJ L 157, 9.6.2006.

356 Council directive (EEC) 89/104 on the approximation of the trade mark laws of the Member States, OJ L 040, 11.2.1989.

357 Directive (EC) 2008/95 of the European Parliament and of the Council to approximate the laws of the Member States relating to trademarks, OJ L 299/25, 8.11.2008.

scent trademarks, on the interpretation of reputation, the use of trademarks through business names, etc.), which judgments fundamentally determine the interpretation of law by the member states and thus, ensure the uniform application of the norms of the directive. As a result of a lengthy revision process, the *Second Trademarks Directive* ((EU) 2015/2436) was adopted on 16 December 2015.[358] The Second Trademarks Directive has incorporated a vast amount of trademark related case-law of the Court and provides for deeper integration and harmonization including rules for official procedures.

Contrary to the planned Community patent, the establishment of the Community trademark system was a genuine success. The negotiations concerning the Community trademark commenced as early as in 1959. As a result of lengthy coordination talks, 1994 saw the formation of the *OHIM* (*Office for Harmonization in the Internal Market, Hungarian acronym: BPHH*), i.e. the proper Community trademark office with its seat in Alicante, Spain, on the basis of Council regulation (EC) No. 40/94.[359] Then, on April 1, 1996, the date of application of the first Community trademark was recognized.[360] Since then, several hundred thousand Community trademarks have been registered, which have been effective in Hungary as well since May 1, 2004. The *Community Trademark Regulation* was later incorporated in a consolidated structure with all the amendments and it is currently in effect under number *207/2009/EC*.[361] Parallel to the renewal of the Trademarks Directive, the regulation Community Trademark Regulation has been reformed. The amending regulation[362] changed the name of OHIM to *EUIPO* (European Union Intellectual Property Office) the name of the Community trademark to *European Union trademark* or *EUTM* and has incorporated a vast body of the case-law of the Court into the Regulation.

The EU trademark ensures *unitary protection* for the registered indications, which can only be granted or cancelled for the entire territory of the European Union. Since the subject matter of EU trademark protection is determined by an EU regulation, in principle it is the same in each member state. The success of the EU trademark is mainly due to this and its low costs. The appellate body of the EUIPO is the European Court of Justice, whose judgments adopted in rela-

358 Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks (Recast).

359 Council regulation (EC) 40/94 on the Community trademark, OJ L 011, 14.1.1994.

360 This was the AIPPI trademark, which was applied for by the *Association Internationale pour la Protection de la Propriété Intellectuelle*, which uses the same acronym.

361 Council regulation (EC) 207/2009 on the Community trademark, OJ L 78/1, 24.3.2009.

362 Regulation (EU) 2015/2424 of the European Parliament and of the Council amending Council Regulation (EC) 207/2009 on the Community trade mark and Commission Regulation (EC) 2868/95 implementing Council Regulation (EC) 40/94 on the Community trade mark, and repealing Commission Regulation (EC) 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs), OJ L 341, 24.12.2015.

tion to EU trademarks exert significant effect on the law enforcement of the member states, as the rules stipulated in the EU trademark regulation are mostly equivalent to the rules of the directive, which are mandatory for the member states.

5.3 Designs

The standardization of the system of design protection took place much more quickly and simply than that of the patents or trademarks. It was in 1998 that *directive (EC) No. 98/71 on the legal protection of designs*[363] *was adopted*, which was implemented by Hungary too. Similar to the trademark directive, this directive does not extend either to the issues of official procedures and law enforcement.

Community design protection serves similar purposes as EU trademark protection. The former was established by the Council *in its regulation (EC) No. 6/2002*[364] adopted in 2001. Community design protection is one that has uniform effect both geographically and in subject matter, similarly to the EU trademark. Community design protection is registered by OHIM, similarly to the EU trademark. It is interesting that the regulation on Community design protection acknowledges the so-called *unregistered design*, which is established by publication and ensures limited protection both in time and with regard to subject matter.

5.4 Geographical indications

The regulation of geographical indications shows a very diverse picture, as there are different regimes in place for the individual types of products,[365] and the regulation of the individual product types is realized on different levels of legislation, according to the explanation below. *Geographical indication* is a collective term,[366] which creates the protection of the information related to the origin of the goods in question, relevant for the consumers, and thus, in general it car-

363 Directive (EC) 98/71 of the European Parliament and of the Council on the legal protection of designs, OJ L 289, 28.10.1998.

364 Council regulation (EC) 6/2002 on Community designs, OJ L 3/1.5.1.2002.

365 According to the explanation below, there are different rules for agricultural products and foodstuffs, viticultural and wine products, spirit drinks and industrial products.

366 The sources of international law, the law of the EU, as well as the national laws define the category of geographical indications in several different ways. In the TRIPS Agreement, the expression 'geographical indications' is used, while in the EU and Hungarian laws, 'protected designations of origin', i.e. PDO's and 'protected geographical indications', i.e. PGI's are mentioned, and in the Lisbon Agreement administered by WIPO, you will find the term 'appellation of origin'.

ries value. A geographical indication has no specific right owner: it can be used by anyone who fulfills specific preconditions (e.g. one who manufactures their products in a specific geographical area). A simple geographical indication refers to a specific area where the goods were produced, irrespective of whether the location of production affects the quality of the goods (*e.g. 'Made in Hungary', 'Szekszárd salami'*). A designation of origin also refers to a specifically definable geographical area, the location, natural characteristics of which, or the special knowledge of the inhabitants lend extra quality to the product in question (*e.g. Tokaj wine, Parma ham)*.

The agriculture of the European Union does not favor mass production, however, European producers manufacture a very high number of goods whose quality is closely related to the location of production and the century-old traditions that have evolved there and due to this special quality, they can be sold at a higher price than similar goods that do not reach this quality and are manufactured outside this gepgraphical area. Because of this and in order to establish the unitary protection and internal market of the goods supplied with geographical indications, the EU has been continuously developing its regulation on geographical indications since the 1990s.

In the European Union, there is exclusive, EU-level regulation in place for the geographical indications of foodstuff and agricultural products, as well as viticultural and wine products. This means that the designations of origin of these products can only be granted protection on the EU level, so the national level regulation of protecting these products should be terminated. According to regulation (EU) No. 1151/2012 on quality schemes for agricultural products and foodstuff, the name *Protected Designation of Origin (short: PDO)* indicates a product, it is the name used for describing an agricultural product or foodstuff of a certain region, a specific geographical location, or in an exceptional case, a country, the quality or characteristics of which are fundamentally or exclusively due to the geographical environment in question, as well as the related natural and human factors, and whose production, processing and manufacturing take place in a specific geographical area. According to the regulation, in the case of *Protected Geographical Indication (short: PGI)*, it is sufficient if the special quality, reputation or other characteristic feature of a product manufactured in a certain place are attributable to this geographical origin and at least one phase of manufacturing takes place in this strictly defined geographical area. Protected Geographical Indications, i.e. PGI's from Hungary include e.g. the (winter) salami of Szeged, the Makó onions, or the Hajdúság region's horse radish. Protected geographical indications from Hungary include e.g. the apricots of Gönc, the sausages of Gyula and Csaba, or the roses of Szőreg.

In this regulation, a third category is also defined: this is the circle of *Traditional Speciality Guaranteed (short: TSG)* products. In order for an agricultural

product or foodstuff to be acknowledged as a Traditional Specialty Guaranteed product, it has to be prepared from traditional raw materials or ingredients, it has to have a traditional composition, or its method of production and/or processing has to be of the traditional type. Based on an application from Hungary, 'tepertős pogácsa' (scones with cracklings) was registered as a Traditional Specialty Guaranteed product and the registration procedure concerning 'rögös túró' (chunky cottage cheese) is currently in progress.

The protection can be obtained in a two-step procedure in the case of all three types of protection. The groups that work with the product to be registered submit a registry application to the member state, to which application they have to attach a detailed product description. Then the member state reviews the application in order to check whether it is justified and is in line with the criteria for the form of protection in question, then the application is published, against which an objection can be submitted. If after the review of the potential objections, the member state deems the application as one that is in compliance with the statutory requirements, the member state will forward the application to the Commission. In the second phase of the procedure, the Commission, by publishing the application in the Official Journal of the European Union, conducts the EU-level objection procedure, during which the member states or other persons get the chance to contribute their opinions against the registration. The Protected Geographical Indications can be searched for on the homepage of the European Commission, i.e. in the DOOR database when they refer to agricultural products, while in the E-Bacchus database when they refer to viticultural or wine products.

Furthermore, the regulation introduces the concept of *optional quality terms*[367] as a new institution. The purpose of establishing this concept is to make it easy for the producers of agricultural products that possess value adding characteristics to promote these characteristics in the internal market. According to the regulation, optional quality terms should satisfy the following criteria:

a) the term relates to a characteristic of one or more categories of products, or to a farming or processing attribute which applies in specific areas;

b) the use of the term adds value to the product as compared to products of a similar type; and

c) the term has a European dimension.

As the first optional quality term, the regulation introduces the term 'mountain product', and gives a detailed definition of the criteria of using it.

Furthermore, in relation to certain products prepared from grapes (basically, certain wines and champagnes), the concept of '*traditional terms*'[368] was intro-

367 Optional Quality Terms – shortly OQT.
368 Traditional terms.

duced. According to the effective rules, traditional terms mean an expression used traditionally in the member states with regard to the products listed in detail in the respective regulation,[369] which indicates:

a) that a certain product is supplied with a designation of origin or geographical indication under Community or national law; or

b) the production or ripening procedure, the quality, color, the nature of the place of origin, or an event related to the history of the product supplied with a designation of origin or geographical indication.

According to the regulation, a protected traditional term can exclusively be used in relation to a product manufactured according to the above definition. Traditional terms originating from Hungary include, among others, 'bikavér' ('bull's blood', i.e. the most noted of wines from the Eger region), 'aszú' and 'szamorodni' (traditional Tokaj-Hegyalja speciality wines).

Regulation (EC) No. 110/2008 on the geographical indication protection of spirit drinks[370] stipulates the rules on the indication of spirit drinks (hard liquors). According to the regulation, a geographical indication is a designation which identifies the spirit drink as one that originates from the territory of a certain country, or a region or place of such territory if the quality, reputation or any other characteristic feature of the alcoholic beverage is basically attributable to the geographical origin in question. According to Annex III of the regulation, geographical indications originating from Hungary include 'Pálinka' (brandy), 'Törkölypálinka' (grape marc brandy), 'Szatmári Szilvapálinka' (the plum brandy of Szatmár), 'Kecskeméti Barackpálinka' (the apricot brandy of Kecskemét), 'Békési Szilvapálinka' (the plum brandy of Békés), 'Szabolcsi Almapálinka' (the apple brandy of Szabolcs), as well as 'Gönci Barackpálinka' (the apricot brandy of Gönc).

On the European level, the geographical indication protection of spirit drinks works somewhat differently than the origin protection of agricultural products and wines, the EU protection system functions in parallel to, and is built on the national protection system, and a registry application can only be submitted to the Commission if the geographical indication in question is under national protection.

As regards *non-agricultural products* (e.g. industrial or handicraft products), currently there is no EU-level protection system in place, national protection is

369 Council regulation (EC) 1234/2007 establishing a common organization of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), OJ L 299/1, 16.11.2007.

370 Regulation (EC) 110/2008 of the European Parliament and of the Council on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) 1576/89, OJ L 39/16, 13.2.2008.

available for them in Hungary but the EU is looking into the possibility of the introduction of such protection.[371]

Besides EU-level and national level protection, the international protection of the designations of origin can also be applied for on the basis of the Lisbon Agreement in the context of WIPO, with regard to the countries that participate in the treaty, or outside the international system, the individual countries can place certain indications under protection through bilateral international agreements as well (e.g. the bilateral agreement between the Hungarian People's Republic and the Swiss Confederation was announced by decree law No. 22 of 1981, under which the Emmental cheese is protected, among others).

The structure of, and correlations between the individual protection systems are summarized in the following table:[372]

	Agricultural products and foodstuff	**Viticultural and wine products**	**Spirit drinks**	**Industrial products**
Inter-national protection	the Lisbon Agreement (in the 28 member states); bilateral agreements	the Lisbon Agreement (in the 28 member states); bilateral agreements	the Lisbon Agreement (in the 28 member states); bilateral agreements	the Lisbon Agreement (in the 28 member states); bilateral agreements
EU-level protection	Exclusive	Exclusive	Parallel	None
National protection	cannot be maintained in the EU member states	cannot be maintained in the EU member states	created on the basis of EU (and international) protection	through the sui generis system or attesting/joint trademarks

5.5 Protection for plant varieties

EPC has expressly excluded from its scope of regulation the plant and animal varieties, and on the international level, a specific treaty was entered into for the

371 http://ec.europa.eu/internal_market/indprop/geo-indications/index_en.htm, date of review: December 10, 2014.

372 Dr. András Jókuti, 'A földrajzi árujelzők oltalma' (The Protection of Geographical Indications), in: *Iparjogvédelem* (Industrial Property Rights), published by Szellemi Tulajdon Nemzeti Hivatala (the Hungarian Intellectual Property Office), Budapest 2012, p. 148.

protection of plant varieties in 1961. Its review in 1978 created *a distinct union* called *UPOV*, i.e. the *Union pour la protection des obtentions végétales*, the members of which organization are obliged to establish protection ensuring exclusive rights for the new plant varieties. In the Hungarian law, the protection for plant varieties is a *sui generis* protection, the regulation of which is stipulated in the patent law.

The European Union ensured the uniform regulation of the exclusive rights for the new plant varieties in the member states by establishing its own system, and it was for this purpose that *Council regulation (EC) No. 2100/94 on Community Plant Variety Rights*[373] was adopted. Under this regulation, varieties of all botanical genera and species, including, inter alia, hybrids between genera or species, may form the object of Community plant variety rights.

It should be noted that the effect of the regulation does not extend to newly bred species of animals.

5.6 Protection of the topography of microelectronic semiconductor products

A directive on the *protection of the topography of microelectronic semiconductor products*[374] was adopted in 1986. The adoption of this directive became necessary because many industries realized the increasing significance of semiconductor products and accordingly, semiconductor technology can be regarded as one of fundamental significance for the industrial development of the Community. Furthermore, the functioning of semiconductor products greatly depends on the topography of such products and the elaboration of topographies requires the investment of substantial human, technical and financial resources, while they can be multiplied for a fraction of the costs involved by independent development.

The low number of the registered protections suggests that this form of protection has become outdated. In Hungary, only one protection had been registered, which was cancelled since then, in lack of renewal.

6 Copyright

A comprehensive regulation similar to the individual forms of industrial rights protection was not established by the European Union in the area of copyrights. As copyrights protection is not established through registration under the Euro-

373 Council Regulation (EC) 2100/94 on Community plant variety rights, OJ L 227, 1.9.1994.

374 Council directive (EEC) 87/54 on the legal protection of topographies of semiconductor products, OJ L 24, 27.1.1987.

pean laws, it is not necessary to create the EU's own copyright protection system through regulations. Up till now, not even the legal harmonization that can be achieved through directives has touched upon the most general issues of copyrights but quite a number of EU directives have been adopted in several specific partial areas.

Some directives that regulate such partial areas include, among others, the following:

- Council directive (EEC) No. 93/83 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission;
- Directive (EC) No. 96/9 of the European Parliament and of the Council on the legal protection of databases;
- Directive (EC) No. 2001/29 of the European Parliament and of the Council on the harmonization of certain aspects of copyright and related rights in the information society (the Infosoc Directive);[375]
- Directive (EC) No. 2001/84 of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art;
- Directive (EC) No. 2006/115 of the European Parliament and of the Council[376] on rental right and lending right and on certain rights related to copyright in the field of intellectual property;
- Directive (EC) No. 2006/116 of the European Parliament and of the Council[377] on the term of protection of copyright and certain related rights;
- Directive (EC) No. 2009/24 of the European Parliament and of the Council[378] on the legal protection of computer programs;

375 In the Judgment of 13 February 2014 in Case C-466/12, Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB, [2014] ECR 76., the European Court of Justice, in relation to the interpretation of one of the provisions of the directive, came to the conclusion that the application of hyperlinks does not violate the right to public broadcasting. In its preliminary decision in the Judgment of of 7 March 2013 in Case C-607/11, ITV Broadcasting Ltd and Others v TV Catch Up Ltd., [2013] ECR 147., the so-called Ulmer case that was meant to interpret the directive, the European Court of Justice took the position that the libraries may digitalize the books in their register without permission, and they can make them available from the terminals placed in their buildings.

376 This directive repealed Council directive (EEC) 92/100 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346, 27.11.1992.

377 This directive repealed Council directive (EEC) 93/98 on harmonizing the term of protection of copyright and certain related rights, OJ L 290, 24.11.1993.

378 This directive repealed Council directive (EEC) 91/250 on the legal protection of computer programs, OJ L 122, 17.5.1991.

- Directive (EC) No. 2014/26 of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

The regulation concerning the above partial areas has substantial judicial legal practice, what is more, the judgments adopted in the preliminary ruling procedures concerning these partial areas more and more frequently take a stance on general copyright issues as well.[379]

7 Harmonization of the enforcement of intellectual property

It was by the end of the 1990s that the European Union harmonized the substantial laws concerning the protection of intellectual property, which were material for the development of the internal market. Also, the EU established protection for EU trademark, designs, plant varieties and geographical indications through directives. The elaboration of the relevant EU sources of law, however, only resulted in a slight level of harmonization with regard to the enforcement of the regulated rights and thus, the applicable sanctions. It is exactly because of this that there are differences between the individual member states regarding the nature and efficiency of the legal remedies.

This is what is meant to be resolved by *directive (EC) No. 2004/48 on the enforcement of intellectual property rights*, which harmonizes the system of sanctions in the area of intellectual property in aspects that directly affect the functioning of the internal market. The objectives of the directive were summarized by Professor Dr. György Boytha as follows: '*According to the requirement of the fundamental right to efficient legal remedy, the directive strives to appropriately ensure a quick intervention, the preservation of evidence, the benefits provided by the temporary measures, the full recovery of the incurred damages, the counterbalancing of the moral offenses, the prevention of the concealment of assets, as well as the application of sanctions that also serve preventive purposes.*'[380]

379 From the cases of the recent period, Case C-201/13, Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others (Deckmuyn case), judgement of 3 September 2014, not published yet, can be mentioned, in which the Court interpreted the provisions of the Infosoc directive concerning parodies. According to the decision, a parody means an exception from the exclusive rights of the author if the parody does not convey any messages that suggest discrimination.

380 Boytha 2003, p. 434.

A preliminary ruling of the Court issued in 2011[381] draws attention to the fact that the differences between the sanction systems of the individual member states still pose challenges for the uniform enforcement of intellectual property rights.

381 Judgement of 12 April 2011 in Case C-235/09, DHL Express France SAS, previously DHL International SA vs. Chronopost SA., [2011] ECR 02801.

EUROPEAN SOCIAL POLICY

Nikolett Hős

1 Introduction

The emergence of social policy as one of the policies of the European Union was related to the deepening of the European integration. Originally, this policy appeared at the EU level as a flanking policy functionally complementing economic integration. The European social policy concept includes the Union's legislation in the field of social policy as well as the set of tools related to the coordination of Member States' employment and social protection policies. For a long time, European social policy was what is referred to as a regulatory policy,[382] so it was primarily through legal harmonisation that the EU law interfered with the legislative autonomy of Member States. However, the role of (re)-distributive type of policies has increasingly grown recently, which, partly due to the significant budget costs involved, has required the introduction of new regulatory mechanisms.

2 The concept of European social policy[383]

It is not easy to define the concept of European social policy since this policy encompasses the laws passed in various fields of the regulatory system related to the social and welfare functions of the state as well as other legal norms having no legally binding force. At the same time, the concept of European social policy must be distinguished from the concept of national social policy. The concept of national social policy primarily covers the system of social services (e.g. unemployment benefits) and the related social supply system (e.g. the social security system).[384] In comparison, European social policy includes, among others, the regulatory system related to legal harmonisation in labour law as well. The name of the policy is somewhat misleading since, essentially until the 1990s, the Union did not have any significant authority in the fields traditionally qualifying

382 For the differentiation between regulatory and distributive policies cf., G. Majone, 'The European Community between Social Policy and Social Regulation', *Journal of Common Market Studies*, Vol. 31, 1993, pp. 153–170.

383 For more details on the European social policy concept cf. T. Gyulavári & G. Kardos, 'Szociális politika', in: T. Kende & T. Szűcs (eds.), *Bevezetés az Európai Unió politikáiba*, Complex Kiadó, Budapest 2009, pp. 491–496.

384 Ibid., p. 49.

as social policy fields.[385] These fields underwent legal harmonisation only to the extent it was necessary for enabling the free movement of persons.[386] Although from the 1990's, employment policy and social protection related issues gradually started to gain increasing significance in the European Union, the level of integration in these fields continues to be different compared to the traditional regulatory policies. For the EU-level integration of social policy measures a new mechanism, the *Open Method of Coordination (OMC) was introduced*. The essence of legal harmonisation in the EU is that, by transposing guidelines into the national legislations, Member States gradually approximate their laws to those of other Member States along the guidelines formulated. In contrast, the essence of the Open Method of Coordination is that, within its framework, Member States' employment policies, for instance, are coordinated on the basis of '*soft law*' norms, i.e. legal norms that have no legally binding force. As a main rule, however, beyond the coordination of policies this mechanism leaves the regulatory and legislative autonomy of Member States untouched.

3 The history of European social policy

3.1 The 'policy of non-intervention' – 1957–1973

Although in the 1950s there was a lively debate as to what extent the European integration should participate in the enforcement of social rights, in the end there were almost no social policy provisions included in the Treaty of Rome establishing the European Economic Community (EEC). At the centre of the economic integration there was the intention to establish a single market, i.e. an area without internal borders in which means of production (goods, services) and factors of production (employees and capital) could freely move. Even though the Treaty of Rome did include certain social policy provisions, these were formulated in such general terms and with such a policy making nature that it would have been very difficult to derive any legislative authority from it. Thus Article 117 provided that Member States 'agree upon the necessity to promote improvement of the living and working conditions of labour so as to permit the equalization of such conditions in an upward direction', but Article 118 only authorised the Commission to promote close collaboration between Member States

385 Harmonisation in social legislation was implemented in two fields initially: in the harmonisation of certain aspects of the labour law of Member States and for the implementation of the principle of equal treatment.

386 In this context mention must be made of Regulation 1408/71/EC on the coordination of the social security systems of Member States (OJ L 149, 5.7.1971) and Regulation 1612/68/EC laying down provisions for promoting the free movement of workers and their family members (OJ L 257, 19.10. 1968.).

in the social fields[387] in the broad sense.[388] The substantive social policy provisions of the Treaty of Rome were Article 119 on the principle of equal remuneration for men and women and Article 120 on paid holiday schemes. Finally, as an instrument of European social policy, the *European Social Fund* was established by way of Article 123 with the aim to promote, by providing subsidies to the Member States and regions, the geographical and occupational mobility of workers and improve workers' employment opportunities. In contrast to the weak social policy provisions (competition law rules and fundamental freedoms) of the Treaty of Rome, the economic provisions of the founding treaties formulated explicit prohibitions on the one hand[389] and, on the other hand, included specific legislative authority for the implementation of the objectives included therein.[390] Thus, in the integration model envisaged by the founding fathers there was no need for strong social policy provisions at the supranational level because they trusted that the establishment of the common market would help the gradual improvement of living and working conditions in the Member States (automatic convergence model). Thereby the Treaty of Rome artificially separated economic and social issues.[391] This integration model implied that the increasingly close integration of economic issues at the supranational level could be implemented by leaving labour law and social issues almost exclusively in the autonomous legislative competence of Member States.[392]

---

387 Art. 118 provided that the Commission shall have the task task to promote collaboration between Member States especially in the following fields: employment; labour law and working conditions; basic and advanced vocational training; social security; prevention of occupational accidents and diseases; occupational hygiene; the right of association, and collective bargaining between employers and workers.

388 For this purpose, the Commission, maintaining close relations with the Member States, could make studies, give opinions and organise consultations on problems both arising at the national level and being of considerable interest for international organisations.

389 Within the range of competition law rules, the then Arts. 85 and 86 formulated negative prohibitions concerning agreements restricting competition and taking improper advantage of a dominant position. Article 85 explicitly rules that agreements restricting competition shall be null and void. The Treaty formulated similarly negative prohibitions in the range of fundamental freedoms. Art. 30, for instance, formulated an explicit prohibition regarding quantitative restrictions on importation and all measures with equivalent effect. Article 48 established the abolition of any discrimination based on nationality in the field of the free movement of workers.

390 Art. 87 explicitly authorised the Council to adopt, based on the Commission's proposal, any appropriate regulation or directive with a view to the application of the principles set out in Arts. 85 and 86. Arts. 49–51 of the Treaty establishing the EEC authorised the Council to pass secondary legal sources for promoting the free movement of workers. This was the basis, among others, of Resolution 1612/68/EC as well.

391 F. W. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity', *Journal of Common Market Studies*, Vol. 40, 2002. pp. 645–70.

392 C. Barnard & S. Deakin, 'Negative and Positive Harmonisation of Labour Law in the European Union', *Columbia Journal of European Law*, Vol. 8, 2002, pp. 389–413.

There are other explanations, too, why the founding treaty did not include strong social policy provisions. According to some theories this primarily reflected the founding fathers' neo-liberal attitude according to which the implementation of social goals was not a prerequisite but merely a favourable consequence of economic integration in the Community.[393] This was pointed out in the *Spaak* report,[394] among others, which emphasised that legal harmonisation in social policy was a consequence rather than a prerequisite of the implementation of the common market and economic integration. The *Ohlin* report[395] made by a committee comprising ILO experts similarly discarded the idea of *general* legal harmonisation in the field of social policy; it recommended legal harmonisation only in certain fields *selected* in advance, e.g. in the field of equal remuneration. At the same time, the 'asymmetry' of the economic and social issues in the original founding treaty was also related to the economic-political transition ongoing in the Member States after World War II. The initial period of economic integration coincided with the strengthening of the welfare social states in Western Europe, so the governments of Member States were committed to protecting social rights and improving working conditions.[396] Another reason why the idea that, at the level of their national economies, Member States would use the advantages arising from economic integration for extending social rights and improving working conditions, was acceptable was the strengthening of trade union movements. Finally, the social policy provisions of the founding treaty were also the results of a French-German political compromise. In France, employees' rights were guaranteed on a broad scale at that time already.[397] Considering the latter, the French were afraid that due to the stricter labour law rules the French industry and French enterprises would suffer a competition disadvantage at the common market. Germany, on the other hand, tried to reduce state intervention to the minimum. It served Germany's interests that, beyond the above two fields[398] the founding treaty did not provide for general legal harmonisation in labour and social law. As the European Court said in relation to the *Defrenne II*

393 This theory is based on the interpretation of Art. 117 of the Treaty of Rome according to which the improvement of employees' living and working conditions does not only *follow* from the operation of the common market preferring the harmonisation of social systems but also (…) from the approximation of legal, regulation and public administration provisions.

394 Rapport des Chefs de Délégations, Comté Intergouvernemental, 21 April 1956, pp. 19–20, 60–61.

395 OHLIN Report 1956, 'Social Aspects of European Economic Co-operation, Report by a Group of Experts', in: OFFICE, I. L. (ed.), New Series, No. 46, Geneva.

396 S. Giubboni, *Social Rights and Market Forces in the European Constitution*, Cambridge University Press, 2006.

397 The principle of equal remuneration, for instance, was implemented on a broad scale, longer paid holidays were guaranteed to workers and French employees were paid higher overtime rates, too.

398 The principle of equal pay for equal work for men and women and the rules on paid holidays.

Case,[399] Article 119 had a double purpose. In addition to its social purpose, the primary purpose of Article 119 was actually an *economic* one: 'to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-community competition as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay'.[400]

3.2 1973–1986

It was the Paris summit that brought the first breakthrough change in the attitude to social policy in 1973. In their Declaration issued at the summit, the heads of state and prime ministers of Member States emphasised that action in the social field was just as important to them as achieving Economic and Monetary Union.[401] As a result, a social action programme[402] was adopted in 1974, which led to the formulation of several directives in the fields of labour law and gender discrimination.[403] Considering that the social policy chapter of the founding treaty did not include a specific legislative authorisation, the directives were adopted based on the then Articles 100 and 235 ruling on legal harmonisation related to the internal market. Both articles demanded unanimity in the Council and community legislators had to prove that legal harmonisation was directly necessary for the creation and operation of the common market. Later on, in the 1980's, social legislation started to stagnate, which was among others due to the fact that the British conservative government headed by Margaret Thatcher prevented the adoption of several proposals in the fields of social and labour law.

3.3 1986–1989: The Delors *age*

One of the most significant measures of the committee headed by Jacques *Delors* was launching the Single Market Programme in 1986, which further con-

399 Judgment of 8 April 1976 in Case C-43/75, Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena (Defrenne), [1976] ECR 00455.

400 Ibid., par. 9 Later, in the Deutsche Post Case, the Court inverted the relationship between the social and economic goals of this provision and established that the prevention of factors distorting competition between Member States was secondary to the social policy goals of this provision, Case C-270/97 and C-271/97, Deutsche Post AG, [2000] ECR 929, at 57.

401 EC Bull. 10/1972, Paras. 6 and 19.

402 OJ 1974 C 13/1.

403 From the labour law directives mention must be made of three related to the reorganisation of enterprises: Directive 75/129/EEC on collective redundancies (OJ L 48, 22.2.1975.), Directive 77/187/EEC on the transfer of undertakings and Directive 80/987/EEC on employers' insolvency (OJ L 61, 5.3.1977.).

firmed the view that social policy was necessary for the successful implementation of the single market and for enabling citizens of the Community to enjoy the advantages of the internal market to the extent possible. In addition, the Single European Act (SEA, 1986) was adopted in this period, which, as a significant novelty, introduced qualified majority decision making with reference to workplace safety and health protection.[404] Thereby the 'English veto' could be circumvented in the Council and, by the broad interpretation of the concepts of workplace safety and health, the Community institutions adopted several directives on this legal basis once again, including the first directive on the organisation of working time[405] and the directives on the protection of young people at work and on maternity protection.[406] It was the SEA furthermore that first introduced the reference in the founding treaty with regard to the minimum legal harmonisation in the field of social policy[407] and laid down the contractual basis for the European social dialogue as well.[408] These developments increasingly strengthened the view that social issues could in fact not be separated from economic issues and a Community social policy was required for the successful implementation of the single market integration. The Community Charter of Fundamental Social Rights for Workers was adopted in 1989. Even though this document did not become a binding legal source,[409] its primary significance was that it stimulated Member States to further social legislation. After the adoption of the Charter in 1989 a new action package was issued on the basis of which, for instance, the directives on the posting of workers as part of the provision of services[410] and on the obligation to inform employees of the conditions applicable to the work contract[411] were adopted.

404 Art. 118a.

405 Directive 93/104/EEC concerning certain aspects of the organization of working time, OJ L 307, 13.12.1993.

406 Council Directive 94/33/EC on the protection of young people at work (OJ L 216, 20.8.1994.) and Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ L 348, 28.11.1992.).

407 Art. 118a para. 3.

408 Art. 118b.

409 From the then 12 Member States of the Community only the United Kingdom was not willing to confirm the document.

410 Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services, OJ L 018, 21.1.1997.

411 Council Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ L 288, 18.10.1991.

3.4 Treaty on the European Union (1992)

The Maastricht Treaty opened a new chapter in social policy. In the fields of education, occupational training and youth protection the Union was given new, albeit very limited competence. The Union's authorisation was restricted to stimulating cooperation between Member States and supporting Member States' activities. At the same time, the founding treaty expressly excluded the possibility of legal harmonisation.[412] Originally, the Maastricht Treaty was meant to totally transform the social policy chapter but in the end, due to the resistance of the United Kingdom, the new provisions were attached to the treaty by way of protocols, which became known as the Social Policy Agreement. In this it was stipulated that the legal acts adopted on the basis of the Agreement were not binding for the United Kingdom or Northern Ireland.[413] The Agreement would have granted significant legislative authorisation to Community institutions in the field of social policy and extended qualified majority voting.[414] The Agreement would have introduced a significant change in relation to social dialogue as well. Before, within the framework of social dialogue, social partners had had consultation rights primarily. The Agreement granted the opportunity to social partners to sign European-level agreements, which could be made generally valid in the whole territory of the European Union by a resolution adopted by the Council. Finally, the Maastricht Treaty introduced the institution of EU citizenship as well.[415]

One of the most significant novelties of the Treaty of Maastricht was the introduction of the provisions regarding the Economic and Monetary Union (EMU). The introduction of the single currency and the common monetary policy had an indirect effect on the formation of social policy. On the one hand, the introduction of the Euro eliminated exchange rate differences, which is good for the economy and ultimately leads to the creation of workplaces. On the other hand, participation in the EMU has several negative effects as well, e.g. Euro zone membership and the implementation of the convergence criteria demands high budget discipline of the Member States. The introduction of the single currency

412 Art. 149 (1)-(2).

413 This is what is referred to as the *opt-out* clause.

414 By virtue of Art. 2 (1) a qualified majority decision would have been required for: the protection of workers' health and safety; working conditions, the information and consultation of workers; equality between men and women; the integration of persons excluded from the labour market. Unanimous decisions would have still been required in new fields like social security and the social protection of workers; the protection of workers where their employment contract was terminated; collective workers' rights, including co-determination; conditions of employment of third-country nationals legally residing in Community territory; financial contributions for promotion of employment and job creation.

415 EC Treaty, Art. 17 (1).

deprives Member States of the opportunity to increase their countries' competitiveness or avoid negative social policy effects by devaluating their currencies. Participation in the EMU indirectly restricts Member States in autonomously designing their employment and social policies. The fact that employment policy criteria were not included in the convergence criteria has further increased the 'asymmetry' between economic and social issues.

3.5 The Treaty of Amsterdam (1999)

The Treaty of Amsterdam inserted, with minor amendments, the Social Policy Agreement into the founding treaty.[416] A direct reference to the European Social Charter (1961) passed within the framework of the Council of Europe and to the Community Charter on the Fundamental Social Rights for Workers (1989) was inserted in Article 136.[417] This amendment of the treaty introduced the cooperation procedure in social policy and created a direct legal basis between men and women for implementing the principle of equal treatment.[418] Article 3 (2) of the EC Treaty provided that 'in all activities referred to in this Article, the Community shall aim to eliminate inequalities, and promote equality, between men and women' (this is referred to as the *mainstreaming* clause). Another significant novelty of the Amsterdam Treaty was the introduction of Article 13 of the EC Treaty,[419] which gave legislative authorisation to the Council to take unanimous action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. This provision launched the EU's anti-discrimination policy, which contributed to significantly extending the principle of equal treatment and the ban on negative discrimination and to the efficient enforcement of these in the Community. While the Community's anti-discrimination policy was restricted to gender discrimination before, Article 13 imposed a ban on another five forms of negative discrimination.[420] It was on the basis of Article 13 that Directive 2000/78/EC for equal treatment in employment and occupation and Directive 2000/43/EC on equal treatment irrespective of racial or ethnic origin were established. This latter directive is significant also because its material scope extends beyond the framework of employment providing for the implementation of the principle of equal treatment in diverse areas of everyday life: from social protection to education to health care. Moreover, in the closing provisions of this directive there is an explicit enforcement system by

416 Arts. 136-145 [after the Treaty of Lisbon took effect, Arts. 151-161 of the TFEU].
417 Currently Art. 151 of the TFEU.
418 Art. 141 (3) [after the Treaty of Lisbon took effect, Art. 157 (3) of TFEU].
419 After the Treaty of Lisbon took effect, Art. 19 of the TFEU.
420 These include the ban on discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation.

which it directly interferes with the procedural autonomy of Member States with reference to the implementation of the directives.

Finally, the Amsterdam Treaty inserted a new employment policy chapter in the founding treaty (EC Treaty Title VIII, Articles 125-130). This was preceded by the issuing of the Commission's under the title *Growth, Competitiveness and Employment* in 1993 and a Green Book on *European Social Policy*. One of the most important effects of the two documents was that they had a focus on workplace creation and measures fostering the improvement of the employment situation, connecting these to enhancing European competitiveness. The employment policy coordination introduced by the Amsterdam Treaty was built on the Open Method of Coordination (popularly known as the European Employment Strategy). The effect of this employment policy in the field of social policy was that, instead of the protection of employees the focus was shifted towards workplace creation and the improvement of the employment situation.[421] This shift of focus in employment policy was reinforced by the *Lisbon Strategy* promulgated in March 2000, with the aim to 'make the EU 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, by 2010'. The Lisbon Strategy furthermore suggested extending the Open Method of Coordination to further areas of social policy, including the field of combating poverty and social exclusion.

3.6 The Treaty of Nice and the EU Charter of Fundamental Rights

The Treaty of Nice added two more fields to the social policy competence of the Community: combating social exclusion and modernising social security systems.[422] In these fields the Council was granted authorisation only for devising stimulating measures, however, and the founding treaty explicitly excluded the opportunity of legal harmonisation.

The EU Charter of Fundamental Rights was adopted at the same time as the Nice Treaty, but for a long time the Charter lacked legally binding force.[423] The Charter was promulgated by the three Community institutions (the European

421 This was also reflected in the objectives of the Community legal harmonisation, e.g. Directive 97/81/EC on part-time work serves a double purpose (1) to prevent the less favourable treatment of part-time workers and to improve the quality of part-time work and, on the other hand, (2) to foster the development of part-time employment on a voluntary basis (OJ L 014, 20.1.1998.).

422 Art. 137(1) (j) and (k) [TFEU Art.153 (1) (j) (k)].

423 It was at the Cologne Session of the Council of Europe in June 1999 that a political decision was made for the first time articulating that the European Union was in need of a stand-alone document on fundamental rights. After the 'convent' set up based on the decision of the Council of Europe in Tampere formulated the text of the Charter, it was put forward for adoption at the session of the Council of Europe in Nice, in December 2000.

Commission, the Council and the Parliament) and the heads of state and prime ministers of Member States reinforced it at the Nice session of the Council of Europe. The Member States left it to the next Intergovernmental Conference to decide on issues related to the ultimate legal status of the Charter. For a long time, the Charter had an uncertain legal status, i.e. it lacked a formally binding force, but served as an important tool of legal interpretation in the legal practice of both the European Court and the courts of Member States. The issues related to the Charter's legal status were finally made clear in the Lisbon Treaty.

3.7 The Lisbon Treaty (2009)

The Lisbon Treaty (also known as the Reform Treaty), which took effect on 1 December 2009 did not introduce any significant novelties related to the social and employment policy chapters of the treaty. It must be emphasised however that Article 3 of the TEU has an explicit reference to the concept of a 'social market economy aiming at [...] social progress', underlying which, some assume, was a shift of the European integration towards a new economic model where social goals and values would be given a much more prominent role. This assumption is supported by the fact that in the targets of the Union listed in Articles 2 and 3 of the TEU an explicit shift of focus can be observed towards targets of a political nature. It is stipulated in Article 9 of the TFEU furthermore that: 'In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health' (this is referred to as the social mainstreaming clause). The most important novelty in the Lisbon Treaty from the point of view of social policy was to make the Charter of Fundamental Rights legally binding. By virtue of Article 6 (1) of the TFEU 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg on 12 December 2007, which shall have the same legal value as the Treaties.' Accordingly, the Charter has legally binding force and is at the level of primary EU law.[424] It is a significant novelty in the Charter from the point of view of the development of social policy that it mentions social and economic rights at the

424 With reference to the United Kingdom and Poland a protocol was attached to the Treaty, which added certain reservations to the implementation of the Charter with reference to these two countries. Protocol No. 30 on the application of the Charter of Fundamental Rights of the EU to Poland and the United Kingdom became infamous by granting an opt-out clause for the United Kingdom and Poland for the application of the Charter.

same rank as civil and political rights. The Charter interprets the concept of social rights broadly, meaning not only the right to social security but also employees' fundamental rights. Social rights are primarily found under the chapter Equality[425] and Solidarity,[426] while two important fundamental rights from the aspect of labour rights, i.e. the freedom of assembly and association and the right to work are found under the chapter Freedoms.[427] At the same time, the Charter continues to maintain the traditional approach to the enforcement of social rights. Certain social rights enacted in the Charter are formulated not as subjective rights but as general principles. By virtue of Article 52 (5) the provisions establishing the fundamental principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. This article makes it clear furthermore that they shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

It was an explicit goal of the Reform Treaty to make the division of powers clear between the Union and the Member States. In fact, on the basis of the Lisbon Treaty, the Union has three various types of authority. In social policy, the Union has *divided authority* with Member States.[428] This authority is characterised by allowing both the Member States and the Union to design and adopt binding legal acts. At the same time, Member States may exercise their authority only to the extent that it was not exercised by the Union.[429] According to Articles 5 (2) and (3) of the TFEU, however, the coordination of employment policy and the social security systems must be carried out within what is referred to as the *coordination authority*. The fields of education, vocational training and youth, which are also under the social policy chapter of the Treaty, were listed under *complementary, supportive authorities*.[430] Within the framework of this latter competence the EU has authority only to take measures supporting, supplementing or coordinating the measures taken by Member States, without depriving Member States of their existing authorities. It is explicitly stipulated in the treaty, however, that the binding legal acts adopted in this field may not result in legal harmonisation.[431]

425 Title III.
426 Title IV.
427 Title II.
428 TFEU Art. 4 (b).
429 TFEU Art. 2 (2).
430 TFEU Art. 6 (e).
431 TFEU Art. 2 (5).

4 The relation between economic integration and the social policy of the EU/Member States

As it was obvious from the above historical review, one reason why Member States did not include strong social policy provisions in the founding treaty was that they did not expect that economic integration and the establishment of the internal market would question their legislative autonomy or regulatory competence in the field of labour or social law. The application of the economic provisions of the treaty, however, occasionally conflicted with the social policy provisions of the Member States and the Union. In the case of such conflicts of laws it was usually the European Court that was to find the right balance between the economic and social goals. The *Albany*[432] Case concerned a Dutch sectoral complementary pension scheme set up by way of a collective agreement. The Dutch minister for social affairs and employment made it compulsory for every employer in the sector to join the fund and pay the contributions. The complainant argued that this system violated Article 101 of TFEU [former Article 81], i.e. it qualified as an agreement restricting competition. The Court emphasised that the Community's activity did not only include a system that 'prevented the distortion of the internal market'; it incorporated 'social policy' as well. The Court also pointed out that the treaty expressly supported the negotiations of social partners at the European level and, within the framework of that, the system of agreements to be signed at the European level.[433] Considering the social policy targets and provisions in the Treaty, the Court formulated the following: 'It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour would be subject to Article 101 of the TFEU[434] *when seeking jointly to adopt measures to improve conditions of work and employment* [*italics added*].'[435] So the Court decided that, *for the purpose* between the social partners outlined above, Article 101 of the TFEU did not apply to agreements signed within the framework of collective bargaining, considering the nature and objectives of these agreements.[436] Thus in these cases the Court granted (limited) immunity to collective agreements from

432 Judgment of 21 September 1999 in Case C-67/96, Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie (Albany), [1999] ECR 05751.
433 Ibid., paras. 54–58.
434 Previously EC Treaty, Art. 81 (1).
435 Case C-67/96 Albany, para. 59.
436 Ibid., para. 60.

Article 101. In the *Viking*[437] case, on the other hand, it did not exclude the possibility of applying fundamental freedom rights when assessing the lawfulness of collective action by trade unions despite the fact that Article 153 (5) of the TFEU[438] clearly excludes the right to association and to strike from the competences of the EU. In this case, the Court ordered to apply the provisions referring to the freedom of establishment to collective action by trade unions, including strike. The Court differentiated between Member States' abstract legislative competence and their exercising the former: '… in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law'. Thus, in the latter case, Member States must consider the provisions governing fundamental freedom, and this is unaffected even by the fact that the right to strike is a fundamental freedom both in Member States and in EU law.[439] With reference to this actual case the Court established that the collective action by the trade unions and their associations violated the prohibition formulated under Article 49 of the TFEU since it blocked, restricted or made less attractive the freedom of establishment in the Union.[440] The Court finally provided explicit guidelines to the court in the Member State regarding assessing the lawfulness and proportionality of collective action as well.

5 The major fields of European social policy

a) Legislation on the free movement of workers: The founding treaty has granted the right of the free movement of workers in the territory of the Community and later the Union since the Treaty of Rome took effect. Facilitating the free movement of labour as a production factor is an important means to improve living and working conditions and especially to approximate wages. In both the primary and the secondary legislation, the main organisational principle of regulation is the ban on discrimination based on nationality and the enforcement of the principle of equal treatment in the territory of the host country. From the secondary legislation Regulation 1612/68/EEC should be highlighted, the aim of which is to enforce the principle of equal treatment in the area of the host country with reference to foreign employees and their family

437 Judgment of 11 December 2007 in Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti (Viking case), [2007] ECR 0779.

438 Previously Art. 137 (5).

439 Case C-438/05 Viking, para. 44.

440 Ibid., paras. 72–73.

members with respect to access to employment, work conditions and social services. Another important source of law is Regulation 1408/71/EEC[441] on the coordination of Member States' social security systems.[442] The coordination is based on five fundamental principles: the principle of equal treatment, the principle of aggregation,[443] the principle of the exportability of benefits,[444] the principle of the application of the legislation of a single Member State[445] and the rule against overlapping benefits.[446]

b) Legal harmonisation in EU labour law: EU labour law means, on the one hand, the directives made by institutions of the Union for the harmonisation of certain issues of labour law[447] and, on the other hand, the legal harmonisation related to occupational health and safety.[448] The Union continues to have competence for the harmonisation of certain labour law issues specified in the Treaty only. According to a generally accepted stance, there continues to be no need for the general legal harmonisation of the labour law systems of Member States. In addition to the protection of employee interests, the legal harmonisation in labour law aims to guarantee competition neutral condi-

441 The latest amendment of the Regulation was Directive 883/2004/EC adopted in April 2004. Resolution 987/2009/EC enforcing the latter regulation took effect as of 1 March 2010.

442 Thus, the Resolution does not aim to harmonise the social security systems of Member States; it merely aims to coordinate the enforcement of Member States' legislation in this field along certain basic principles.

443 In the host country, all periods that are important for obtaining and maintaining the social entitlements and for calculating the amounts of benefits, and which must be observed by virtue of the legislations of Member States, must be added up.

444 Money benefits are related to persons, i.e. employees are eligible for these irrespective of where their permanent or temporary residences are. This principle overrides the principle of territoriality, according to which latter, as a main rule, people who have their usual places of residence in the area of a certain country are eligible for the social benefits of that country.

445 If an employee works in the areas of several countries, in the scope of this regulation only the law of a single state shall be applicable to him.

446 If an employee has paid social security contributions in several countries, the purpose of the directive is to prevent an inappropriate duplication of benefits.

447 Legal harmonisation in labour law covers certain issues of both individual and collective labour law. The directives can be thematically categorised in several ways; here it suffices to mention certain directives. In the category of individual labour law, mention should be made of the labour law directives related to the reorganisation of enterprises (Directive 75/129/EEC on collective redundancies, Directive 77/187/EEC on the transfer of undertakings, Directive 80/987/EEC on employer insolvency and the amendments of these); Directive 93/104/EEC on the organisation of working time, the directives on atypical forms of employment (Directive 97/81/EC on part-time work, Directive 1999/70/EC on fixed-time work and the latest is Directive 2008/104/EC on temporary agency work). Considering the field of collective labour law, mention must be made of Directive 94/45/EC on European Works Councils and Directive 2002/14/EC on informing and consulting employees.

448 Due to their special regulatory technique, directives related to workplace health and safety are usually discussed separately. The role of Framework Directive 89/391/EEC should be underlined in this field.

tions at the internal market by the approximation of Member States' labour law regulations. Enterprises from countries where the level of labour law protection is lower may gain competition advantage over enterprises resident in Member States where the level of labour law protection in higher. Furthermore, in the scope of free movement[449] enterprises have the opportunity to avoid, by using the differences in the labour law regulations, the application of the stricter labour law regulations of certain Member States.[450] Lately, harmonisation in labour law has aimed to disseminate certain forms of employment in Member States.[451] The means of legal harmonisation is legislation by way of directives primarily, while 'soft law' legal sources have had a growing role as well.

c) The enforcement of the principle of equal treatment and the policy of equal chances. Initially, the enforcement of the principle of equal treatment covered the narrow field of equal pay for both sexes for the same work. The enforcement of this principle was based, on the one hand, on primary legal provisions[452] and, on the other hand, on secondary sources of law.[453] Especially from the 80s, the principle of equal treatment was extended by secondary legislation to broader areas of employment.[454] But the Community-level legal harmonisation continues to cover discrimination between the sexes only. With regard to this latter, it was the Treaty of Amsterdam that brought about a significant change, authorising the Council to combat any form of negative discrimination. The new Article 13 of the EC Treaty gave legislative competence to institutions of the Union, beyond the field of gender discrimination, in the fields of discrimination based on racial or ethnic origin, religious or other affiliation, disability, age or sexual orientation. On the basis of this it was in 2000 that the two new, above mentioned directives on the prohibition of racial discrimination[455] and the general framework directive

449 Primarily in the scope of the freedom of establishment and the freedom of service provision.

450 This statement is contested. The costs on labour are only one factor under the production costs of an enterprise. Furthermore, the level of these costs is usually directly related to the productivity of the work force.

451 E.g.: Directive 97/81/EC on part-time work.

452 Currently TFEU Art. 157.

453 Directive 75/117/EEC on the application of the principle of equal pay, OJ L 45, 19.2.1975.

454 Directive 76/207/EEC obliged Member States to enforce the principle of equal treatment in all areas of employment already, OJ L 039, 14.2.1976. Directive 86/613/EEC extended the scope of the principle of equal treatment to self-employed persons as well (OJ L 359, 19.12.1986.). Mention should be made furthermore of Directive 96/34/EC on parental leave (OJ L 145, 19.6.1996.) and Directive 97/80/EC on the inverted burden of proof and indirect discrimination (OJ L 14, 20.1.1998.).

455 Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000.

in the area of employment[456] banning discrimination based on religion, disability, age or sexual discrimination, were adopted. Within the framework of the general anti-discrimination policy the EU has made efforts to help the elimination of discrimination and facilitate equal chances especially in employment but lately in diverse fields of life by various legal and non-legal tools[457] (equal chances policy).

d) For the coordination of Member States' employment policies and certain other policies related to social protection, the Open Method of Coordination, to be outlined below, was introduced.[458]

6 The regulatory mechanisms of European social policy

6.1 Legal harmonisation

The primary and oldest regulatory mechanism of European social policy is legal harmonisation. Legal harmonisation aims at the (gradual) approximation of the legislations of Member States. Legal harmonisation is primarily implemented by the adoption of directives. Initially, the legal harmonisation of social legislations was functionally related to the establishment/operation of the single/internal market. As the EU gradually obtained legislative competence in social and labour legislation, an increasing number of legal harmonisation tools were adopted in order to facilitate autonomous social policy objectives. Legal harmonisation in social legislation was primarily implemented in labour law, but in a rather fragmented way. It must be underlined that the broadly accepted legal harmonisation method of the EU in social policy is what is referred to as minimum harmonisation.[459] The essence of this is that, as a main rule, EU directives set so-called minimum standards only, but Member States and social partners are allowed to make stricter labour law rules than those in the directives. At the same time, the directives in labour law often include what are called non-regression provisions, which explicitly prohibit Member States to lower the level of labour law protection in the course of the implementation of a Community directive.

On the other hand, legal harmonisation in social policy in the EU is characterised by striving for flexibility. Due to the differences in the social systems of

456 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000.
457 Education, health care, social security, etc.
458 For further details cf. Section 6.3.
459 The method of minimum legal harmonisation is reinforced by the founding treaty as well. Cf. TFEU Art. 153 (2) b) and (4).

Member States, directives try to grant Member States and social partners as broad discretion as possible to enable them to harmonise the minimum requirements laid down in the directive with their own labour law and social system. It is related to this, among others, that in the field of social policy there is an opportunity for social partners to implement Community directives by way of collective agreements or, in certain cases, to divert from the provisions of directives and adopt more favourable provisions.[460]

6.2 Social dialogue and the European-level agreements of social partners

It is an important characteristic of European social policy that, in addition to Member States, social partners, too, have an outstanding role in the shaping of the EU policy within the framework of the European social dialogue. On the one hand, the founding treaty grants the social partners' European-level key organs the right to participate in the EU's legislative procedure by way of consultations with the Commission.[461] This directly goes back the event in 1985 when chairman of the Commission *Delors* invited the top bodies of European social partners to a summit in the Castle of Val Duchesse in Belgium, encouraging them to comment on the Commission's proposals and make individual initiatives, too, to facilitate the development of the Community law. On the other hand, the procedure that can be considered as the most innovative was introduced by the Social Policy Agreement of Maastricht since it gave an opportunity to European social partners, while keeping the proposal-making monopoly of the Commission, to make agreements at the EU level. Social partners may initiate launching this procedure during the consultation with the Commission.[462] Article 155 of the TFEU says that EU level dialogue between social partners may lead to agreements. These agreements can be implemented in two ways. On the one hand, in accordance with the specific procedures and practices of the social partners and Member States.[463] In this case we speak of what are referred to as autonomous agreements, which, as a main rule, are binding only for the social partners signing the agreement and are not binding for third persons.[464] At the same time, at the joint

460 TFEU Art. 153 (3) At the same time, it is the Member State that is ultimately responsible for the efficient implementation of the Community law.

461 TFEU Art. 154 The consultation has two levels. According to the Treaty, before submitting proposals in the social policy field, the Commission shall consult social partners on the possible direction of Union action [TFEU Art. 154 (2)]. If the Commission considers Union action advisable, it shall consult management and labour on the content of the proposal as well [TFEU Art. 154 (3)].

462 TFEU Art. 154 (4).

463 TFEU Art. 155 (2).

464 Judgment of 17 June 1998 in Case T-135/96, UEAPME [1998] ECR II-2335., para. 45: The place of these agreements in the general system of legal sources of the EU is disputed. For the legal status of

request of the signatories, the Council, based on the Commission's proposal, may promulgate these agreements in the form of resolutions (in practice directives), thereby making them binding (*erga omnes* validity).[465]

The procedure laid down in Article 155 is significant from the point of view of European law partly because it gives an opportunity to *private entities* to devise EU norms in an essentially delegated competence. From the point of view of the democratic legitimacy of this alternative form of legislation, the conditions for the representativity must be emphasised. These determine which organisations of the social partners may participate in the consultation procedure and the procedure leading to EU-level agreements. With reference to these conditions the Commission formulated proposals in a non-binding statement.[466] The three top alliances recognised as the most important social partners are: the Union of Industrial and Employers' Confederations of Europe (UNICE), the European Centre of Employers and Enterprises (CEEP) and the European Trade Union Confederation (ETUC). Within the framework of social dialogue the agreement on telecommuting, for instance, was adopted in the form of an autonomous agreement, but most agreements made within the framework of social dialogue were later promulgated by the Council incorporated into a directive. An example for the latter is the Directive on the protection of pregnant workers[467] and the directives promulgating the framework agreements on part-time and fixed-time employment.[468]

6.3 Open method of coordination

A relatively new tool of European social policy making is the *Open Method of Coordination*. The essence of this mechanism is that it primarily aims to har-

---

the agreements Cf. in detail D. Schiek, 'Autonomous Collective Agreements As A Regulatory Device In European Labour Law: How To Read Article 139 EC', *Industrial Law Journal*, Vol. 34, 2005, p. 23.

465 TFEU Art. 155 (2): Only the Council and the Commission participate in this procedure. The European Parliament shall be informed only. As a main rule, the Council makes qualified majority decisions, but if the agreement refers to issues in fields where unanimity is required by the Treaty, the Council shall act unanimously.

466 The organisations should be cross industry or relate to specific sectors or categories and be organised at European level; consist of organisations which are integral and recognised part of Member State social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible; have adequate structures to ensure their effective participation in the consultation process, COM (93) 600 *final.*

467 Council Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145, 19.6.1996.

468 Council Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work (OJ L 014, 20.1.1998.) and Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ L 175, 10.7.1999.).

monise Member States' social policies rather than their legislations, at the same time, as a main rule, leaving the legislative autonomy untouched. The political nature of this procedure is evident from the dominant role of the Council of Europe and the fact that the legal norms adopted within the framework of the open coordination mechanism are 'soft law' norms, i.e. they belong to legal acts with no legally binding force.[469] The normative acts used within the framework of the employment policy coordination mechanism include, for instance, the employment policy guidelines, the National Action Programmes and the recommendations of the Council.

The two major fields of the Open Method of Coordination are employment policy coordination, and social security and the combating of social exclusion regulated by Articles 145-150 of the TFEU.[470] According to the definition laid down at the 24–25 March, 2000 Lisbon session of the Council of Europe, the major procedural steps of the open coordination mechanism are the following.[471] The procedure starts with political guidelines formulated at the EU level and, where necessary, the setting of quantitative and qualitative indicators. Member States design their national policies considering the former, and thus, within the framework of employment policy coordination for instance, they work out what are referred to as national employment action plans in compliance with the recommendations laid down in the European employment guidelines. The Community institutions (the Council and the Commission) regularly control and evaluate Member States' performance but, considering that a significant part of the legal acts adopted within the framework of the procedure lack binding force, no infringement procedure may be launched against Member States.[472]

469 The normative acts used within the framework of the employment policy coordination mechanism include, for instance, the employment policy guidelines, the National Action Programmes and the recommendations by the Council.

470 It is Art. 153 (1) of the TFEU that can be considered the formal legal basis of this latter field. The framework of the community action plan of the combat against social exclusion is furthermore laid down in Decision 50/2002/EC of the European Parliament and of the Council of 7 December 2001 establishing a programme of Community action to encourage cooperation between Member States to combat social exclusion, OJ 2002 L 10/1-7.

471 Presidency Conclusions on 24-25 March 2000 Session of the Council of Europe, http://europa.eu/european-council/index_en.htm.

472 TFEU Art. 258.

CROSS-BORDER HEALTHCARE IN THE EUROPEAN UNION

Éva Gellér-Lukács and Laura Gyeney

The regulation of cross-border healthcare is a manifold process, i.e. when one talks of cross-border healthcare services, many types of cases are meant.[473] In some cases, it is the very healthcare provider that travels to another member state expressly for treatment purposes.[474] It is much more common that it is not the health service provider but the patient who travels to the member state where healthcare is provided. A typical example for this is when the need for a health service that is either medically required or was previously planned arises during a stay in a foreign country, which stay is basically related to studies or work. In these cases, regulation (EC) No. 883/2004 on the coordination of social security systems will apply.[475] In those cases where the patient travels to another member state with the express purpose of using the service, other rules are to be applied. For such cases, i.e. expressly for using foreign healthcare services, a directive on the use of cross-border health services, namely directive No. 2011/24/EU on the application of patients' rights in cross-border healthcare[476] was also adopted in 2011. Thus, currently there are two secondary regulatory tools that govern these issues in European legislation.[477] The provisions set out in the directive may provide an important basis for establishing an integrated future European healthcare policy.

473 Stephanie De La Rosa, 'The Directive on cross border healthcare or the art of codifying complex case law', *CMLRev*, Vol. 49, 2012.

474 This is supported by directive No. 2005/36/EC on the recognition of professional qualifications, OJ L 255, 30.9.2005.

475 Pursuant to Art. 19, an insured person staying in a Member State other than the competent Member State shall be entitled to the benefits in kind which become necessary on medical grounds during their stay, taking into account the nature of the benefits and the expected length of the stay.

476 Directive 2011/24/EU of the European Parliament and of the Council of March 9, 2011 on the application of patients' rights in cross-border healthcare (OJ L 88, 4.4.2011, p. 45). This directive is furthermore applicable for the so-called telemedicine services, including those healthcare services during which the person receiving the treatment and the person providing the healthcare service do not meet. In this case, the connection between them is established via a remote data transmission system, which primarily means the internet, or the telephone, and where the main goal of establishing contact is to conduct a diagnostic consultation. Similarly, the rules laid down in the above directive are applied in the cross-border purchase of medicines and medical aids.

477 According to Para. (3), Art. 3 of the Treaty on European Union, 'The Union 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.'

1 The issue of cross-border healthcare 'from a Union perspective'

What do we mean by cross-border healthcare from the specific perspective of European law? Obviously, this means situations where patients use healthcare services in a member state which is different from the one in which they are insured. However, the 'European law' that ensures free movement between the member states cannot be restricted to allowing a patient to use health services in a member state which is different from the place where this patient holds insurance. If we think about it, it can easily be done if it is exclusively the patient who bears the costs of such services. The real challenge is posed by the preservation of the social security eligibilities of the patients after crossing the borders, i.e. evading 'the principle of territoriality', which also means that the affected patient receives a certain amount of contribution to their costs.

According to the provisions set out in the above-mentioned regulation (EC) No. 883/2004, which has been applicable in Hungary since its EU accession, the patients receive equal access to the system of the member state that provides the healthcare services in the same way as if they had been insured locally, and the *insurers of the member states settle the costs between each other*. Usually, the patients only have to pay a very low amount locally (this is the so-called co-payment). If the healthcare service *is medically required, no prior authorization from the insurance company will become necessary* but if the use of the healthcare service is planned, it should be applied for in each case. It is the above-mentioned system of the regulation that was supplemented by the Court's decision adopted in the 'Kohll and Decker' cases,[478] which opened new horizons for the free movement of services as a fundamental right to economic freedom in respect of the reimbursement of the costs of the health services. In the decisions adopted by the Luxembourg Court on access to health services provided in other member states in the internal market, namely in the Luisi and Carbone,[479] and Grogan[480] cases, it was already declared earlier that *health services* qualify as *economic services*, so they belong under the effect of the free movement of services.[481] However, the Kohll case was the first case in which a state-funded ser-

478 Judgment of 28 April 1998 in Case C-120/95, Nicolas Decker v Caisse de maladie des employés privés (Decker), [1998] ECR 01831., and Judgment of 28 April 1998 in Case C-158/96, Raymond Kohll v Union des caisses de maladie (Kohll), [1998] 01931.

479 Judgment of 31 January 1984 in Joint Cases 286/82 and 26/83, Luisi and Carbone v Ministero del Tesoro [1984] ECR 00377.

480 Case C-159/90, Grogan.

481 Although the issue of public health was vaguely present in the internal market previously, more precisely, in the scope of measures that exert the same effect as quantitative restrictions, as a kind of reason for contractual exemption. Currently it is Paragraph 36(2) of the Treaty on the Functioning of the European Union that specifies the scope of public health exceptions.

vice belonging under the effect of social security was used.[482] In this specific case, the Court decided that *making the fee dependent on prior authorization creates an unjustified obstacle to the free movement of services, including dental care services in the internal market*. It was declared that as a general rule, the costs of healthcare services used in a foreign country can also be reimbursed, even in lack of prior authorization, which is different from the content of the regulation.

In another case, namely, in the Smits and Peerboms case,[483] the Court also made it clear that the prior authorization of reimbursement *can be justified* both for those *hospital* and *non-hospital health services* which *require planning*, or those which require *the application of special and costly medical infrastructure or medical equipment*. The new procedure applied in the Kohll and Decker case of course left a lot of uncertainties both with respect to the scope of justifiability and other procedural issues.[484] After the above-mentioned decisions of the Court, the need for clarifying the legal framework seriously arose. The Commission submitted its draft of the directive on the application of patients' rights in cross-border healthcare in July 2008. The effective text of directive No. 2011/24/EU was ultimately approved on March 9, 2011 under the Hungarian presidency. The member states had to adopt the rules specified in the directive by October 25, 2013.

As a result of the above, *besides applying the regulations*, the *directive incorporating the mechanism developed by the judicial case law* based on the primary EU legislation, more precisely, on the contractual provisions of the free movement of services, was adopted. The point of this is that the patients do not have to apply for prior authorization for all the healthcare services to be used abroad, however, they should pay the costs that are incurred to the health service provider. It is always decided on the basis of the specific situation whether the

482 Mr. Kohll crossed the Luxembourg border in order to use healthcare services. Raymond Kohll had his daughter's orthodontics done in Germany. Then he applied for the reimbursement of his costs from his own Luxembourg-based health insurance company, although the insurer had not previously given its consent to treatment abroad. Although it was Mr. Kohll's express request to receive authorization for the treatment, it was refused on the grounds that orthodontics is not deemed to be an urgent treatment, this is why it could also be done in Luxembourg. Kohll argued that the prior authorization procedure hindered him from buyig services in another EU member state, which goes contrary to Articles 49 and 50 of the then effective EC Treaty on the free movement of services.

483 Judgment of 12 July 2001 in Case C-157/99, B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen (Smits and Peerbooms), [2001] ECR 05473.

484 The Vanbraekel and Watts cases that followed the Kohll and Decker cases further refined the mechanism based on the free movement of services. Judgment of 12 July 2001 in Case C-368/98, Abdon Vanbraekel and Others v Alliance nationale des mutualités chrétiennes (ANMC)(Vanbraekel case), [2001] ECR, 53633, as well as the Judgment of 16 May 2006 in Case C-372/04, The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health (Watts), [2006] ECR 04325.

patients will receive any subsequent reimbursement from their insurer, and if so, in what amount, after the settlement of the costs.

It should be pointed out that *the coordination regulation* (EC) No. 883/2004 *will continue to be in effect, along with the directive, what is more, it will also have priority as long as the rules thereof are more favorable*. In the preamble to the directive, a very important guideline was set forth, i.e. that the patients must not be deprived of exercising the more favorable rights ensured by the Union regulations on the coordination of the social security systems, as long as the conditions thereof are met. However, the patients may still decide to choose the directive, as it is simpler or faster for them.

2 The goal and structure of the directive

The directive allows EU citizens traveling to another member state for using medical services and the insured persons of the EU member states who exercise the right of free movement to receive *the same treatment* as the citizens of the member state in which they receive the treatment. The primary goal of the directive is to transform the system of the current legal practice related to patient mobility into one which is transparent and which guarantees high quality and security, first of all in the area of *cost reimbursement* and the *procedural guarantees* related to prior authorization. The directive accomplishes this by eliminating the unjustifiable obstacles to free movement, emphasizing the importance of *European values* in healthcare through declaring *new patients' rights*.

The structure of the directive is as follows:

The first chapter specifies the subject matter and scope of the directive, its relationship with other EU provisions, as well as definitions of concepts.

According to Article 1 of the directive, 'This Directive provides rules for facilitating the access to safe and high-quality cross-border healthcare and promotes cooperation on healthcare between Member States, in full respect of national competencies in organising and delivering healthcare. This Directive also aims at clarifying its relationship with the existing framework on the coordination of social security systems, Regulation (EC) No 883/2004, with a view to application of patients' rights.'[485]

Article 3 of the directive defines the concepts of 'healthcare', 'insured person' and 'health professional', which are of key importance in the execution of the directive, in definitions. As regards the definition of healthcare,[486] it should be

485 See: Art. 1 of the directive.

486 According to the directive, 'healthcare' means health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices. See Point (a), Art. 3 of the directive.

noted that *it excludes all services which are aimed at such long-term patient and medical care the goal of which is to support those patients who need daily, routine type of assistance, furthermore, it also excludes any and all medical intervention related to organ transplantation.*

Surprisingly, the directive does not define the concept of '*hospital treatment'*, which is of outstanding importance in the area of prior authorizations. From the text of the law, however, one may conclude the 'minimum definition' according to which 'such treatment which requires that the patient concerned stay at hospital for at least one night will qualify as hospital treatment'. Thus, healthcare services provided to a patient who receives hospital or clinical treatment, then is released and called back for a checkup on the following day, or the second part of whose treatment is on the next day, does not qualify as hospital treatment in the sense of the directive.

The second and third chapters of the directive constitute the core of the law, as this part sets out the rules of the member states' responsibility, as well as the general rules of the reimbursement of costs related to cross-border healthcare services.

The directive specifically provides on the responsibility of the member state of treatment (Article 4) and the member state of affiliation (Article 5).

According to the directive, it is the *member state of treatment* that organizes and provides *healthcare services*, observing the requirement of the *equal treatment* of patients from other countries. Furthermore, through control mechanisms, it ensures the observance of *quality and safety norms* related to providing healthcare services. Also, it makes sure that *personal data are protected*. The national contact point of the member state of treatment *provides relevant information* to the patients on the general functioning of the healthcare system, as well as the organizations that control and supervise it.

After the health service is provided, *it is the member state of affiliation* that is responsible for *reimbursing the appropriate part of the costs of the healthcare service to the insured person, as long as the treatment received is part of the insurance package that the person concerned is eligible to under the national laws.* The extent of reimbursement is equivalent to the amount that would have been paid by the financing insurance company in the mandatory social security system to the local health service provider if the service had been provided in its own territory. The reimbursed amount may not exceed the actual costs of the healthcare services that were used.

Thus, the directive essentially relies on the solution developed in the earlier judicial practice of the court, i.e. it distinguishes between *hospital and non-hospital care*. According to the general rule, the patients may use those *non-hospital treatments* to which they are otherwise eligible in their own member state and which do not require prior authorization, in another member state even in a

planned form. In this case, the patients will be entitled to the reimbursement of their own treatment costs on the basis of the domestic costs in the patient's own insurance system (Article 7).

The directive starts out from the fact that this system does not jeopardize the sensitive financial equilibrium of the social security systems, however, if this threat still emerges, the member states will become entitled to take 'countermeasures'. It is Article 4 that allows the latter when it stipulates that the requirement of non-discrimination laid down in the directive 'shall be without prejudice to the possibility for the Member State of treatment, where it is justified *by overriding reasons of general interest*, such as planning requirements relating to the aim of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources, to adopt measures regarding access to treatment aimed at fulfilling its fundamental responsibility to ensure sufficient and permanent access to healthcare within its territory.'[487] Of course, these measures should be in line with the extent necessary for and proportionate to the goal, they cannot become the tools of voluntary discrimination, furthermore, they should be made preliminarily and publicly accessible.

As has been mentioned before, *with regard to* some of the cross-border healthcare services, including *hospital treatments*, the member state of affiliation may apply a system of prior authorisation (Par. 1, Article 8). During the elaboration of the directive, one of the greatest challenges was to further limit the future scope of prior authorization by the member states, so when a healthcare service involves treatments that present a particular risk for the patient or the population; or it is provided by a healthcare provider that, on a case-by-case basis, could give rise to serious and specific concerns relating to the quality or safety of the care [Article 8 (2)(b) (c)].[488]

Furthermore, it is stipulated by the directive based on which reasons the member state of affiliation may refuse to grant prior authorization (Par. 6, Article 8).

Finally, the fourth chapter of the directive discusses the issues of healthcare cooperation.

The member states *cooperate with each other* in order to make the implementation of the directive easier. Thus, the establishment of a European reference network of health service providers is especially supported, the goal of which is to encourage the mobility of expertise within Europe, as well as to ensure access to highly specialized healthcare services through the concentration and harmonization of the available resources and expertise. The member states acknowl-

487 See: Para. (3), Section 4 of the directive.
488 See: (2) (b) (c), Art. 8 of the directive.

edge the validity of medical prescriptions issued in another member state, as long as they refer to medication authorized in their own respective territories.

3 The cardinal provisions of the directive

3.1 Reimbursement

As we could see above, one of the central elements of the directive is the mandatory reimbursement by the insurance company of a certain proportion of the costs incurred during using healthcare services in another member state. First of all, it should be pointed out that regarding this reimbursement, what is meant here is the *expressis verbis stipulation* of eligibility on the one hand, and *making the procedure of such reimbursement clearer* and more transparent, on the other hand. Of course, the eligibility to reimbursement arises from the case law of the Court but declaring it in a directive undoubtedly contributes to applying the law uniformly. Besides the regulation mechanism, the directive puts *a new mechanism* into effect, which is based on the provisions of the Treaty on free movement. This mechanism allows the patient to use healthcare services in another member state if they are also eligible to this in the member state of affiliation, and the costs of these to be reimbursed by the insurance company up to the level of costs that would have been incurred if the treatment had been received at home (Par. 4, Article 7).

Paragraph (4), Article 7 of the directive provides that 'The costs of cross-border healthcare shall be reimbursed or paid directly by *the Member State of affiliation up to the level* of costs that would have been assumed by the Member State of affiliation, had this healthcare been provided *in its territory* without exceeding *the actual costs* of healthcare received.' This wording reflects the principle laid down in the *Vanbraekel* case[489], according to which a *supplementary re-*

489 The Vanbraekel case No. C–368/98 [2001] ECR I–5363. According to the facts of the case, Mrs. Descamps, who was insured by Belgian social security, applied for authorization to her own health insurance fund for the performance of an orthopedic surgery in France. The Belgian authorities refused the application filed by Mrs. Descamps because the intervention had not been commented on by a specialist of a Belgian clinic. After she had received treatment in France, without having been granted prior authorization, Mrs. Descamps returned to Belgium and lodged a successful appeal to the Belgian court. They consulted the European Court of Justice for deciding the extent of the reimbursement, i.e. whether the treatment should be reimbursed by applying French or Belgian tariffs. According to form No. E 112, the insured person should have been reimbursed on the basis of the rates applied in France (38 thousand French Franks), while pursuant to the Kohll and Decker procedure, she should have been reimbursed on the basis of the rates applied in Belgium (50 thousand French Franks). The Court finally concluded that as long as the patient receives a lower level of reimbursement than the amount that she would have received if she had been treated in her own country, this would prevent her from searching for a cross-border healthcare provider, this is why the

imbursement equivalent to the difference between the reimbursement level specified in the laws of the member state of affiliation and the reimbursement level applied by the member state of treatment should be provided to the patient. This circumstance is explained by that as long as the insured person receives *less favorable reimbursement* for using hospital treatment in another member state than when the same care is received in the member state of affiliation, this may make the patient uncertain about, or may even prevent them from consulting healthcare service providers in another member state, which in turn constitutes *an obstacle to the freedom to provide services*.[490]

As it turns out from the above, the directive endeavors to codify the liberal judicial case law related to reimbursement, however, it *also* takes the *requirement to safeguard the financial interests of the member states* into account. The competence of the member state is primarily manifested in that the member states are entitled to determine *which healthcare services will be reimbursed* by the insurer, however, this right can only be exercised within the framework provided by the directive.[491] Thus, as a general rule, it is not mandatory to provide reimbursement if the healthcare service is not listed in the 'insurance package of the member state'. Such services typically include the different plastic surgeries exclusively done for aesthetic purposes.

However, if *the healthcare service provided in* another *member state is not included in the 'list of reimbursable treatments', in each case individual consideration* should be given to the granting or rejection of authorization by the competent authority of the country of affiliation if the medical condition in question cannot be treated in the member state of affiliation. Consequently, if no appropriate treatment can be provided, such national regulation in which authorization is automatically rejected on the basis that such treatment is not available in the territory of the member state in question goes contrary to EU law.[492]

However, it should be underlined that if the national regulation has sufficient detail, and it only provides reimbursement for a certain type of treatment in the healthcare service used in its territory, then this principle will also be valid outwards, i.e. it is only this very type of treatment that will be reimbursed in the case of healthcare services received in another member state too. The principle

---

Court instructed the Belgian authorities to reimburse the patient by applying the higher Belgian rates.

490 Case C–368/98, Vanbraekel, p. 45.

491 See: Para. (3), Art. 7 of the directive.

492 See: Art. 8 (5) of the directive: 'The Member State of affiliation may not refuse to grant prior authorisation when the patient is entitled to the healthcare in question in accordance with Article 7, and when this healthcare cannot be provided on its territory within a time limit which is medically justifiable, based on an objective medical assessment of the patient's medical condition, the history and probable course of the patient's illness, the degree of the patient's pain and/or the nature of the patient's disability at the time when the request for authorisation was made or renewed.'

itself is laid down in Paragraph (5), Article 8 of the directive, the basis for which was provided by the famous Elchinov decision of the Court.[493] However, the Bulgarian regulation that served as the basis for the Elchinov case was not detailed, so it did not accurately define what treatments were eligible to reimbursement (more specifically: it does make a difference whether a national law stipulates that it ensures ophthalmic care, or says that it ensures a specific form of ophthalmic care).

Finally, when discussing the rules of reimbursement, those provisions which contain more favorable conditions for the patients depending on the discretion of the member states than those provided by the general rule should also be mentioned. The situation is that the member states may decide to reimburse the *total costs*, as long as the total costs of the cross-border healthcare services exceed the costs of the treatment in the patient's own territory.

This also refers to the reimbursement of the so-called *related costs*, such as accommodation or travel costs, as well as extra costs which persons with disabilities might incur.[494]

493 Elchinov is a Bulgarian resident, who held a health insurance with NZOK (the National Health Insurance Fund of Bulgaria) and suffered from a serious condition. He asked the health insurance fund to issue form No. E 112, to ensure that he can receive a peak technology treatment which is not applied in Bulgaria at a Berlin-based specialist clinic. With regard to his health condition, Elchinov was in the meantime admitted to the German clinic and he received the treatment there before he got any response from NZOK. The director of NZOK, however, refused to grant the requested authorization to Elchinov, among others, because the conditions for granting the authorization laid down in Article 22 of the directive had not been met, as the director thought that the treatment in question was not listed among those regulated by Bulgarian law and reimbursed by NZOK. According to the Court's decision, the authorization cannot be refused in a case where the treatments specified by the national laws are provided in a list in which the applied treatment method is not specifically or accurately mentioned, where only the types of treatments reimbursed by the competent institution are defined, and by applying the usual principles of interpretation, after conducting an objective and non-discriminative assessment, by taking all the relevant medical criteria and available scientific data into account, it is concluded that this method of treatment corresponds to the types of treatment specified in the list in question. Judgment of 5 October 2010 in Case C-173/09, Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa (Elchinov case), [2010] ECR 08889., Gabriella Berki, 'Az Európai Bíróság újabb ítélete az egészségügyi szolgáltatás tervezett külföldi igénybevételének tárgyában. A tagállami ellátási csomag tartalmának kérdése' (A new decision adopted by the European Court of Justice on the planned use of cross-border health services abroad. The contents of the member state treatment package), *Jogesetek Magyarázata*, 2012/2.

494 Art. 7(4) (3) of the Directive. See: Judgment of 15 June 2006 in Case C-466/04, Manuel Acerada Herrera v. Servicio Cantabro de Salud, [2006] ECR 05341. In this decision, it was declared by the Court that Article 22 of the decree cannot be interpreted as one that generates eligibility for the insured person authorized to travel to another member state to use hospital treatment to receive reimbursement from the institution mentioned above, for their own costs incurred in the territory of this member state, or the travel, accommodation and meal costs incurred by the person who accompanies them, except for the hospital accommodation and meal costs of the insured person.

3.2 Prior authorization in the provisions of the directive

On the one hand, the directive maintains the compelling requirements set forth in its earlier case law, however, it also *extends* the scope of healthcare services that may depend on prior authorization, which are as follows: (1) the goal of ensuring sufficient and permanent access to a balanced range of high-quality healthcare services; (2) the existence of planning requirements related to the endeavor to control costs and prevent any waste of financial, technical and human resources; (3) finally, when the maintenance of the service capacity and the healthcare expertise in the territory of the member state are of critical importance for public health.

It is in view of these *three compelling* requirements that those cases where prior authorization may be required can be defined. This is the subject of Article 8 of the directive, which specifies three such groups of services. Prior authorization does not extend to those services which are beyond this scope, including the majority of non-hospital services.

Thus, it can be pointed out that in the directive, it is the closed list of services that require authorization that is specified, ensuring flexible interpretation for the member states. So, the question remains which those cases are where the provision of healthcare services *may be tied to prior authorization* according to the rules of the directive.

(1) The healthcare service is made subject to *planning requirements* relating to the object of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resource and, *cumulatively*, one of the options described in the two subsections below is realized (see Point (2) (a) of Article 8 of the directive).

Thus, it involves overnight *hospital accommodation* of the patient in question for at least one night, or requires the use of highly *specialized and cost-intensive* medical infrastructure or medical equipment.

As regards hospital treatment, as has been pointed out by the Court in the Smits and Peerbooms case, prior authorization is fully understandable, as the number, geographical position, level of equipment of the hospitals and the medical services that they offer require thorough planning. Thus, the member states enjoy a high level of freedom regarding this policy, which allows them to apply different standards in the individual regions. However, it can be assumed that the directive will contribute to a ‘common thinking’ of the member states in the border regions.

At the same time, it is also possible that the healthcare service is provided outside the hospital but it still requires *the use of highly specialized and cost-inten-*

sive medical infrastructure or medical equipment, so it will also make preliminary planning necessary, similarly to the above cases. The Commission v France case[495] gives an important insight, since it was declared by the Court that the use of MRI scanners and PET scanners should be regarded as such.

The other two groups of cases discussed in the directive belong much more to the public health exceptions explained in Article 36 of the Treaty on the Functioning of the European Union than under the justification criteria for the compelling requirements.

(2) Thus, if the healthcare service involves treatments presenting *a particular risk* for the patient or the population (see Points (2) (a) and (b) of Article 8 of the directive),

(3) or the healthcare service is provided by a healthcare provider that, on a case-by-case basis, could give rise to serious and specific concerns relating to *the quality or safety* of the care (see Point (2) (c) of Article 8 of the directive).[496]

The latter exceptions were included in the text of the law at the express request of the Council in order to increase the space of the member states, what is more, without an accurately defined wording.[497] This may give too wide a space of maneuver to the member states, furthermore, it may generate tension on the basis of case law, since a distinction is only made between hospital and non-hospital care.

Finally, one of the key guarantee elements of the directive cannot be stressed enough, i.e. that the authority *may only refuse to grant prior authorization on the basis of the reasons specified individually in the* closed *list* in Paragraph (6), Article 8 of the directive.

3.3 Patients' rights

In the preamble, it is strongly emphasized that European values should be taken into account in public health and *the comprehensive values of universality, access to good quality care, equity and solidarity* are specifically highlighted.[498] In this respect, those endeavors of the European Union which are targeted at the social commitment after the adoption of the Union's Treaty of Lisbon (or at least this is what is meant to be demonstrated) are well reflected, on the one hand, in declaring the healthcare rights specified in the Charter of Fundamental Rights,

495 Judgment of 5 October 2010 in Case C-512/08, Commission v France, [2010] ECR 08833.

496 These derogations can actually be connected to the secondary legislation on pharmaceutical products or the practicing of healthcare professions.

497 According to the original draft, the list that was to be prepared by the Council would have contained the specific cases.

498 See the directive, Point 21 of the Preamble.

on the other hand, through the 'social clause' that was included in the primary law.[499]

This value-oriented approach is also obvious in the guarantee requirement of the directive, according to which the various *administrative and financial considerations should not play any role* in deciding *whether to grant or refuse prior authorization*.[500] Thus, under Paragraph (5), Article 8, prior authorization cannot be refused if the healthcare service cannot be provided within a medically reasonable time based on an objective medical assessment regarding the patient's condition at the time of submitting or renewing the application for authorization, the patient's medical history and the probable progress of the disease, as well as the intensity of the pain suffered by the patient, or the disability of the patient.

Although the directive, in harmony with the judicial case law, specifically with the Watts case, *does not criticize the waiting list system in itself*, it requires some flexibility from the member states in this respect. At this point, the above-mentioned values are given key importance. The situation is that bureaucratic and financial considerations can never be more important than the condition of the patient. As is also laid down in the preamble to the directive, '(…) the refusal to grant prior authorisation may not be based on the ground that there are waiting lists on national territory intended to enable the supply of hospital care to be planned and managed on the basis of general clinical priorities',[501] as long as there is no objective, personalized medical examination.

Finally, when speaking of new types of patients' rights, the information authorizations guaranteed by the directive should also be mentioned.

According to the provisons set out by the directive, each member state shall designate one or more national contact points for cross-border healthcare and communicate their names and contact details to the Commission.[502] In order to enable patients to make actual use of their rights in relation to cross-border healthcare, national contact points in the member state of treatment shall provide them with information concerning healthcare providers, as well as information on patients' rights, with special regard to complaints procedures and mechanisms for seeking remedies, furthermore, the legal and administrative options available to settle disputes, including in the event of harm arising from cross-border healthcare. Access to information and providing information are of key importance in a sensitive area like cross-border healthcare, as it is based on these that the patient can make a truly informed decision on using a healthcare service abroad.[503]

499 Art. 9 of the Treaty on the Functioning of the European Union.
500 Watts case, Point 120.
501 See the directive, Point 43 of the Preamble.
502 See Art. 6 of the directive in question.

It is the responsibility of the healthcare providers under the effect of the directive to provide information on the specific healthcare services. Point (2) (b) of Article 4 of the directive provides on that healthcare providers provide relevant information to help individual patients to make an informed choice on treatment options, on the availability, quality and safety of the healthcare that they provide in the Member State of treatment and that they also provide clear invoices and clear information on prices, as well as on their authorisation or registration status, their insurance cover or other means of personal or collective protection with regard to professional liability. To the extent that healthcare providers already provide patients resident in the Member State of treatment with relevant information on these subjects, this Directive does not oblige healthcare providers to provide more extensive information to patients from other Member States.

4 The transposition of the directive into Hungarian law

Hungary implemented the entire directive by the deadline, which can be regarded as a major success, with regard to the fact that only less than half of the member states were able to keep the transposition deadline. As a result of the law harmonization, quite a number of laws were amended (EBtv.[504], Eüak.[505], Ebtv VHR.[506], government decree No. 43/99[507]), furthermore, as the most important element of transposition, government decree No. 340/2013 (IX. 25.) on the detailed rules of medical treatment carried out in foreign countries was adopted. In the annex to the government decree, Hungary laid down which treatments require prior authorization, as long as the Hungarian insured person wishes to use the healthcare service with subsequent reimbursement[508], furthermore, the conditions of these were defined in detail.

503 When does the patient use cross-border healthcare services? Basically, in two cases. Thus, obviously when the care in question is not available or not available within a reasonable time in the patient's own member state. Second, if the use of the healthcare service is more convenient for them in the other member state, as it is nearer, or treatment is better or faster.

504 Act LXXXIII of 1997 on mandatory health insurance.

505 Act XLVII of 1997 on the handling and protection of health data and related personal data.

506 Government decree No. 217/1997 (XII. 1.) on the execution of Act LXXXIII of 1997 on the treatments provided under mandatory health insurance.

507 Government decree No. 3/1999 (III. 3.) on the detailed rules of the financing of healthcare services from the National Health Insurance Fund.

508 Most healthcare services can be used on the basis of prior authorization (the healthcare services that can be provided on the basis of such authorization are listed in the annex to the government decree, so these include in-patient care, one-day care and regularly scheduled course-like treatments, such as CT, MRI diagnostic and therapeutic interventions, laboratory diagnostic and molecular biology diagnostic procedures.

The Hungarian Government chose to apply the law centrally, i.e. the system is run by the National Health Insurance Fund (hereinafter referred to as: OEP) in order to make the procedure uniform and well monitorable. OEP reports the processes to the Ministry of Human Resources every month, which is entitled to intervene in the system if the costs generated by the Hungarian insured persons traveling abroad jeopardize the financial equilibrium of the National Health Insurance Fund. Similarly, the Hungarian hospitals may refuse to provide services to patients coming from abroad if they jeopardize the hospitals' fulfilling their territorial treatment obligations.

5 Future prospects

It becomes obvious from the above that the European legislator is not in an easy situation, as the current European health policy is built on compromises. It is primarily built on the compromise between the freedom of the internal market and health policy, which traditionally belongs to the competence of the member states, secondarily, on the compromise between the future commitment of the Union to social values and the deficiencies in the repertoire that is available for this purpose. The question becomes whether the legislators succeeded in creating a genuinely forward-looking law after having overcome these difficulties.

The answer is both positive and negative. It is very positive that the directive fulfills the original purpose, as it creates legal security in the system of reimbursements based on the foundations of the internal market, it contributes to defining the status of a 'patient' in European law, through defining information rights, laying down the procedural guarantees accompanying the application for prior authorization, as well as the mutual recognition of medical prescriptions.

Besides the codification of the principles of the internal market, however, the member state competences are highly respected by leaving the definition of the scope of treatments to be reimbursed to the member states, by allowing prior authorization regarding a certain set of treatments, furthermore, by setting up only 'structures of cooperation', primarily by voluntary participation. Thus, it can be concluded that during codification, it creates a balance between the interests of opposite directions.

At the same time, the directive, which does not go beyond the logics dictated by the internal market, ensures treatment in another member state only to those who are adequately 'equipped' (knowledge of languages, relevant information, financial coverage, as well as the possibility of mobility) to use it. The survey conducted by Eurobarometer shows that neither the patients nor the staff of the healthcare institutions are aware of their rights regarding reimbursement. What is more, 30% of the population of the European Union is not aware of their pos-

sibility to apply for healthcare services in another member state with their insurance company's taking financial liability.[509] What turns out from the member states' responses given to the questionnaire of the Commission is that there is a high level of uncertainty in this respect even now.[510] All in all, the directive may prove to be an important building element of the creation of a genuine European healthcare region, as the strengthening of cooperation between the member states, even on the practical level, will possibly mean a positive shift in European Union health policy, which is now confined within strict competence limits.

509 Analytical report, cross-border health services in the EU, 2007.

510 Commission staff working document SEC 2008 2163, p. 12. Thus, information flow between the institution providing the healthcare service and the institution of affiliation, as well as regarding the purchase of medicine prescribed abroad is especially problematic, p. 14.

THE IMMIGRATION AND ASYLUM POLICY OF THE EUROPEAN UNION

Laura Gyeney and Tamás Molnár

1 Introduction

Mass migration, as it appears in the 21st Century, is one of the greatest challenges of our globalized world. Nothing makes this more obvious than the massive increase in the rate of immigration in recent years that has mostly affected Europe. At the peak of the European migration crisis, in 2015 *over 1.000.000 migrants* crossed the borders of the European Union, either to seek refuge from persecution or just in hope of a better life. As Donald Tusk, the President of the European Council put it in his opening address to the Valletta Summit on Migration[511] in November 2015: 'The number of people on the move globally has never been so big.'

However, the insecurity apparent in the way leaders of the EU treat the crisis and in their approach to future challenges of migration is clearly illustrated by the contents of the *European Agenda on Migration* published in May 2015 by the European Commission. It claims: '[w]hile most Europeans have responded to the plight of the migrants, the reality is that across Europe, there are serious doubts about whether our *migration policy* is equal to the pressure of thousands of migrants, to the need to *integrate* migrants in our societies, or to the economic demands of a Europe in demographic decline.'

The unanswered questions of EU immigration policy that emerged over the past few decades have become more pressing than ever. One of these urgent questions is: how can we provide for a developing European economy in an era of *demographic decline* in a way that it is based on the *opportunities opened up by legal forms of migration*. A second, perhaps more burning question is: how can the European Union ensure the safety of the incoming people in need and, at the same time, keep away illegal migrants and eliminate criminal activities related to migration. Built on the ruins of WWII, the European Union is destined to spread the principles of peace and unconditional respect for human rights not only within its own borders, but also on a global scale, when engaging in international affairs.[512] In addition to observing human rights, however, the European

511 European and African heads of state and government were invited to the summit with the particular aim to enhance their cooperation in dealing with issues related to migration, to seek answers for the current challenges, and to discuss the opportunities brought about by migration.

Union must also take into account all *security considerations* that are pertinent in guaranteeing the free movement of its citizens within the Member States.[513]

What is more, the crisis made it all the more obvious that Member States with a different historical, economic and cultural heritage have *different perspectives* on particular issues related to migration vindicating their sovereign rights to legislate in a number of areas. Therefore, when formulating its migration policy the European Union should not unnecessarily interfere in areas traditionally regulated by national law.

It is important to consider, however, that on their own, individual Member States are often unable to cope with the challenges posed by the crisis, as such, it has by now become obvious that an area formerly perceived to be marginal in the European Union, i.e., immigration and asylum policy, is now the key to the future of Europe, and must therefore be reinforced. Following a short historical overview, we shall give an account of the major steps taken in and the most important legal instruments of EU immigration and asylum policy, accompanied by a brief overview of the European Agenda on Migration published by the European Commission in May 2015 in response to the crisis.

2 Historical background

We may better understand the migration and asylum policy of the European Union if we put it in a *historical context*. The rebuilding of the European continent began after WWII attracting a great number of foreign workers to the war-torn countries of Europe, mainly from southern, Mediterranean countries and from the former colonies.[514] The majority of foreign workers arrived within the framework of *migrant worker programmes* and were only granted temporary residence in the host countries. The large-scale recruitment of foreign workforce and the generally liberal practices in granting work permits were cut short by the economic recession at the end of the 1960's and the first oil crisis in 1973. During this period Member States were already taking measures to limit the influx of foreign workforce, partially due to the increase in the unemployment rates and the growing social tensions created by the arrival of the migrants and fuelled

512 Naturally, the EU intends to fully comply with these principles in its foreign relations, including its agreements with third countries.

513 While citizens may therefore move freely in the 'Area of Freedom, Security and Justice', they also have the right to security. This can best be achieved by the stringent control of external borders, and thus, the exclusion of unwanted persons from third countries, and by the proper management of issues related to migration.

514 Workers from the former colonies mainly settled down in the Netherlands and the United Kingdom, while Germany, Denmark, and Sweden received foreign workforce primarily from North Africa and Turkey.

by the fear that the growing migrant communities appearing in certain Western countries would pose a significant threat to social cohesion. However, the stricter rules applied by the receiving countries to the entry of foreigners resulted in the permanent *settlement* of those foreign workers who had arrived earlier, since they faced the risk of not being able to re-enter once they left the receiving country. The same period was characterized by unstable political and economic conditions in certain countries of origin, e.g. in Turkey, further contributing to the fact that many third-country foreign workers, who originally only planned on a temporary stay, finally decided to settle down in the receiving country. Naturally, the phenomenon of permanent settlement gave rise to a dramatic increase in entries for the purpose of family reunification, which contributed to the second major wave of migration.

From the end of the 1980s Member States received an *increasing number of third-country nationals seeking refuge from conflicts and arriving under the protection of international law*. After 1989, the Balkan Crisis and the conflict in the Middle-East triggered a sudden and dramatic increase in the influx of asylum seekers and refugees, and the tendency continued for several years.

Although from 2004 onward the rate of influx of migrants arriving to the European Union seemed to demonstrate a modest decline – except for certain southern Member States, as well as the United Kingdom and Sweden –, the immigration of third-country nationals nevertheless significantly contributed to population growth, and in many countries the rate of immigration exceeded that of natural growth. As far as the purpose of entry is concerned, the first decade of the new Millennium witnessed a significant increase in the figures of employment related migration, since almost 40% of the migrants entered the receiving countries for that purpose.

The most recent, and still ongoing wave of migration is the outcome of the crisis that erupted in 2011 in North Africa, commonly referred to as the Arab Spring,[515] which prompted tens of thousands of African migrants to try and reach Europe at the shores of the Italian island of Lampedusa.[516] Since then, this series of events has gained further momentum due to the conflicts ravaging the Middle East. Growing numbers of refugees mainly from the Middle East, the Balkans

515 Political oppression, the global economic crisis and the recent burst of population growth in North African countries are among the primary causes of the Arab Spring. The protests first started in Tunisia and in Libya. The fall of Colonel Gaddafi practically opened the way for migrants from inside the African continent to Europe. In 2011 the wave of protests reached Syria and escalated into a civil war due to the operations of the Assad regime.

516 The first, highly mediatised major disaster occurred in October 2013 when a boat that was transporting migrants shipwrecked and 400 people lost their lives. The event triggered the Italian government to launch Operation Mare Nostrum that was intended to search and rescue migrant ships even near the shores of Lybia.

and Central Asia attempt to enter the European Union by crossing the Mediterranean or via the Western Balkans migration route.

3 The legal framework

3.1 History and main periods of EU immigration and asylum policy

The general legal framework for the adoption of EU rules on immigration and asylum has changed over time, but it has moved steadily towards increased EU competence and a greater role for the *supranational Community method*.

The first period of the immigration and asylum policy of the European Union spanned the beginning of integration until 1993. In this period the national governments had exclusive competence in policy related to migration and refugees, and they entered into ad hoc forms of co-operation with one another while maintaining their sovereign privileges. The idea of 'Fortress Europe' emerged in this period, an approach in which migrants were perceived as a threat to public order and blamed for taking advantage of the social services provided by the state.

The beginning of the second period of EU immigration and asylum policy is marked by the Maastricht Treaty, which entered into force on the 1 November 1993. After the incorporation of justice and home affairs (JHA) into the Treaty on European Union – institutionalizing thereby a 'diluted' form of intergovernmental structure – issues of migration were dealt with also on the EU level. While the treaty emphasized that the regulation of migration is of common concern, the national governments maintained their key role in shaping the policy. Nevertheless, the Maastricht Treaty brought the issue of migration into the centre of political and regulatory activities and it became a regular topic of intergovernmental negotiations. Intergovernmental cooperation, however, suffered from a number of flaws, mainly due to the requirement of unanimity, and the lack of parliamentary participation and judicial review.

The fairly limited output of the EU in this field marked by this period stood in stark contrast to the successful development of a legal framework established outside the EU system. This was the *Schengen Convention* signed by six Member States (Germany, France, and the Benelux States). The signatory States have abolished all internal border controls between themselves and, as a corollary, they strengthened their common external border control. They also agreed to adopt a common visa policy and to establish rules on the allocation of powers related to asylum applications, irregular migration and judicial and police cooperation. At the heart of the Schengen mechanism lay an information system set up by the signatories. The SIS allows Schengen States to exchange data on sus-

pected criminals, on persons who had been denied the right to enter the EU, on missing or stolen property. The Schengen Convention was applicable from 1995.

The 1997 revision of the founding treaties of the European Union in Amsterdam opened a new chapter in the immigration policy of the EU, since a new title IV was inserted into TEC III entitled 'Visas, asylum, immigration and other policies related to free movement of persons' within the 'Area of Freedom, Security and Justice'. As a result, '*community' competence* was extended to measures taken in the areas of asylum, immigration and safeguarding the rights of third-country nationals, external border controls, visas, administrative cooperation and judicial cooperation in civil matters. Enhancing community competence obviously required certain compromises. The Treaty defined a *temporary period* of five years ending on 1 May 2004 during which all important Council decisions still required unanimity, while Member States maintained their right to propose regulations, and the European Parliament was not an equal party to the decision making process but was merely consulted.

Finally, it is necessary to mention that the Treaty of Amsterdam integrated the 1985 Schengen Agreement and the 1990 Convention implementing the Schengen Agreement and measures based upon it (the so-called Schengen acquis) into the EU legal order without the participation of the UK and Ireland.

3.2. Changes brought about by the Treaty of Lisbon

Initiated by the Nice Intergovernmental Conference the creation of the *Treaty of Lisbon* marked a major milestone in the history of European integration. The Treaty of Lisbon entered into force on the 1 December 2009 bringing about significant changes in the 'Area of Freedom, Security and Justice' by eliminating the pillar structure.[517]

With the elimination of the pillar structure the 'supranational Community method' became the general rule, i.e., decisions are now made by a *qualified majority voting*.[518] The Treaty also extended the powers of the European Parliament, since now this area is regulated through the ordinary legislative procedure. The co-decision process, including QMV, now applies both to the regulation of legal migration, as well as the establishment of visa lists and visa formats. This system facilitated agreement upon a number of legal migration proposals that had previously been vetoed by the Member States. In accordance with the provi-

517 The 'Area of Freedom, Security and Justice' is regulated in Part 3, Title V (Arts. 67-89) of TFEU and in Art. 276 TFEU. Provisions on policy are regrouped in five chapters: 1. General provisions; 2. Policies on border checks, asylum and immigration; 3. Judicial cooperation in civil matters; 4. Judicial cooperation in criminal matters; and 5. Police cooperation.

518 Exceptions include: operative cooperation within police cooperation, judicial cooperation in criminal matters, and family law, where the requirement of uninamity is maintained.

sions of the Treaty of Lisbon the application of the consultation procedure is limited to exceptional cases. A sudden influx of third-country nationals is such an example, where the Council may take temporary measures, upon consultation with the Parliament, in respect of the countries involved. In addition to securing the monopoly of the Commission to initiate legislation, the Treaty also extended the jurisdiction of the European Court of Justice granting judicial protection also under this area of European law.[519]

The Lisbon Treaty also complemented the rules on the British and Irish opt-outs by way of new provisions on a possible termination of British and Irish in earlier EU measures in case they fail to opt-in to new measures amending these acts.[520]

3.3 Programmes intended to create the Area of Freedom, Security and Justice

After the entry into force of the Treaty of Amsterdam the foundations of the migration policy of the European Union were developed in *five-year programmes*. The European Council defined the main objectives together with a strict schedule in the Tampere Programme adopted in October 1999 which was replaced by the Hague Programme in November 2004 (covering the period of 2005-2009). The Stockholm Programme offered guidelines for the period between 2010 and 2014 prepared by the Swedish Presidency of the EU Council.

These programmes are characterized by rather different approaches depending on the political climate of the particular period. While the *Tampere Programme* set rather ambitious goals for the European Union and the Member States, and primarily focused on the rights and the integration of third-country nationals residing legally in the territory of the European Union, launched in the aftermath of the terror attacks of 11 September 2001, the *Hague Programme* is much more moderate and mainly focuses on security considerations. While the first programme expressly states that the Union must ensure the fair treatment of third-country nationals residing legally in the territory of the European Union and grant them rights and obligations comparable to those of citizens of the Union,[521]

519 Art. 68 (1) limited the rights to request preliminary rulings in relation to measures based on Title IV of TEC (visas, asylum, immigration and other policies related to free movement of persons) to national courts against whose decisions there is no judicial remedy under national law.

520 Steve Peers, 'Immigration and asylum', in: Catherine Barnard & Steve Peers: *European Union Law*, Oxford University Press, 2014. p. 780.

521 Paras. 18-21 of the Tampere Programme claim that third-country nationals holding long-term residence permits should be granted a set of uniform rights which are as near as possible to those enjoyed by EU citizens. The programme claims that the Union should also enhance non-discrimination in economic, social and cultural life. This latter objective is in accordance with the

the latter programme concentrated more on border control, and other means of combatting terrorism, illegal immigration and human trafficking.

Entitled 'An open and secure Europe serving and protecting citizens' and accepted in 2009 the *Stockholm Programme* focuses on ensuring the interests of citizens, and emphasizes the needs and interests of everyone – such as third-country nationals – for whom the EU has a responsibility. It also emphasizes that the protection of fundamental freedoms and human rights should be accorded primacy over security considerations. The Stockholm Programme, together with the Commission's action plan implementing the program represents a moderate, middle course approach compared to the Tampere Programme that promoted the rights of third-country nationals and heavily focused on human rights on the one hand, and to the security-oriented Hague Programme on the other.

After the Stockholm Programme lapsed in 2014 the conclusions of the European Council of 26 and 27 June 2014 defined the strategic guidelines for legislative and operational planning for the period between 2014 and 2020 within 'the Area of Freedom, Security and Justice' ('Ypres Guidelines'). This document does not set out a full-scale programme but rather, it offers fairly general guidelines promoting the transposition, implementation and harmonisation of existing legal measures.

As it was mentioned earlier, the Commission published the *European Agenda on Migration* on 13 May 2015 in reaction to the migration crisis, and made it clear that it intends to treat the issue of migration as a top priority. The Agenda sets out *immediate actions* in order to cope with the crisis in the Mediterranean, as well as *medium to long-term priorities* in order to better manage aspects of migration. The Commission sets out four areas where medium to long-term priorities are proposed:

- *Reducing the incentives for irregular migration*: development cooperation agreements, humanitarian aid, fight against smuggling and trafficking networks and against illegal employment of third-country nationals by means of an effective return policy;
- *Effective border management* by means of consolidating the patchwork of sectorial documents and instruments into a Union standard for border management by making better use of the opportunities offered by IT systems and technologies and by creating the European Border Surveillance System out of FRONTEX;
- *Creating a strong common asylum policy* based on the implementation of the Common European Asylum System, and the evaluation and possible re-

contents of Art. 13 incorporated in the Treaty of Amsterdam that grants a wide spectrum of powers to the Union to realize the principle of non-discrimination.

vision of the Dublin Regulation in 2016 that was heavily criticized for uneven responsibility sharing;
- *Creating and reassessing a new policy on legal migration* through a revision of the Blue Card scheme, and by maximising the benefits of migration policy for persons and countries of origin, e.g. by facilitating cheaper, faster and safer remittance transfers.

Among the *immediate actions* the Commission made the decision to triple the budget allocated for the search and rescue patrols in the Mediterranean (FRONTEX joint-operations Triton and Poseidon). It also put forward two proposals to implement the principle of solidarity set out in Article 80 TFEU.[522] It proposed a temporary European relocation scheme for the distribution of asylum seekers in the territory of the European Union on the one hand, and a European resettlement scheme that would provide settlement in the EU for persons *waiting in refugee camps outside the* EU.[523] The distribution keys of the above schemes are based on objective criteria, such as GDP, population size and unemployment rates of the Member States, as well as the number of former asylum applications received and the recent efforts made by Member States in the area.

Finally, the Agenda proposes considering options for possible Common Security and Defence Policy operations to eliminate smuggling networks and to target human trafficking in the Mediterranean.

4 Visas and border control

The European Union has been quite active in the area of regulating visas and border control, primarily by reason of the fact that the Schengen Acquis was integrated into EU law, and a wide spectrum of further acquis was built upon it. The Schengen system is grounded upon the following pillars:
- the right of any person, irrespective of his/her nationality, to cross the internal borders without checks being carried out;
- the reinforcement of external borders;

522 Art. 80 TFEU: 'The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.'

523 These proposals were adopted by the Council as decisions made on the 14 and the 22 September 2015 (Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015, pp. 146–156; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24.9.2015, pp. 80–94).

- the effective control over the movement of persons across the external borders;
- common policy of issuing visas for short stays.

The Convention implementing the Schengen Agreement of 1990, together with the legal instruments serving its implementation set out the detailed regulation of the above issues, while most of these instruments have been replaced by *EU regulations*.

1. The regulation establishing the *Schengen Borders Code,* for instance, constitutes a detailed regulation of the conditions of external border control, the crossing of external borders, and the reintroduction of border controls at internal borders, as well as the conditions for issuing visas at the border. The former SBC was codified already in 2006 (Regulation (EC) No 562/2006) though only in March 2016 the consolidated version appeared (Regulation (EU) 2016/399).[524]

A basic principle of the Schengen system is that the *external borders of the Union* may be only crossed at border crossing points and during fixed opening hours. When crossing an external border, EU citizens and other persons enjoying the right of free movement under Union law undergo a minimum check, while non-EU-country nationals (aka. third-country nationals) are subject to checks upon leaving and entering the EU. Minimum checks are carried out to establish their identity on the basis of their travel documents.

Any person, irrespective of his/her nationality, may cross the *internal borders* at any point without checks being carried out.

Member countries may only *reintroduce border controls* at their internal borders in exceptional cases.[525] The criteria against which any justification by a Schengen state to reintroduce border controls with another Schengen state must be assessed are now set out in Articles 25–30 of the new Regulation. The first requirement of Article 25, setting the general framework, is that there must be a 'serious threat to public policy or internal security' in a Member State. Neither public policy, nor internal security is defined in the Regulation. However, there may be a presumption that the meaning is consistent with the use of the same words in other EU instruments.[526]

524 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), OJ L 77, 23.3.2016., pp. 1–52.

525 This was the case in 2015, when overall eight countries of the Schengen area have reintroduced border controls at their internal borders in view of a serious threat to internal security and public policy related to secondary movements of irregular migrants. The countries concerned are Belgium, Denmark, Germany, Hungary, Austria, Slovenia, Sweden and Norway.

526 Internal border controls in the Schengen area: Is Schengen crisis-proof? Directorate General for Internal Policies. Study for the LIBE Committee, European Parliament, 2016.

According to Article 25 (1) and (2) the reintroduction of intra-Schengen border controls must be exceptional and introduced as a last resort. This confirms the status of intra-Schengen border controls as an exception to a fundamental right – the free movement of persons. Accordingly, the interpretation of any exception should be narrow and the monitoring of the use of the exception must rest with the Union.

There are three types of controls that may be invoked. The first are exceptional controls where an unforeseen event justifies the immediate reintroduction of border controls as there is not time to inform the other Member States and institutions (emergency procedure laid down in Article 28). This type of border control can be extended for ten-day periods for up to two months.

In case the threat is foreseeable, the second type of control must be used where advanced notice to the other Member States and institutions is required before the introduction of the controls (regular procedure laid down in Article 27). This form of control can be used for up to six months with regular updates regarding the continuing existence of the threat.

The third type of control is where the overall functioning of the Schengen area is put at risk (prolongation procedure laid down in Article 29). This requires a decision of the Council on the basis of a proposal by the Commission specifying the nature of the risk and why it constitutes a threat to the overall functioning of the system.

The criteria for the temporary reintroduction of border controls are laid down in Article 26. The main question that the Member State must assess is the extent to which the measure is likely to adequately remedy the threat to public policy or internal security and the proportionality of the measure in relation to the threat.

The so-called *local border traffic system* (established by *Regulation (EC) No 1931/2006*) is also worth mentioning. It has created an exception from under the strict provisions of the Schengen Borders Code for residents of the border area of neighbouring third countries subject to a visa requirement granting them the right to simplified entry procedures.[527]

2. *The regulation establishing FRONTEX*[528] *(Regulation (EC) No 2007/2004).* According to its founding regulation, FRONTEX performs the following tasks:

- coordinating operational cooperation between Member States in the field of management of external borders;
- assisting Member States in training national border guards;

527 In 2007, Hungary entered into an agreement on the rules of local border traffic with Ukraine in order to maintain a closer relationship with the Subcarpathian Hungarian community (promulgated by Act CLIII of 2007).

528 The full name of FRONTEX: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

- assisting Member States in circumstances requiring increased technical and operational assistance;
- providing Member States with the necessary support in organising joint return operations, i.e., in deporting persons illegally staying in the Member States;
- carrying out risk analyses;
- following up on the development of research relevant for the control and surveillance of external borders.

The operability of the Schengen system was repeatedly questioned during the 2015 migration crisis. Therefore, in December 2015 the Commission presented a set of proposals in order to further increase the security of the EU's external borders and to protect the Schengen area. Among them the Commission proposed two major modifications. Through a targeted amendment of the Schengen Borders Code the Commission intends *to introduce mandatory systematic checks* of EU citizens entering or exiting the Schengen area.[529] In a similarly significant proposal the Commission intends to develop FRONTEX into the European Border and Coast Guard Agency (EBCGA) with extended competence, and to create a joint European Border and Coast Guard (EBCG). The operability of FRONTEX used to be limited by the fact that it could only conduct border control operations and return illegal migrants *upon request of the Member States*.[530]

3. Following the incorporation of the Schengen Acquis into the first pillar of EU law, the Council adopted the so-called *EU visa regulation* (Regulation (EC) No 539/2001) which offers a comprehensive list of the third countries whose nationals must be in possession of visas when crossing the external borders (Annex I – 'black list') and those whose nationals are exempt from the said requirement (Annex II – 'white list'). The lists in this regulation are regularly updated and the decision whether the nationals of a particular country are subject to the visa requirement is always based on individual consideration. It is primarily a political decision that is, at the same time, dependent on a number of factors, such as considerations related to public policy and internal security as well as economic considerations; the number of illegal migrants arriving from the particular country; reciprocity, i.e., if one of the third countries decides to make the nationals of Member States subject to visa requirement, then the Union does the same.[531]

529 Obligatory checks on EU citizens will be introduced against databases such as the Schengen Information System, the Interpol Stolen and Lost Travel Documents Database and relevant national systems.

530 The Commission is convinced that the new competences proposed will allow the Agency to survey the control of external borders by Member States, and in case of urgency, to intervene upon request from a Member State or even against the will of a Member State.

531 In Europe the citizens of Western Balkan countries (except Kosovo) and the European microstates are currently exempt from visa requirement, while the citizens of Russia, Ukraine and the Post-Soviet states remain subject to visa requirement. Basically the citizens of all of the states in the Asian

At this point it is worth mentioning *Turkey*, the country that the EU has recently tried to involve in its efforts to ease the migration pressure on the continent. To this end an EU-Turkey action plan was drawn up to stop the dramatic influx of migrants. A part of the action plan is a *visa liberalisation roadmap* that envisages visa free entry into the Schengen area to Turkish citizens with biometric passports. The system is planned to start operation from October 2016.

The EU seeks to mitigate the negative effects of the visa requirement by entering into *visa facilitation agreements* with third countries which serve as incentives to third countries subject to the visa requirement in other issues related to migration, such as in the cooperation in removal; such measures are considered to be rather important foreign policy instruments of the Union.[532]

4. The procedures for issuing visas are enshrined in the *Regulation establishing a Community Code on Visas (Regulation (EC) No 810/2009)* which defines the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States not exceeding three months in any six-month period. The Member State competent for examining applications is the Member State whose territory constitutes the sole or the main destination of the visit. If no main destination can be determined, the competent Member State shall be the one whose external border the applicant intends to cross in order to enter the territory of the European Union. The issuing of EU visas valid in the 26 Member States, therefore, pertains to the national competence.[533]

5. The *Visa Information System (VIS)*, which was established by *Regulation (EC) No 767/2008*, is meant to facilitate the issuing of visas, becoming operative in 2011 following a regional roll-out scheme. VIS is a joint European database that enables through a central database the exchange and sharing of personal data between the Member States – such as biometric photographs and fingerprint data – on short-stay visas in order to prevent visa shopping and visa fraud. VIS was rolled out on a regional basis, starting in 2011 with North African coun-

---

and Pacific region are subject to visa requirement, except for Japan, Australia, New Zealand, South Korea and Taiwan. Most of the countries of the American continent are exempt from visa requirement (except for Colombia, Peru, Ecuador, and Bolivia). Finally, the countries of the African and Caribbean region are all subject to visa requirement, except for a few tropical island countries, such as Saint Kitts and Neville or Trinidad and Tobago.

532 Boldizsár Nagy & Petra Jeney, 'A szabadság, biztonság és jog térsége az Európai Uniónban' (The Area of Freedom, Security and Justice in the European Union), in: Tamás Kende & Tamás Szűcs (eds.), *Bevezetés az Európai Unió politikáiba* (Introduction to the Policies of the European Union), Complex, Budapest 2011, p. 662.

533 The application for visa is refused if the applicant presents a travel document which is false, conterfeit or forged, does not provide justification for the purpose and conditions of the intended stay, does not provide proof of sufficient means of subsistence for the duration of the intended stay / the return to his country of origin, is a person for whom an alert has been issued in the SIS for the purpose of refusing entry, is considered to be a threat to public policy, internal security.

tries, followed by other regions, such as India and China at the end of 2015 in keeping with a strict roadmap.

5 Long-term residence and immigration

According to the TFEU, a common immigration policy is aimed at 'ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.' Article 79(1) TFEU serves as the legislative basis for the common immigration policy. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

- the conditions of entry and residence of third-country nationals;
- the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;
- combating illegal immigration and the trafficking in persons.

The Treaty of Lisbon brought about significant progress in the exercise of EU competence in the area of immigration policy by excluding a former treaty provision (Article 63 TEC) from the text of the treaty which stated: '…measures adopted by the Council shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.' It should be noted, however, that the procedure for issuing long-term visas and residence permits for the purposes of employment and residence remains with the Member States. This is clearly illustrated by the fact that the definition of the number of economic immigrants seeking entry, i.e., the regulation of the migrant quota remains in national competence. Article 79(5) TFEU *expressis verbis* states on the level of primary EU law that Member States retain the right to freely determine volumes of third-country nationals admitted to their territory in order to seek work, whether employed or self-employed. The legal basis for enacting measures aimed at the integration of immigrants appears to be an important new element. In addition, the common immigration policy is now extended to the removal and repatriation of persons residing in the territory of the Union without authorisation, and the combating of human trafficking, affecting in particular women and children.

5.1 Secondary EU legislation in the field of common immigration policy

EU legal acts established in the area of immigration policy are the product of two waves of regulation. The first wave of regulation was practically the outcome of the Tampere Programme.[534] In accordance with the Tampere conclusions of the European Council of 1999 the European Commission made ambitious efforts to establish community level rules for the admission and residence of third-country nationals who seek work, whether employed or self-employed. The proposal for a directive drawn up in 2001 by the Commission applied a horizontal approach and intended to define the conditions for the admission and residence of all third-country nationals who seek work, whether employed or self-employed, together with the rights of these persons.[535] The proposal, however, failed due to resistance from Member States, and therefore, the rules on the conditions of entry for economic migrants were not adopted.

During the implementation of the Tampere Programme this period saw the adoption of several Union acts for the facilitation of legal forms of migration:

1. Council Directive 2003/86/EC on the right of third-country nationals to family reunification is a prerequisite to the social integration of migrants and it also regulates the employment of family members.

2. Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents. The directive observes the principle established in Tampere stating that persons holding a long-term residence permit should be granted in a Member State a set of uniform rights which are as close as possible to those enjoyed by citizens of the European Union.

3. Council Directive 2004/114/EC on the conditions of admitting third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service. The directive permits admission to the territory of the Union of third-country nationals for the purposes of study, pupil exchange or training, and defines the possible limitations on employment of students by the Member States.

4. Council Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research in the European Community. The directive enables researchers to join European research programs through a simplified procedure and, at the same time, it facilitates the return of researchers to their country of origin so that they can contribute to the development of their home country with the experiences they gathered.

534 Nagy & Jeney2011, p. 664.
535 COM (2001) 386 final.

5.1.1 Council Directive 2003/86/EC on the right of third-country nationals to family reunification

Up until recently, family reunification was the most frequent legal basis for the legal forms of immigration into the European Union.[536] Therefore, the Council intended to accept Direction 2003/86/EC on the right of third-country national to family reunification as a means of protecting third-country nationals. The ambitious proposal was significantly curtailed by the fierce resistance from Member States, therefore, today it practically functions as a means of minimum harmonization. The directive was harshly criticised for failing to observe certain fundamental rights. This was apparent from the legal action initiated by the European Parliament to annul the directive on family reunification[537] claiming that it breached the general legal principles of community (today union) law, such as human rights.

The first report on the application of the directive[538] arrived at the conclusion that the measure provides too much discretion for Member States. As a result a Green Paper[539] was issued, launching a process of public consultation. In April 2014 the Commission issued a Communication on the guidance for the Member States for the application of the directive. The objective of the directive is to ensure the right to family reunification for third-country nationals residing lawfully in the Member States by defining the minimum criteria to be met by all Member States in the procedure for family reunification. According to the directive this regulation must be applied if a sponsor holds a residence permit issued by the Member State valid for at least one year and has reasonable prospects of obtaining the right to permanent residence. The directive does not provide a definition of the above terms putting the applicability of its rules in question.

The directive provides a list of family members who are entitled to entry and residence in the particular Member State according to the family reunification directive. The rules differentiate between cases where – if all other criteria defined in the directive are met – the Member States are obliged to permit family reunification, and other cases where the decision belongs to the discretion of the Member States. The latter group of persons may be different in the individual Member States.

In accordance with the above provisions Member States are obliged to grant entry and residence to the following family members: the spouse of the sponsor,

536 While formerly 55% of the permits were issued for the purpose of family reunification, due to the restrictive policies applied by Member States this figure decreased to 21%.

537 Judgment of 27 June 2006 in Case C-540/03, European Parliament v. European Council, [2006] ECR 05769.

538 COM 2008 610.

539 Green Paper on the right to family reunification of third-country nationals living in the European Union COM 2011 (735).

minor or adult unmarried children of the sponsor and of his/her spouse, including adopted children. Thus, the directive focuses on the concept of nuclear family but it may be extended under the discretion of the Member States.

In addition, this group of persons may be further limited according to the – rather questionable and frequently questioned – provisions of the directive. The directive allows Member States to determine in relation to children over 12 arriving independently from the rest of their families whether they meet the conditions for effective integration. (Paragraph (1) Article 4). This limitation is currently only applied by Germany.

None of the Member States applied the second limitation that allows Member States to authorise the entry of children on grounds other than family reunification if the application is submitted after they had reached the age of 15 (Paragraph (6) Article 4).

Nevertheless, the European Parliament believed that the above two legal acts posed serious limitations on human rights and the fundamental right to the respect for private and family life.[540] These limitations are particularly in conflict with the right to the respect for private and family life and the principle of non-discrimination as enshrined in the European Convention of Human Rights.

The Court of Justice of the European Union did not consider annulling the directive for the above reasons to be justified. In its procedure the Court primarily relied on the well-established but less 'children friendly' European Convention of Human Rights and the established case-law of the Strasbourg forum, as opposed to other international conventions laying more emphasis on the protection of children or the relevant EU law established by the Court in relation to the citizens of the Union. As far as the violation of Article 8 ECHR on the right to respect for family life was concerned, the Court ruled that international law does not oblige Member States to grant entry to third-country nationals even if their close relatives live in the particular Member State.[541] The directive prescribing exact and positive obligations for the Member States still maintains a scope of discretion of Member States even if to a limited extent. The application of the integration test by the Member States falls within this particular scope of discretional powers.[542]

As far as spouses are concerned, Member States may define a minimum age for the spouse before he/she meets the sponsor. This minimum age defined may

540 These limitations are especially in conflict with the right to respect of private and family life and the principle of non-discrimination as enshrined in the European Convention of Human Rights.

541 As it has been mentioned above, according to the general practice of ECtHR, the ECHR does not ensure the right of family reunification in a particular country but the right to conduct a family life anywhere, where it is feasible.

542 The latter, however, is strictly limited by the regulations of the directive, since Member States may only apply the test to children over 12 arriving independently of the rest of their families.

not exceed 21. The directive claims that the age limit has two aims: to ensure better integration of the spouse and to prevent forced marriages.

Statistical data shows that a number of countries are especially affected by the problem of forced marriages, such as Germany, where nearly 3400 such cases were registered in 2010. There are 50 countries in the world where this tradition prevails. However, NGO's believe that education and the spreading of information are key to solving this problem, rather than the limitations of the rights to family reunification.

As far as 'substantive' regulations for the practice of the right to family reunification are concerned, the directive first defines the list of the so-called negative requirements, i.e., the issues of public policy or public security or public health on grounds of which a family member's application for entry or residence may be denied. Member States, therefore, have discretion in this area. In addition to the negative requirements the Member State concerned may require that the person who has submitted the application provide evidence that the sponsor has accommodation considered to be adequate for a comparable family, sickness insurance and resources which are sufficient to maintain himself/herself and the members of his/her family.

As far as sufficient resources are concerned the text of the directive – in contrast with the rules affecting the citizens of the Union – is completed by the requirement of stable and regular resources. The directive also sets out the negative consequences of the failure to apply for the social assistance system.

In the Chakroun case[543] the Court held that Member States may not exercise their discretion in relation to the above requirements in case this means jeopardizing the objective and efficient implementation of the directive.

In the operative part of the judgment the Court stated that the strict Dutch regulations on the requirements of family reunification are in conflict with EU law; such violations include, among others, national rules on resources that differentiate between cases where family relations in the Member State were established before, and where they were established after the sponsor's entry into the receiving state.[544]

---

543 Judgment of 4 March 2010 in Case C-578/08, Rhimou Chakroun v Minister van Buitenlandse Zaken (Chakroun), [2010] ECR 01839.

544 According to the bearings of Case Chakroun, M. Chakroun who is of Moroccan nationality has resided in the Netherlands since 1970 and there holds a residence permit for an indefinite period. R. Chakroun, who also has Moroccan nationality and was married to Chakroun in 1972 in Morocco, applied to the Netherlands Embassy in Rabat (Morocco) for a provisional residence permit in order to live with her husband in the Netherlands.

Dutch regulations make a sharp distinction between the concepts of family formation and family reunification in the narrow sense. In case of family formation a residence permit may be issued only if the reference person has a lasting and independent net income which is equal to at least 120% of the minimum wage, while in case of family reunification this amount is equal to 100% of the minimum wage. In this respect, the Court claimed that the provisions of the relevant directive – requiring

Finally, optional provisions allow Member States to require third-country nationals to be subjected to integration measures. This proved to be one of the most controversial and debated requirements during the negotiations. Three Member States (Germany, France and the Netherlands) apply such measures as a prerequisite to the entry in their territory requiring family members to take a language exam or an exam on information about the society of the receiving country, or require them to sign a contract when entering the receiving country that obliges them to attend a training course – or language course – offered by an NGO.

While the directive does not provide assistance for the application of the integration clause, Member States do not enjoy complete freedom in this respect. All instances of applying and interpreting the provisions must be consistent with the general legal principles of law, such as the principle of proportionality, and the objective of integration itself, i.e., the facilitation of the integration of long-term residents.

What are the rights the directive grants to family members? After accepting the application the Member State concerned shall grant family members a first residence permit of at least one year's duration. The directive also defines the rights of family members to access to education, access to employment and self-employed activity, and finally the right to an autonomous residence permit when particular requirements are met. The right to employment, however, is not without limitations; based on the assessment of their labour market Member States may regulate the conditions of exercising such right.

In conclusion, the most important merit of the directive is that it consolidated earlier, rather inconsistent and diverse Member State rules on the family reunification of third-country nationals in a more coherent form by *expressis verbis* defining the right to family reunification. Unfortunately, the measure has little effect on the harmonisation of Member States' laws.

5.1.2. Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents

The term 'denizen',[545] originally introduced by John Locke was revived by Thomas Hammar who applied it to immigrants who migrated to certain Western and Northern European countries in the 1960's for the purpose of short-term employment, and finally settled down in the receiving country for several decades. Who do we mean by this term that is now widely used? The term refers to for-

individual assessment by the authorities of all applications for family reunification – are not in accordance with Dutch regulations that generally define the particular amount of minimum wage under which all applications for family reunification are refused.

545 The etymology of the word 'denizen': from Latin roots, 'de+intus', meaning 'from within'.

mer immigrants, who have not yet been granted citizenship by the receiving country in the legal sense, but due to their level of social integration they are no longer considered aliens in the society of the host country. In other words, they are halfway towards acquiring full citizenship.

Directive 2003/109/EC applies to third-country nationals who are long-term, legal residents in a Member State, and have a 'half alien–half citizen' status, similar to the above group. The directive is an important milestone in the development of EU immigration policy since it affects more than half a million third-country nationals residing in altogether 24 Member States that fall under the scope of this directive.

The directive aims at providing third-country nationals who are long-term residents in a Member State a new, more secure status attaching particular rights to the same (principally, the right to residence, and the right to quasi equal treatment comparable to those of the citizens of the receiving country). Finally, under certain conditions, the directive grants these persons the right to free movement within the territory of the Union, thus solving the problems arising from 'being bound to one Member State'.

The directive is applicable to third-country nationals who are legally residing in a Member State. Its provisions, however, define a number of exceptions, i.e., third-country nationals who reside in a Member State on temporary grounds such as au pairs or seasonal workers are excluded from the scope of the directive, and in addition, the directive does not apply to third-country nationals whose residence permit has been formally limited. This latter category is interpreted in a number of ways by the Member States, compromising the effectiveness (*effet utile*) of the directive. In the Singh case[546] the CJEU declared that where the validity of a residence permit may be extended at any time, it does not qualify as a formally limited residence permit as defined under the directive.

The prerequisite of obtaining long-term resident status is that the applicant must reside legally and continuously within the territory of a Member State for five years. While the directive fails to define the meaning of legal residence, the report on its implementation states that the limitation of legal residence to residence based on 'residence permit' and, in principle, the exclusion of visas, amounts to an incorrect transposition of the regulation.

What other requirements are defined by the directive with regard to the obtaining of such status in addition to the requirement of five years legal residence? Besides sickness insurance in respect of all risks normally covered,

546 Case C-502/10, Staatssecretaris van Justitie v. Mangat Singh, judgment of 18 October 2012, not yet published. Mr Singh, an Indian national, arrived in the Netherlands in 2001 where he was granted a renewable, fixed-period residence permit, the validity of which was limited to the exercise of an activity as a spiritual leader or religious teacher. It fell into the category of formally limited residence permit for the purposes of the national law and was excluded from the scope of the directive.

Member States may require third-country nationals to provide evidence that they have, for themselves and for dependent family members stable and regular resources which are sufficient to support himself/herself and the members of his/her family. Member States may refuse applications for such status where the person concerned constitutes a threat to public policy or public security. Finally, Member States may require third-country nationals to comply with integration conditions, in accordance with national law. Such integration conditions applied by Member States include language proficiency, although different proficiency levels may be required. They may also include information on the society of the receiving country, usually covering its history, and its legal- and value systems.

The status of 'long-term resident' is a permanent status. The Member State grants a long-term resident's EC residence permit to long-term residents. The residence permit is valid for a minimum of five years, and following its expiry – if necessary – the residence permit can be automatically extended by submitting an application to this end. The report on the application of the directive held that the high fees applied on this occasion seem to be incompatible with the concept of automatic renewal, nor do the high fines (up to 1659 euros) that are reportedly applied in Slovakia to long-term residents that do not apply for the renewal of their permit in due time.

In its judgement[547] in the Commission v. the Netherlands case the Court held: the amounts of the charges claimed by the Kingdom of the Netherlands vary within a range in which the lowest amount is about seven times higher than the amount to be paid to obtain a national identity card is a case of unfair treatment of third-country nationals.

Long-term residents lose their status in case a fraudulent acquisition of long-term resident status is detected, or a return measure against said person is taken, or in the event of absence from the territory of the Union for a period of 12 consecutive months. Long-term residents also lose their status acquired in the first Member State when such status is granted in another Member State, or following six years of absence from the territory of the Member State which granted long-term resident status.

What are the rights granted under the directive to persons acquiring such status? First and foremost, the right to long-term residence in the territory of the receiving country, as well as the right to quasi equal treatment with citizens of the receiving country. The inclusion of the requirement of equal treatment[548] into the

547 Case C-508/10, European Commission v. Kingdom of the Netherlands, judgment of 26 April 2012, not yet published.

548 Such as in respect to employment, pursuit of studies or vocational training, mutual recognition of professional diplomas, certificates and other qualifications, tax benefits, access to goods and services, freedom of association and affiliation, including membership of trade unions, social security,

directive is significant in and of itself, even if it is overshadowed by the wide range of derogations the Member States may apply. But what exactly are these possible derogations?

First of all, we must mention certain general, geographic, i.e., territorial restrictions on the requirement of equal treatment that significantly limit the movement of third-country nationals within the Union. Such a restriction is that the Member State concerned may restrict equal treatment to cases where the registered or usual place of residence of the long-term resident, or that of family members for whom he/she claims benefits, lies within the territory of the Member State concerned. This restriction was probably 'addressed' to long-term residents who intend to stay in another Member State in accordance with regulations on mobility, without however obtaining the status of long-term residents.

Occasional involvement in the exercise of public authority may also constitute a legal basis for restrictions with respect to third-country nationals.

Member States may also retain restrictions in cases where, in accordance with existing national or Community legislation, these activities are reserved to nationals, EU or EEA citizens.

The judgement of the Court in the Kamberaj case[549] was also brought in the context of equal treatment. Servet Kamberaj was an Albanian national who had been residing and was employed in the Autonomous Province of Bolzano since the year 1994 and was the holder of a residence permit valid for an indefinite period. Mr Kamberaj received, in respect of the years 1998 to 2008, a 'housing benefit', i.e., a contribution by provincial authorities to the rental fees of less affluent tenants.

The benefit is divided among citizens of the Union (whether Italians or not) on the one hand and third-country nationals and stateless persons on the other. The Social Housing Institute of the Autonomous Province of Bolzano rejected Mr Kamberaj's application for a housing benefit for the year 2009, on the grounds that due to an amendment of the applicable law the budget for the grant of that benefit to third-country nationals was exhausted. The Court stated that if the determination of the part of the funds granted, as housing benefit, to citizens of the Union on the one hand and third-country nationals on the other hand, is made subject to different methods of calculation, it is to disadvantage of third-country nationals, since the budget available to satisfy their demands is smaller than that for Union citizens and likely to be exhausted more quickly than the former funds.

---

social assistance and social protection, and last but not least, free access to the entire territory of the Member State concerned.

549 Case C-571/10., Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano, judgement 24 April 2012, not yet published.

The directive introduces an important novelty by enshrining the right to reside in the territory of Member States other than the one which granted the applicant the long-term residence status, for a period exceeding three months (intra-EU mobility). While formerly only third-country national family members of EU citizens crossing the borders were granted the above right when moving to a new Member State, Directive 2003/109/EC extends this right to all third-country nationals with a long-term resident status, who reside in the Member State for the purposes of economic activity, pursuit of studies or vocational training, etc. The directive, however, allows for further restrictions that may reduce motivation for intra-EU mobility: Member States, for instance, may introduce labour market restrictions on entries for the particular purpose of economic activity, and require third-country nationals to comply with integration measures[550]. The limited opportunities, together with the large number of risk factors third-country nationals have to face in their new place of residence may positively deter persons with a secure legal status obtained in the first Member State from leaving the territory of that country.

While the directive achieves only minimum harmonization, it significantly eases the financial burdens of third-country nationals by reducing the expenses of entry into and residence in the Member State. In addition, while the mobility between Member States is still more of symbolic significance, it is a large step in the improvement of the circumstances of third-country nationals in the Union. At the same time, the relevant figures show[551] that third-country nationals generally do not have enough information on the status of long-term resident and the rights attached to it, and a number of deficiencies appear in the implementation of the directive.

550 Long-term residents, however, are subject to integration measures in one of the Mamber States alone. Where the third-country nationals concerned have been required in the first Member State to comply with integration conditions in order to be granted 'long-term resident status', the second Member State may not require so, the migrant citizen may only be required to attend language courses. In this respect, the intra-EU mobility regulation basically eliminates the applicability of the integration condition in the second Member State, and ensures the mutual recognition of integration programmes conducted by the Member States.

551 In 2009 about four fifths of third-country nationals with long-term resident status lived in four Member States: Estonia (187,400), Austria (166,600), Czech Republic (49,200), and Italy (45,200). In France and Germany only around 2,000 third-country nationals obtained long-term residence permit. What is more, according to available data, so far only a low number of third-country nationals (less than 50 per Member State) have taken advantage of the new opportunity of intra-EU mobility.

5.1.3 Council Directive 2004/114/EC on the conditions of the admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service

In December 2004 the Council accepted the directive on the entry of third-country national students. Indeed, the admission of third-country students has a number of short and long-term benefits for the receiving countries. For instance, following the completion of their studies third-country students are likely to remain in the receiving country and compensate for the shortage of skilled labour in areas suffering from such shortage. The admission of third-country students has similarly positive effects on the general view on the phenomenon of migration, since incoming students represent a skilled segment of migrants who can easily integrate into the society of the receiving country. Their presence does not constitute an immediate threat to the welfare of the citizens of the receiving country. What is more, their presence may not only result in a better understanding and acceptance of the migrants themselves, but also those of their country of origin, significantly contributing to the strengthening and deepening of political and economic relations between the receiving country and the students' country of origin. Third-country nationals studying in the Union can also contribute to the balanced functioning of the education institutions in the Member States. Higher tuition fees paid by foreign students increase the budget of the receiving education institution, resulting in a higher quality of education. Considering the above benefits, it is no surprise that Directive 2004/114/EC and its transposition to national laws was the least problematic of all of directives on immigration policy. It seems that Member States are more willing to receive students than any other category third-country nationals.

The directive defines mandatory rules in case of third-country nationals who apply for leave of entry into the territory of a Member State for the purpose of studies (university, college students), while entry for the purposes of pupil exchange, unremunerated training or voluntary service remains in the discretion of the Member State concerned. Since these provisions of the directive are optional, their 'added value' is questionable.[552]

552 On the 23rd of March in 2013 the Commission put forward its proposal for the joint modification of the Education directive and the Reaseracher directive (COM/2013/151). The Proposal significantly changes and extends the scope of persons affected by the two former directives. In addition to the two target groups currently affected by mandatory rules, i.e., researchers and students who study in higher education institution, the Commission proposes to make mandatory the optional regulations of the Education directive concerning entries for the purposes of pupil exchange programmes or unremunerated training or voluntary service. In order to secure their rights and provide them protection the Proposal also introduces conditions of admission for two groups of third-country nationals, i.e., au-pairs and remunerated trainees, currently not affected by the scope of the mandatory EU legal frame.

As far as the conditions of entry are concerned, the directive defines the uniform conditions for permission with respect to all four groups of persons. The applicant must have a valid travel document and sickness insurance in respect of all risks normally covered. Other provisions of the directive define the additional conditions for entry in relation to each group of persons. Students, for instance, are required to provide evidence that they had been accepted by an establishment of higher education and that during their stay they will have sufficient resources to cover their subsistence and return travel costs. In addition, Member States may require students to provide evidence of sufficient knowledge of the language of the course to be followed by them, and that they have paid the fees charged by the establishment.

As far as the validity of the residence permit is concerned, as a general rule, the residence permit must be issued to the student for a period of at least one year. Outside their study time students are entitled to exercise economic activity. Each Member State determines the maximum number of hours per week or days or months per year allowed for such an activity.

By limiting economic activities the directive intends to reduce cases of abuse of student visas. According to the mobility provisions of the directive students are also entitled to apply continue their studies already commenced in another Member, or to complement them with a related course of study in another Member State, if they meet the conditions laid down in the directive.

Finally, it is unfortunate that the directive does not regulate the rights of students to family reunification, especially since the family reunification directive entirely excludes them from its scope. The lack of of parental emotional support often discourages even the best students from leaving their home country in order to study abroad. On the whole, it seems that the rights granted by the directive and the national regulations on its basis enjoyed by third-country students are narrower than those afforded to EU citizens with a similar status, who may freely choose the Member State in which they wish to study. EU citizen students may settle in any of the Member States for a period exceeding three months, provided they have sufficient resources and proper sickness insurance. In addition, they may exercise unlimited economic activity in the Member State of residence, thus enjoying treatment equal to that of the citizens of the receiving country. The requirement of equal treatment is only limited in relation to the first three months of the stay and the range of available allowances for subsistence, but only if the student concerned does not exercise economic activity. While due to the restrictions defined in the directive third-country nationals may only exercise marginal, supplementary activities, EU citizen students are entitled to exercise actual economic activities, also providing them access to grants and allowances for subsistence. It is important to mention that a separate programme

serves the facilitation of the mobility of EU citizen students (ERASMUS programme).

5.1.4 Council Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research in the European Community

The facilitation of the entry of third-country researchers into the Union is in accordance with the objective set out in Lisbon, according to which the Union was to become the most competitive and dynamic knowledge-based economy in the world by 2010. The directive is intended to lay down the conditions for the admission of third-country researchers for more than three months for the purposes of carrying out a research project under hosting agreements with research organisations. The directive provides a relatively broad definition of the term 'research', meaning all kinds of creative work undertaken on a systematic basis in order to increase the stock of knowledge, including knowledge of man, culture and society, and the use of this stock of knowledge to devise new instruments and design new procedures. By the term 'Researcher' the directive in question means a third-country national holding an appropriate higher education qualification, which gives access to doctoral programmes, who is selected by a research organisation for carrying out a research project for which the above qualification is normally required.

Perhaps the greatest merit of the directive is that it – at least partially – delegates the power to decide on the admission of third-country researchers from the national authorities to the receiving institutions. According to the directive research organisations receiving the researcher play a key role in the admission procedure of third-country researchers. As a general rule, receiving institutions must seek preliminary approval from the national authorities valid for five years. Research organisations, however, may be made somewhat deterred by the provision of the directive which states that Member States may require, in accordance with national legislation, a written undertaking of the research organisation that in case a researcher remains illegally in the territory of the Member State concerned, said organisation is responsible for reimbursing the costs related to his/her stay and return incurred by public funds.

In addition to the above conditions to be met by the receiving institution the directive also sets out the rules governing the relationship between the receiving institution and the third-country researcher. A so-called 'hosting agreement' specifies the legal relationship between the researcher and the receiving institution. However, research organisations may sign hosting agreements only if certain conditions set out in the directive are met, such as, that the research project has been accepted by the relevant authorities in the organisation, and the neces-

sary financial resources for it are available, and finally, if the third-country researcher provides sufficient proof of his/her qualification. The research organisation must always examine whether during his/her stay the researcher has sufficient monthly resources to meet his/her expenses and return travel costs, and if during his/her stay the researcher has sickness insurance for all the risks normally covered. Finally, the hosting agreement also specifies the legal relationship and working conditions of researchers. In a number of areas the directive affords researchers residing in a Member State under the above conditions equal treatment with nationals of the host Member State as regards the recognition of diplomas, certificates and other professional qualifications, working conditions, including pay and dismissal, social security, tax benefits, access to goods and services and the supply of goods and services made available to the public.

Researchers admitted under the directive may also teach. Member States may set a maximum number of hours or days for teaching. More importantly, researchers are allowed to carry out part of their research in another Member State, under the conditions set out in the directive.

As far as the objectives of the Tampere Programme are concerned, it seems that EU citizen researchers still enjoy more rights than their third-country colleagues, which is illustrated by the fact that research institutions of the Member States may employ members of the latter group as 'traditional employees' as set forth in the Agreement.

5.2 Directives on immigration for the purpose of employment

Since the majority of the Member States did not support the horizontal approach applied in 2001 to the rules on the right to entry and residence of economic migrants, in its 2005 Policy Plan the Commission proposed the application of a sectorial approach. The Policy Plan envisioned the establishment of a general framework directive (single permit directive), which would include provisions on the rights of third-country workers, and the single application procedure with respect to a single permit for third-country nationals to reside and work in the territory of a Member State. In addition, the Policy Plan envisioned the establishment of separate directives on the conditions of the entry and residence of four groups of third-country workers: highly skilled workers, seasonal workers, intra-corporate transferees, and remunerated trainees. The negotiations, however, did not proceed as planned: the single permit directive was drafted among heated legal and political disputes. This explains why the Council first accepted Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment in 2009, while the

Single Permit Directive 2011/98/EU,[553] technically a framework directive, was accepted only in December 2011. Finally, Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, and Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer were established only in 2014.

5.2.1 Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment

In light of the objective set out in the 'Lisbon Strategy' the aim of the European Blue Card Scheme is to attract highly qualified third-country workers to the territory of the Union. This aim is clearly illustrated by the blue card system of the directive, which is intended to compete, both symbolically and actually, with the American Green Card system that governs and represents the immigration of workers to the US. The majority of highly qualified workers arriving to the US do not arrive directly from developing countries but from European countries, which suffer from severe labour shortages themselves. Persons leaving European countries usually complain about excessive bureaucracy, financial problems, and the various kinds of discriminative treatment they are subjected to. The Union has so far not been really successful in attracting skilled workers. The Commission is convinced that this is due to the fragmented labour market with its 28 different systems of entry, as well as the limited mobility between the Member States. The recently accepted EU Blue Card directive intends to facilitate the admission of highly qualified workers and their families by establishing a 'simplified admission procedure' on the one hand, and by granting applicants equal social and economic rights with nationals of the host Member State on the other. The third crucial element of the directive is that it ensures the mobility of highly qualified workers between Member States. Studies on economics seem to support the view that the geographic mobility of highly skilled workers may significantly contribute towards preventing a possible crisis on the labour market and thus, a sudden decline in economic development. The benefits for third-country nationals from the opportunities opened up by the internal market, i.e., from the free movement of persons would create a significant competitive edge over the United States. Therefore, the objective of the directive is to define the conditions for entry and residence of highly qualified third-country workers and their families. It is important to note that the directive does not affect Member

553 European Parliament and Council Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

State competence over the admission of skilled third-country workers, i.e., Member States maintain the right to define the number of third-country nationals they wish to admit to their territory for the purposes of highly qualified employment. While the application of national quotas is both legally and politically justifiable, it may constitute a significant obstacle in the realization of the objective set out in the directive. Another provision of the directive is aimed at the protection of the national labour market, which allows Member States before taking the decision on an application for an EU Blue Card, and when considering renewals or authorisations during the first two years of legal employment as an EU Blue Card holder, to examine the situation of their labour market and reject the application on this ground.

The directive offers a comprehensive list of the criteria for the application for the Blue Card. Since admission is based on demand, third-country nationals must present a valid work contract or a binding job offer with a duration of at least one year when applying for admission. They must also present a document attesting the fulfilment of the conditions set out under national law for the exercise of the regulated profession by Union citizens, as well as valid travel documents, visa and sickness insurance. The application is also refused if the applicant poses a threat to public policy, public security or public health. Finally the salary of the applicant must be at least 1.5 times the average gross annual salary in the Member State concerned.

The validity of the Blue Card may be between one to four years and Member States always set a standard period of validity themselves. In light of the above, the directive does not seem too competitive compared to traditional host countries, such as the US and Canada, which have been providing permanent settlement for skilled workers, thereby maintaining a successful immigration policy for several years.

For the first two years of legal employment in the Member State concerned as an EU Blue Card holder access to the labour market is restricted to the exercise of paid employment activities which meet the conditions for admission. During this period changes in employer shall be subject to prior authorisation in writing by the competent authorities of the Member State of residence, and any modifications that affect the conditions for admission shall be subject to prior communication. The latter probably applies to cases when a Blue Card holder wishes to perform a different kind of task at the same employer, or when his/her salary falls under the limit specified above. The directive does not consider the possibility that the case may come under the scope of restriction even without the modification of the conditions, e.g. if the increase in the worker's salary is slower than that of the average salary. After the first two years, Member States may grant the persons concerned equal treatment with nationals as regards ac-

cess to highly qualified employment. This, however, is merely an option for the Member States.

In order to prevent limiting the geographical mobility of highly qualified workers who have not yet obtained long-term resident status, residence of EU Blue Card holders in different Member States may be cumulated. The effect of the European immigration policy on the developing countries is one of its greatest dilemmas. Statistical data show that the majority of highly qualified third-country nationals from these countries. There seems to be an irresolvable tension between the efforts to make third-country nationals leave their home countries, and the objective of contributing to the development of these countries. It is also true that in most of the developing countries people find it hard to get a job even with a university degree and the financial support from immigrants is a major contribution to the living conditions of those who remained in the home country. It is hard to tell which way the balance will finally tip, therefore, the effects of the directive on third countries should be monitored.

5.2.2 European Parliament and Council Directive 2011/98/EU on a single application procedure

The Single Permit framework directive was established following its adoption by the Council and the Parliament on 13 December 2011, and entered into force a few days later on 24 December 2011. The directive has two objectives: first, it regulates the application procedure of third-country nationals to work in the territory of a Member State. Therefore, the directive aims simplifying and rendering the rules more efficient both for the workers themselves and their employers by introducing a single application procedure, in the framework of which the competent authority issues the applicant a combined title encompassing both residence and work permits within a single administrative act.

The other main objective of the directive is to provide migrant workers with uniform rights and equal treatment with nationals of the receiving country in accordance with the objectives of the Tampere Programme.

As far as the personal scope of the directive is concerned, while it excludes a number of categories, as a framework directive it aims at covering the widest possible scope of third-country workers, regardless of the primary purpose of their entry to the territory of the Member States. An important novelty introduced by the directive is that it not only considers those third-country nationals to be workers who have been admitted to a Member State for work but also those who have been admitted for other purposes and have been given access to the labour market of that Member State in accordance with the provisions of national law.

A new, central and very positive element of the directive is the single permit procedure itself, as a result of which a single permit is issued for the applicant. The single permit is a uniform document combining a residence permit and a work permit. It is of crucial importance that Member States are not entitled to issue other types of permits, such as a separate work permit. Therefore, this directive significantly simplifies the procedure by reducing the number of competent authorities and the steps taken in the procedure. Naturally, it also makes it easier to control the legal status of residents and workers.

The very first article of the directive declares that it is without prejudice to the Member States' powers concerning the admission of third-country nationals to their labour markets.

One of the most crucial regulations of the directive is that Member States maintain the right to define the most important conditions of obtaining the permit to reside and work in their territory, what is more, they may also define their national procedure, including the relevant authorities participating in the procedure and their competence.

A particularly important provision of the directive stipulates that an application may be considered inadmissible on the grounds of the volume of admission of third-country nationals arriving for employment purposes and, on that basis, these applications need not be processed.

Another important result of the directive is that it grants unified rights to third-country nationals legally working in the territory of the Member States. By regulating the requirement of equal treatment the directive aims at, among others, eliminating the significant gap between the status of migrant workers and those of the nationals of the receiving country. Unfortunately, however, the directive does not include the applicable rules on equal treatment in two important areas: access to the labour market and social benefits.

The directive does not provide increased protection against expulsion either. Naturally, by obtaining long-term resident status one may be protected against expulsion, but as demonstrated above, this status is not easy to obtain, and until obtaining such status, the legal and economic situation of affected migrants is rather uncertain.

5.2.3 European Parliament and Council Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers

Directive 2014/36/EU[554] passed in February 2014 regulates the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers. The directive intends to provide a legal framework for third-country nationals, formerly employed in violation of alien employment rules, to perform seasonal activity on the territory of the Union dependent on the passing of the seasons, and, affording them protection against exploitation. The maximum duration of stay is determined by the Member States and limited to a period of between five to nine months within a period of twelve months. It is also important that the work be of genuinely seasonal nature. The directive allows for an extension of the contract or change of employer, provided that the admission criteria continues to be met. That basically reduces the risk of abuse that seasonal workers may face and, at the same time provides for a flexible response to employers' actual workforce needs. The possibility to change the employer, however, does not entail the possibility for the seasonal worker to seek employment while being unemployed.

The directive also clarifies the rights of migrant workers. Seasonal workers are entitled to equal treatment in respect of the terms of employment, including the minimum working age and working conditions, pay and dismissal, working hours, leave and holidays, as well as health and safety requirements at the workplace. Equal treatment also includes branches of social security (related to sickness benefits, invalidity benefits and old-age benefits), and consulting services on seasonal work afforded by employment offices. At the same time, housing constitutes an exception from the social benefits provided. The right to equal treatment excludes family benefits and unemployment benefits, and Member States may also restrict equal treatment with respect to tax benefits, education and vocational training.

554 European Parliament and Council Directive 2014/36/EU of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94, 28.3.2014, pp. 375–390.

5.2.4 European Parliament and Council Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer

Directive 2014/66/EU[555] on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer was adopted in May 2014. The new directive aims to facilitate the mobility of managers, specialists and trainee employees of branches and subsidiaries of multinational corporations, temporarily relocated for short assignments to other units of the company in the European Union by reducing the administrative burden associated with work assignments in several Member States. This is a mutually beneficial practice for both workers and the receiving company: while workers acquire work experience the company is provided with the necessary skills.

The directive seeks to define the conditions applicable to third-country nationals and their families in case their company relocates them for work purposes for more than 90 days to one or more other units of the company in the European Union. The directive does not apply to self-employed workers, students or those who are assigned by employment agencies.

The maximum duration of the intra-corporate transfer is three years for managers and specialists and one year for trainee employees. A primary condition of relocation is that the transferees be employed within the same company prior to the transfer for a certain period of time. This period must be at least three to twelve uninterrupted months of employment immediately prior to the transfer in the case of managers and specialists, and from at least three to six uninterrupted months in the case of trainee employees. Transferees must have work contracts, and they must present evidence that the third-country national will be able to transfer back to an entity pertaining to that undertaking or group of undertakings and established in a third country at the end of the intra-corporate transfer.

The directive also sets a minimum wage by requiring that intra-corporate transferees are entitled to equal treatment with nationals of the receiving country occupying comparable positions as regards remuneration which will be granted during the entire transfer. Negative conditions include the possibility to refuse entry to the territory of the EU to persons considered to pose a threat to public policy, public security or public health.

555 European Parliament and Council Directive 2014/66/EU of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157, 27.5.2014, pp. 1–22.

6 Fight against illegal migration

6.1 Historical overview

The *Treaty of Amsterdam* signed in 1997 and entered into force on 1 May 1999 was the first EU primary law instrument that gave the European Union *actual competence* in the area of fighting illegal migration, in the form of a 'Community' policy within the first pillar. While certain aspects of the Union level fight against illegal migration were already included among the so-called matters of collective interest in the third pillar established by the 1992 Treaty of Maastricht actually in force from 1 November 1993 (cooperation in the areas of justice and home affairs), this era merely saw the reconciliation of interests within the confines of traditional intergovernmental cooperation. The competences related to 'combating unauthorized immigration, residence and work' (Article K.1 (3) lit. (c) of the original TEU) were characterized by unanimous decision-making processes typical of traditional intergovernmental organisations, and – in lack of Community law – by special, mostly 'soft' legal instruments (recommendations, resolutions, conclusions, etc.), without actually involving the European Parliament in the legislative process and by practically excluding the jurisdiction of the European Court of Justice.

The area the Treaty of Amsterdam elevated to the 'Community level' continued to exist as a first pillar Community policy forming part of the cooperation in justice and home affairs which was renamed the '*Area of Freedom, Security and Justice'* (hereinafter: AFSJ), equipped with all the instruments of secondary Community law, and the structural characteristics of EC law (direct applicability, direct effect, supremacy). As a part of the emerging common European immigration policy the fight against illegal migration was moved to *Title IV* of the Treaty Establishing the European Community (TEC), authorizing the Community to adopt measures in relation to *illegal immigration and illegal residence, including repatriation of illegal migrants*.[556] Article 64 TEC added restrictions to this authorization by claiming that this EU competence *may not affect* the exercise of the responsibilities incumbent upon Member States *with regard to the maintenance of law and order and the safeguarding of internal security*. The relevant strategic guidelines, referred to as 'milestones' in the conclusions on justice and home affairs of the 1999 Tampere Summit of the heads of state and government of the Member States (the so-called *Tampere Programme*) contributed to the opening up of the contents of this still rather laconically worded competence. The Programme, among others, intends to introduce strong measures in order to tackle illegal immigration at its source, in particular by combating those

556 Art. 63 (3) lit. (b) TEC.

who engage in trafficking in human beings and the economic exploitation of migrants, to promote the voluntary return of illegally staying third-country nationals to their country of origin, to facilitate the closer co-operation and mutual technical assistance between the Member States concerned in combating networks of human smuggling and trafficking of persons, and to establish and negotiate EU level readmission agreements and/or to include 'readmission clauses' in more general international agreements with third countries.

This was followed by the *comprehensive action plan of 2002* that was intended to implement the Tampere Programme and to combat illegal immigration and trafficking of human beings; the action plan was approved by the Justice and Home Affairs Council the same year.[557] This crucial document defined the framework of Union policies centred on the fight against illegal migration, and listed the related tasks, among which the most important ones include the reinforcement and the development of a common policy on readmission and return; more operative powers given to EUROPOL to enable it to collect information on networks of trafficking in human beings or human smuggling; and the proposed introduction of a number of sanctions in order to tackle the *pull factors* of illegal migration (to be imposed on those employing illegal migrants, or by determining the liability of carriers transporting third country nationals not in the possession of the necessary travel documents for admission).

These objectives regularly appeared in the latter thematic action plans of the European Commission (e.g. in its 2006 Communication on Policy priorities in the fight against illegal immigration of third-country nationals[558]), and also in other strategic programmes of the *European Council*, which filled the framework of AFSJ as set out in the founding treaties by providing guidelines on specific policies (in relation to combating illegal migration, see: Chapters 1.6. – 1.7. of the Hague Programme for 2005–2009; Chapter II of the European Pact on Immigration and Asylum of 2008, or Chapter 6 of the Stockholm Programme for 2010–2014).

6.2 Current objectives and legal instruments of the fight against illegal migration

1. Within the architecture of the founding treaties of the post-Lisbon era *Article 79(1)* of the Treaty on the Functioning of the European Union (TFEU) defines the *general objectives* of Union action on illegal migration. It declares: '[t]he Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, […] and the prevention of,

557 2002/C 142/02 [OJ C 142, 14.6.2002., pp. 23–36.].
558 COM 2006 (402) final, Brussels, 19 June 2006.

and enhanced measures to combat, illegal immigration and trafficking in human beings.'

2. *Further objectives* of the common European strategy for the fight against illegal migration are defined in the strategic policy guidelines endorsed by the European Council on the basis of Article 68 TFEU, such as the current *Ypres Guidelines* governing the development of this policy field until 2020 (adopted by the European Council in its Ypres/Brussels meeting on 26-27 June 2014). The conclusions claim that *addressing the root causes of illegal migration* is an essential part of EU migration policy, together with the prevention of illegal migration, as well as an *effective return policy* for third-country nationals illegally residing on the territory of the European Union. This requires intensifying cooperation with countries of origin and transit (including assistance to strengthen their migration and border management capacity). Looking ahead into the upcoming years the heads of state and government of the EU Member States strongly agreed that further steps must be taken to ensure that the common migration policy becomes *a much stronger integral part of the Union's external and development policies (enhancing synergies)*, applying the 'more for more' principle (i.e. the more a partner country contributes to the fight against illegal migration, the more generous technical and financial support it receives from the EU). The above mentioned conclusions of the European Council set out the following priorities for the period between 2014 and 2020 in the area of curbing illegal migration:

> 'strengthening and expanding Regional Protection Programmes, in particular close to regions of origin, in close collaboration with UNHCR; increase contributions to global resettlement efforts, notably in view of the current protracted crisis in Syria;
> addressing smuggling and trafficking in human beings more forcefully, with a focus on priority countries and routes;
> *establishing an effective common return policy and enforcing readmission obligations in agreements with third countries*;
> […]
> FRONTEX, as an instrument of European solidarity in the area of border management, should reinforce its operational assistance, in particular to support Member States facing strong pressure at the external borders, and increase its reactivity towards rapid evolutions in migration flows, making full use of the new European Border Surveillance System (EUROSUR);
> *in the context of the long-term development of FRONTEX, the possibility of setting up a European system of border guards to enhance the control and surveillance capabilities at our external borders should be studied.*'[559]

559 Conclusions of the European Council of 26-27 June 2014 (EUCO 79/14, Brussels, 27 June 2014), pp. 3–4.

3. During the seventeen years that have passed since the entry into force of the Treaty of Amsterdam a number of legal acts and other initiatives enhancing and facilitating practical cooperation were introduced in the area of the fight against illegal migration (see details below). Following the implementation of the relevant legislation in this domain, building on past programmes, the overall priority now is to consistently *transpose* current EU legal instruments and policy measures into Member States laws, *as well as to effectively implement and consolidate the same*. As a part of this intensifying operational cooperation – by using the potential of Information and Communication Technologies' innovations –, enhancing the role of the different EU agencies (e.g. FRONTEX, EASO, EUROPOL), and ensuring the strategic use of *EU funds* will be of key significance (the resources available for activities related to return are primarily defined in Chapter IV of the regulation on the Asylum, Migration and Integration Fund[560]).

6.3 Legal bases and decision-making procedure

1. Article 79 (2) and (3) TFEU define the applicable legislative procedures in this area:

> '(2) For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:
> […]
> c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation,
> d) combating trafficking in persons, in particular women and children.
> *(3) The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States*.'

It is worth noting that, as a novelty, the term *removal* was mentioned separately as an area of EU intervention, and that Article 79(3) offers a *definition* for the term 'illegal migrant' from the perspective of EU law. It is also of crucial importance that the external competence of entering into readmission agreements between the Union and third countries is now expressly mentioned in EU primary law, what is more, the role of the *European Parliament* in the treaty-mak-

560 European Parliament and Council Regulation 516/2014/EU of 16 April 2014 stablishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC [OJ L 150, 20.05.2014. pp. 168–194.].

ing procedure was reinforced, becoming an important partner as opposed to its former, consulting role: its *consent* is now required for the Union to enter into EU level readmission agreements.[561]

2. The above powers of EU institutions laid down in the founding treaties were supplemented and placed into a marked human rights context by the elevation of the *EU Charter of Fundamental Rights* to the level of primary law with the entry into force of the Lisbon Treaty. This novel layer of binding rights (forming also the standard of legal review of secondary law) declares not only the *principle of non-refoulement* and the *prohibition of collective expulsions* (Article 19), but also grants several *other fundamental rights* to illegally staying third-country nationals (e.g. prohibition of torture and inhuman or degrading treatment or punishment – Article 4; prohibition of slavery and forced labour – Article 5; right to liberty and security – Article 6; respect for private and family life – Article 7; right to property – Article 17).

3. As a general rule, legal acts of the Union elaborated in the areas related to the fight against illegal migration in accordance with Article 79(2)-(3) TFEU are subject to *ordinary legislative procedures*. Acting as co-legislators, the Council of the EU and the European Parliament negotiate secondary Union legislation within the framework of a so-called *codecision procedure*, based on the proposal for legislation *submitted by the European Commission*. The fact that as of 1 December 2009 the *Court of Justice of the European Union* enjoys full and unrestricted jurisdiction over this area, brought about an important change since it provides significant additional legal protection against expulsion and removal – both sensitive issues from the perspective of human rights. This is illustrated by the rich and continuously growing case-law of the Luxembourg Court related to the so-called Return Directive (2008/115/EC) aiming at the reconciliation and fine-tuning of the fundamental rights of illegal migrants and the sovereign prerogatives of the Member States to take effective and rapid decisions about the return of such persons.

6.4 EU legal and policy instruments to combat illegal migration

6.4.1 The volume and main forms of illegal migration in the EU

Due to its latent nature the *volume* of illegal migration is very *difficult* to accurately determine. It is as just difficult to define the number of third-country nationals who avoid border controls or get around them by presenting fraudulent documents, as those who lawfully enter the territory of the EU but fail to leave it (the so-called overstayers), or no longer meet the conditions of legal residence

561 Art. 218 (6) a) (v) TFEU 218.

(e.g. due to illegal employment). A comprehensive, pan-European research conducted within the auspices of an international consortium at the end of the 2000's (the so-called *CLANDESTINO project*[562]) could also conclude that by the end of 2009 the number of illegally resident third-country nationals was somewhere between *2.5 and 4.5 million people*. The annual reports of the European Commission on the immigration and asylum situation in the EU[563] *do not even venture* to estimate such figures, they only report the numbers of illegal migrants who were returned that year during the border control procedure or were refused entry, and those who were captured on the territory of the Member States by the authorities of the Member States (during internal controls).

The term 'illegal migration' is actually an umbrella term for situations that take a number of *different forms*. The term includes the *illegal entry* of third-country nationals into the territory of an EU Member State by land, see or air (including the transit zones of airports), either through the border crossing points (by hiding in vehicles and getting around controls or by corrupting the border guards), or through 'green' or 'blue' borders by avoiding control. This is often carried out by using counterfeit or forged documents and/or visas and with the active participation of networks of organized crime engaged in human smuggling and trafficking who organize the transport.[564] Another form of illegal migration into the EU is when a third-country national legally enters the EU with a valid visa or is exempt from visa requirement and *stays longer than permitted* (*overstayers*) or changes his/her purpose of residence without filing a separate application (*status change*), e.g. if a third-country national does not change his/her status as a student to that of a worker after the completion of his/her university studies, but seeks employment regardless. And finally the term also covers *refused asylum seekers* who fail to leave the territory of the Union after receiving a final refusal of their application for international protection and a return decision, thereby becoming illegal residents.

6.4.2 Legal instruments

The considerable number of EU law measures concerning the fight against illegal migration may be categorized in various ways. The present subchapter first discusses measures related to the prevention of illegal migration, moving on to

562 The website of the CLANDESTINO project (including the major findings of the research) is available: http://irregular-migration.net (Accessed: 1 March 2016).

563 See e.g.: Communication from the Commission to the European Parliament and the Council – 5th Annual Report on Immigration and Asylum (2013), COM (2014) 288 final.

564 Tamás Jagusztin & Gergely Bodnár, 'Az illegális migráció elleni küzdelem jogi és politikai eszközei az Európai Unióban' (Legal and Policy Instruments of the Fight Against Illegal Migration), in: Szilveszter Póczik & Szilveszter Dunavölgyi (eds.), *Nemzetközi migráció – nemzetközi kockázatok* (International Migration – International Risks), HVG-Orac, Budapest 2008, pp. 93–95.

the legislative acts aiming at the return and readmission of third-country nationals actually residing illegally on the territory of the EU, and finally it discusses the legal instruments curbing undesirable factors within the EU attracting illegal migrants (*pull factors*). The above categories will serve as the basis for discussing the relevant measures adopted by the EU.

6.4.2.1 Prevention of illegal migration

The elimination or at least the possible reduction of illegal migration, i.e., the prevention of this phenomenon is the most attractive policy option for Member States, since successful prevention reduces the number of administrative activities and the volume of resources and expenses necessary for the search for, the capture and then the expulsion of third-country nationals illegally residing in the territory of the country. As a form of prevention Member States may share their responsibility with the private sector (e.g. carriers).

a) The common European rules governing the *responsibility of carriers and the penalties they may be subjected to* are included in Article 26 of the Convention implementing the Schengen Agreement, Directive 2001/51/EC[565] on the responsibilities of carriers, and Directive 2004/82/EC[566] on the obligation of carriers to communicate passenger data. In accordance with these rules carriers, transporting people by land, see or air (bus companies, shipping companies, airline companies), must communicate *certain data of passengers* transported from outside the territory of the Union in advance, because if the authorities conducting border control receive information on third-country nationals intending to enter before they arrive at the border crossing point, the pace and the efficiency of the border control can be significantly enhanced. The development of Union law reached the point when it requires carriers to proceed with due care – in order to prevent illegal migration – before the commencement of the trip or the crossing of the border.[567] It is the obligation and responsibility of carrier companies to check whether third-country nationals have the necessary travel documents and/or visa required to enter the territory of the EU. If the border control authorities deny the entry of third-country nationals on the basis of insufficient documents or for other reasons, the carrier is required to *transport back* third-country nationals not entitled to entry to the point of departure or to another destination in a (third) country outside the EU, or if there is no such a country, to *transport them onward* to a Member State that is required to admit the third-

565 Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 [OJ L 187, 7. 10 2001., pp. 45–46.]

566 Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data [OJ L 261, 8.6.2004., pp. 24–27.]

567 Jagusztin & Bodnár 2008, p. 103.

country national. This obligation to transport back or transport onward third-country nationals must be in accordance with the 1951 Geneva Convention relating to the Status of Refugees, especially with the principle of *non-refoulement* having the character of international customary law. The gravity of the responsibility of carriers and the severity of the penalties that may be imposed are illustrated by the fact that carriers are subject to *penalties between EUR 3.000 and EUR 5.000*, if failing to properly check the travel documents and/or visas, and in case the third-country nationals concerned are not transported back by the carrier at fault, the latter shall bear the *expenses of transportation*.

b) In order to prevent *human smuggling* Article 27(1) of the 1990 Convention Implementing the Schengen Agreement states that '[t]he Contracting Parties undertake to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens.' This treaty provision was replaced by the new legal regime established by *Directive 2002/90/EC*[568] – based on the definition provided in the 2000 Palermo Protocol against the smuggling of migrants by land, sea and air –, which state that any person who *intentionally* assists a person who is not a national of a Member State *to enter, or transit* across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens; or any person who, *for financial gain*, *intentionally* assists a person who is not a national of a Member State *to reside* within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens[569] is to be considered a human smuggler and will be penalized. Any Member State may decide not to impose the above sanctions where the aim of the behaviour is to provide humanitarian assistance to the person concerned. Penal sanctions adopted with respect to human smuggling are regulated in *Council Framework Decision 2002/946/JHA*,[570] which supplements the directive was originally structured in three pillars. It requires Member States to apply targeted strict measures to human smugglers working for financial gain or within the framework of a criminal organisation, or if the life of the smuggled alien was endangered, by setting the maximum penalty at no less than eight years of imprisonment. On the one hand, the framework decision generally states that penalties provided for by Member States and applied to human smuggling must be *effective, proportionate and dissuasive*, including extradition, and on the other, the le-

568 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [OJ L 328, 12.5.2002., pp. 17–18.]

569 Art. 1 (1) lit. a)-b) of Directive 2002/90/EC.

570 Council Framework Decision 2002/946/JHA (28 November 2002) on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [OJ L 328, 2002.12.5., pp. 1–4.]

gal act defines further penal sanctions, such as the confiscation of the means of transport used to smuggle humans, the disqualification from the practice of commercial activities and the deportation of third-country human smugglers, etc.[571] In its communication issued on 13 May 2015 under the title '*A European Agenda on Migration'*, the flagship of strategic EU responses given to the migration and refugee crisis of 2015, as a disincentive to illegal migration the European Commission defined the fight against smugglers of migrants as a priority in order to prevent the exploitation of migrants by criminal networks. According to the Agenda the goal must be to transform smuggling networks from 'low risk, high return' operations for criminals into 'high risk, low return' ones. In order to realize this goal an *EU Action Plan against migrant smuggling*[572] was published at the end of May 2015, which defines specific measures in relation to the fight against and the prevention of migrant smuggling, covering all phases and types of migrant smuggling, and all migratory routes – while ensuring the protection of the human rights of migrants. The Action Plan identified the following *measures*: 1) identifying, capturing and disposing of vessels used for smuggling; 2) depriving smugglers of their profits; 3) enhancing Member States' operational cooperation against migrant smuggling with each other and with EU Agencies; 4) enhancing information gathering and exchange in third countries; 5) creation of a Eurojust thematic group on migrant smuggling; 6) enhanced prevention of smuggling and effective assistance to vulnerable migrants; and 7) revision of EU legislation on migrant smuggling by 2016.

c) *Trafficking* in human beings is often considered a form of modern-day slavery, meaning more than human smuggling. 'While smugglers and their clients are partners in trying to elude the immigration laws of a Member State, human traffickers and their victims are far from being partners.'[573] In cases of human trafficking the common accord between the parties participating in human smuggling, the approval of the person smuggled is *missing*, since the trafficker *forces* the victims to work, or become a prostitute or to perform a similar activity through violence, intimidation, deceit, or abuse of power. The phenomenon and the felony of human trafficking do not necessarily involve the crossing of borders, but in the age of globalization and the increasingly transnational networks of organized crime it frequently appears as an activity that operates across borders and fuels illegal migration. The ex-third pillar acquis was 'lisbonised' in 2011, i.e., the original framework decision[574] was replaced by *Directive*

571 Art. 1 of Framework Decision 2002/946/JHA.

572 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU Action Plan against migrant smuggling (2015–2020), COM 2015 (285) final.

573 Nagy & Jeney 2011, p. 714.

2011/36/EU[575] adopted on the basis of Article 79 TFEU and completed by several new provisions. The EU acquis heavily relies on the 2000 Palermo Protocol supplementing the United Nations convention against transnational organized crime, intended to prevent, suppress and punish trafficking in persons, especially women and children, as well as the *2005 Warsaw Convention* of the Council of Europe on action against trafficking in human beings, also serving the effective implementation within the Union. The comprehensive and consolidated, new directive, which takes a more fundamental rights oriented approach, defines the minimum standards for the *definition of and the penalties applicable for offences* related to human trafficking (e.g. the minimum penalties of imprisonment), also guaranteeing the protection of *victims' rights*. For the implementation of the directive further Union legal acts were elaborated primarily in relation to illegal migration but also with an effect on human trafficking [e.g. Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings, who cooperate with the competent authorities, or the so-called Employers' Sanctions Directive (2009/52/EC)]. Directive 2011/36/EU *adopts a broader concept of* what should be considered *trafficking in human beings* than the former 2002 framework decision and it includes additional forms of *exploitation* (such as sexual exploitation, prostitution, forced labour, begging, slavery) under its material scope. The renewed legislation defines measures in order to *reinforce the prevention* of this phenomenon, and, among others, extends the responsibilities of Member States in providing *assistance for victims* of human trafficking, and also established the position of an *EU anti-trafficking coordinator*.[576]

6.4.2.2 Return and readmission

a) *Expulsion* from the territory of the Member States, i.e., the obligation to leave the country either by *voluntary departure* or by force (*removal*), is a coercive measure of crucial importance intended to remove third-country nationals illegally residing on the territory of the Union. The return of illegally staying third country nationals clearly serves both as an effective treatment of existing cases of illegal residence, and as the greatest deterrent and general prevention of illegal migration. An indispensable element of a well-organised European migration policy is the establishment of transparent and fair common rules providing for

574 Council Framework Decision 2002/629/JHA (19 July 2002) on combating trafficking in human beings [OJ L 203, 8.1.2002., pp. 1–4.].

575 European Parliament and Council Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [OJ L 101, 4.15.2011., pp. 1–11.].

576 Available: https://ec.europa.eu/anti-trafficking/eu-anti-trafficking-coordinator_en (Accessed: 1 March 2016).

an effective return policy. In order to unify domestic legislations and practices of the Member States applied in case of return, the Council and the European Parliament reached an agreement on *Directive 2008/115/EC* establishing common standards and procedures in Member States for returning illegally staying third-country nationals (hereinafter referred to as the *Return Directive*).[577] The preamble of the Return Directive claims that 'it is legitimate for Member States to return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place, which fully respect the principle of non-refoulement.'[578] The most effective legal instrument available to the Union includes the obligation to return illegally staying third-country nationals, as well as the rules governing voluntary departure, removal, and other coercive measures, the provisions on the of issuing EU level entry bans and bans on residence, as well as the requirements governing the detention of third-country nationals and return procedures, including measures related to legal remedy and legal assistance provided to third-country nationals. The *return decision* is the key term of the directive and must be issued in relation to all illegally staying third-country nationals (except for a rather narrow range of exceptions recognized under the Return Directive, e.g., if the third-country national concerned is taken back by another Member State or if the Member State grants a residence permit for humanitarian reasons). This black-and-white normative logic of 'return or permit residence' eliminates former 'grey zone' cases prevalent in the legal practice of certain Member States (when, after their detection authorities practically tolerated the presence of illegally staying third-country nationals and refrained from giving effect to return decisions they were subject to). In case of expulsion, return, as a general rule, is carried out by so-called *voluntary departure* for which the illegal y staying third/country nationals are provided a period between seven and thirty days. If the third-country national voluntarily departs, he/she is exempt from the *entry ban and the ban on residence* (the 5 or even 10 year length of the ban is a considerable incentive for voluntary departure). The directive also specifies cases when illegal migrants may be returned by force (*removal*), together with the standards of fundamental rights to be complied with in such cases, and the requirement of the establishment of an independent and effective *monitoring system*. The unification of the rules on *aliens' police detention* is another novelty, which is justified only to prepare the return and/or carry out the removal process and is limited to a maximum of *6 months*, which in exceptional cases, *may be extended* on two occasions to a maximum of *18 months* (justified by the lack of cooperation by the third-country national concerned on the one hand, and delays

577 European Parliament and Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [OJ L 348, 12.24.2008., pp. 98–107.].

578 Directive 2008/115/EC, preamble-para. (8).

in obtaining the necessary documentation from third countries on the other). Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. The Return Directive seeks to create a *delicate balance* between providing for a successful and effective return, in a fair and transparent procedure, of third-country nationals illegally staying in the EU, while fully respecting the fundamental rights and the dignity of those concerned.

b) The efficiency of the common return policy is significantly enhanced by the *mutual recognition of return decisions*. *Directive 2001/40/EC* on the mutual recognition of decisions on the expulsion of third country nationals was adopted to facilitate the recognition of an expulsion decision issued by a competent authority in one Member State against a third country national present within the territory of another Member State. Any expulsion decision taken will be implemented according to the applicable legislation of the enforcing Member State. *Council Decision 2004/191/EC*[579] was drafted later in order to set out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of the Directive. The 2001 directive, however, does not cover all, only a part of the types of return decisions defined in the Return Directive, therefore, although an EU level mutual recognition of return decisions rendered by Member States was the goal set for the negotiations on the Return Directive, this eventually failed. As a compromise, a non-binding mechanism was established in the fall of 2011 for *the transit by land through several Member States of voluntary returnees* (in the form of Annex 39 to the Schengen Handbook), in which Member States may voluntarily participate. This opportunity to return home establishes the mutual recognition of return decisions between the Member State of departure and the Member States affected by the transit (transit states). The participation of the authorities of the Member States in *removal by air* is also regulated under EU law: by *Directive 2003/110/EC*[580] on assistance in cases of transit for the purposes of removal by air. The directive aims at establishing cooperation between the authorities of the Member States responsible for the removal, if it is not possible to use a direct flight to the (third) country of destination.

c) An effective fight against illegal migration is impossible without close cooperation with the countries of origin and transit countries. The most profound instruments of this external dimension are the EU level *readmission agreements*

579 Council Decision 2004/191/EC of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals [OJ L 60., 2.27.2004., p. 55.].

580 Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air [OJ L 321, 12.6.2003., p. 26.].

concluded with third countries, who undertake to provide for the readmission of their nationals and other persons (third-country nationals) illegally arriving to the Union directly from their territory. The European Community was first expressly authorized to enter into readmission agreements by the Treaty of Amsterdam.[581] In this respect, the Conclusions endorsed by the European Council on 15-16October 1999 in Tampere proposed that the Council include readmission clauses in agreements with third countries, or to enter into separate readmission agreements with third countries. The Council gave the Commission mandate to negotiate in several steps, and – according to the jurisprudence of the Court of Justice of the European Union (Case No C-466/98, *United Kingdom v. Commission*) – this excludes the competence of the Member States to conduct bilateral negotiations with the same objective. Between December 1999 and the end of 2015 the Council authorized the Commission to negotiate with 22 countries/entities,[582] and such agreements were successfully concluded with 18 countries, 17 agreements of which have already entered into force, with Turkey and Cape Verde as the last countries (there are ongoing negotiations with Morocco, Algeria and Tunisia, while actual negotiations have not yet started with China). The *aim* of the readmission agreements is to create unambiguous international legal obligations based on reciprocity in the following areas: 1) to introduce *accelerated and effective procedures*, endeavouring to identify and return persons illegally entering to or staying on the territory of the parties (nationals of the Member States and those of the contractual party, as well as third-country nationals and stateless persons in transit on the territory of the parties), and 2) to cooperate in facilitating *the transit of persons to third countries (transit by the authorities)*. However, the practical implementation of the agreements creates imbalances: the apparent mutuality covers an asymmetric distribution of responsibilities, since the rate of illegal migration from EU Member States to the partner countries concerned is negligible, while the other contractual party is usually a significant contributor to illegal migration as a country of origin or as a transit country. Therefore, the most sensitive element of the readmission agreements is not the readmission of the respective nationals of the parties (which is also based on generally accepted international customary law), but rather, the readmission of persons, who are not the nationals of the other contracting party but made a transit through its territory before they illegally entered the territory of the Union. In order to reach a compromise between the interests of the parties,

581 Article 63 (3) d) TEC; read in conjunction with Article 300 (1) TEC.

582 The Commission may enter and has entered into return negotiations with regard to the following 22 countries/entities: Morocco, Sri Lanka, Russia, Pakistan, Hong-Kong, Macau, the Ukarine, Albania, Algeria, China, Turkey, Macedonia, Serbia, Montenegro, Bosnia and Herzegovina, Moldova, Georgia, Cape Verde, Belarus, Armenia, Azerbaijan, and finally, based on a mandate granted in December 2014, Tunesia.

clauses pertaining to *the readmission of third-country nationals* were often 'activated' years after the entry into force of the agreement (e.g. the readmission agreement with Turkey). In 2011 the institutions of the Union evaluated the functioning of the common readmission policy and, as a result, the Council of the EU adopted conclusions defining the Union's renewed and coherent *strategy on readmission*.[583] These, among others, defined the following guidelines for the future: the EU readmission policy should be more embedded in the *overall external relations policy of the European Union*; Member States should take measures necessary *to further improve the rate* of approved readmission requests and effective returns; with regard to future mandates on readmission, the migration pressure from a third country on a particular Member State or on the European Union as a whole, cooperation in return by a third country, as well as the geographical position of a third country situated at a migration route towards Europe should be considered *the most important criteria*, while clauses on the readmission of *nationals of third countries*, and rules on *accelerated procedure and transit operations* should be incorporated into future agreements.

d) In order to establish a mutually beneficial cooperation in the fight against illegal migration the EU participates in a number of *bilateral regional dialogues* and *platforms of cooperation (so-called regional consultative processes)*[584] with third countries (e.g. towards the East, the Budapest Process, the Silk Routes Partnership or the Panel on Migration and Asylum of the EU Eastern Partnership, or towards the South, the Rabat Process and the Khartoum Process). These include a wide range of topics from the capacity building of institutions, and the effective integration of legal migrants, to the management of returns, and the efficient implementation of readmission requirements. In accordance with the Global Approach to Migration and Mobility (abbreviated in Union jargon as GAMM) and according to international norms countries of origin or transit countries must also be *motivated* to provide international protection to those in need of such protection, to improve their asylum and admission capacities, to develop properly functioning migration systems, and to protect the fundamental human rights of migrants, by paying special attention to vulnerable migrants, such as unaccompanied minors, victims of human trafficking, women and children. In order to effectively support their efforts, the Union offers these countries *(technical and financial assistance*, extending its cooperation with third countries concerned in order to achieve capacity building in the areas of return and readmission, supporting partner countries in their negotiations on readmission agreements to be made with other third countries. Most recently, dialogues

583 Council Conclusions defining the European Union strategy on readmission (Council Document 11260/11., Brussels, 9–10 June 2011).

584 For more, see: https://www.iom.int/regional-consultative-processes (accessed: 1 March 2016).

with third countries on migration are also aimed framing the topic in the context of the *development and cooperation policy* of the EU, so that the Union could more effectively influence the management of the root causes of illegal migration (*push factors*), such as poverty, unemployment, lack of access to health and social care, or the actions of a corrupt and unpredictable government.[585]

6.4.2.3 Sanctions against employers of illegal migrants

Illegal employment is one of the most important factors motivating illegal migration, that is to say it constitutes a significant *pull factor*. Companies and other agents on the labour market (agricultural cooperatives, the catering trade, or even well-off households) in the Union tend to employ undeclared foreign workers, including third-country nationals without legal status, whose precarious situation makes them ready to accept jobs for low wages and without the protection afforded under labour law, because they still hope for a more decent life than in the one they were living in their home country. In order to eliminate this form of illegal employment a separate directive was adopted on sanctions and measures against employers of illegally staying third-country nationals (in the wording of the directive: 'illegal employment') (*Directive 2009/52/EC*).[586] The so-called *Employers' Sanctions Directive* defines common European minimum standards and specifies *sanctions and measures* (e.g. exclusions from entitlement to public benefits, aids or subsidies, or public procurement procedures for a definite period) against employers of third-country nationals illegally staying in the Member States. The directive primarily *sanctions* the *employment* of third-country nationals hired without a legal status, and the *employers* participating in such activity. The penalties may include *administrative* sanctions (e.g. closure of shops), or *financial* sanctions, and they should be effective, proportionate and dissuasive, and the most serious cases may even result in *criminal penalties* (e.g. in case of the simultaneous employment of a significant number of illegally staying third-country nationals, or particularly exploitative working conditions, and the employment of victims of trafficking in human beings or minors). To prevent illegal employment the directive requires employers *to check* the legal status of third-country national employees, and *to notify* the competent authorities designated by Member States of the start of employment of third-country nationals. The Employers' Sanctions Directive also requires Member States to carry out effective and adequate *labour inspections* on their territory to guarantee the transparency of the employment of third-country nationals. In or-

585 Nagy & Jeney 2011, p. 671.

586 European Parliament and Council Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [OJ L 168., 6.30.2009., pp. 24–32.].

der to provide *legal protection* to illegally employed third-country nationals, the directive secures their rights to any outstanding remuneration, even after they return to their country of origin. Member States are required to put in place the necessary internal legal mechanisms to achieve this end.

6.4.3 Practical cooperation

The quick and extensive *sharing of information* is indispensable for successful and effective operational cooperation between Member State authorities competent in issues related to illegal migration. Proper channels and infrastructure are required to achieve this aim. This was the goal of the ministers of the interior at the beginning of the 1990s when they established the *CIREFI*[587] (a task force of experts, which met every month) in order to provide a platform for sharing information on trends in illegal migration, methodologies and statistics. CIREFI was abolished in 2010 and its activities were transferred to FRONTEX, the EU agency set up to facilitate operational cooperation in border control. In 2005 an already web-based, secure Information and Coordination Network was established for Member States' migration management services (*ICONET*).[588] In 2004 the *immigration liaison officers network* (ILOs)[589] was established to collect and exchange well-grounded prognoses on migration and information on trends in migration between the Member States. The ILO-regulation defined the forms of cooperation between the ILOs of the Member States, and determined the functions and appropriate qualifications of such liaison officers, as well as their responsibilities vis-à-vis the host country and the sending Member State. The ILOs collect information for use either at the operational level, or at a strategic level, or both, in particular concerning issues such as: flows of illegal immigrants and the routes followed by those flows; the means of transport used and the involvement of intermediaries; the activities of criminal organisations involved in the smuggling of humans; events that may become the cause for new developments with respect to flows of illegal immigrants; methods used for counterfeiting or falsifying identity documents and travel documents; or the ways and means to facilitate the return and repatriation of illegal immigrants to their countries of origin.

---

587 Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration. Its legal basis was provided by the following two former third pillar legal acts: Council Conclusions of 30 November 1994 on the organisation and development of the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (Cirefi); and Resolution of 27 May 1999, on the creation of an early warning system for the transmission of information on illegal immigration and facilitator networks.

588 Council Decision 2005/267/EC of 16 March 2005 establishing a secure web-based Information and Coordination Network [OJ L 83, 4.1.2005., pp. 48–51.].

589 Council Regulation 377/2004/EC of 19 February 2004 on the creation of an immigration liaison officers network [OJ L 64, 3.2.2004., pp. 1–4.].

As a further aspect of practical cooperation, the Union provides support (coordinated by FRONTEX) for the effective implementation of return decisions issued by the Member States by *organizing joint flights for the removal* of illegal migrants staying on the territory of the EU, who are subjects of individual removal decisions. Technical procedures and conditions of inter-Member State coordination related to joint removal flights are regulated by *Council Decision 2004/573/EC*.[590] Common guidelines on security provisions, the protection of the health of deportees, the code of conduct for escorts and the use of coercive measures are set out in the annex to the decision.

6.4.4 Financial resources available for the policy (EU resources)

The practical implementation of EU legal instruments in the fight against illegal migration is impossible without the necessary *financial resources* – these have been altered for the current multiannual financial framework for the period between 2014 and 2020. In the beginning, in order to finance administrative cooperation against illegal migration EU resources were allocated within the framework of the ARGO programme which ran between 2002 and 2006,[591] and was later replaced by the *European Return Fund* (2007-2013). This EU financial fund, together with two other migration solidarity funds (the European Refugee Fund and the European Fund for the Integration of third-country nationals) were then merged into the new *Asylum, Migration and Integration Fund (2014–2020)*,[592] which was finally allocated EUR 3.137 billion.[593] Compared to the budget of the former funds in the previous seven years (2007–2013), the resources for the new fund have been considerably increased, which is a clear sign that the Union has recognized the crucial importance of the fighting illegal migration. The *national programmes* of the Member States were approved by the Commission in 2015, and therefore, applications, and projects supported by the new fund and aimed at the fight against illegal migration may commence in spring 2016 (objectives related to return and readmission, as well as actions eligible for funding are included in Chapter IV of the regulation establishing the Fund).

590 Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders [OJ L 261, 8.6.2004., pp. 28–35.].

591 Council Decision 2002/634/EC [OJ L 161/11].

592 European Parliament and Council Regulation No 516/2014/EU of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC [OJ L 150, 5.20.2014., p. 168].

593 Available: http://ec.europa.eu/dgs/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund/index_en.htm (Accessed: 1 March 2016).

6.5 Evaluation and future prospects

The '*external dimension*' of EU politics (i.e. cooperation with third countries) has recently gained further impetus in the European Union's fight against illegal migration, and must remain in focus, while also fostering a more organic connection with the 'internal dimension' (i.e., the EU *acquis* on coercive measures, especially the Return Directive). These efforts should not be limited to entering into *further readmission agreements* (with certain privileged countries of origin), instead, the policy against illegal migration should become an integral part and an inter-policy component of the *overall external relations policy of the EU* with effective support from the European External Action Service and the Commission. Accordingly, the increasingly structured dialogues on policy with third countries concerned should expressly cover the topics of return and readmission.

In terms of practical measures, the operation of *assisted voluntary return* (AVR) *programmes* easily accessible for returnees (primarily under the coordination of the International Organization for Migration), supplemented by a *reintegration component*, may also significantly increase the number of voluntary returns by means of providing financial incentives and the hope of succeeding in the country of origin. Experienced local representatives of the International Organization for Migration and other international organisations (e.g. UNHCR) operating in the countries of origin may also be involved in supporting and monitoring of the reintegration of returnees. Resources for such Union initiatives are provided by allocations from the Asylum, Migration and Integration Fund.

A major step would be to establish mechanisms for the future exchange of information between Member States on return decisions, possibly in the form of a *common EU database of return decisions* issued by the Member States (e.g. within SISII). It is also of crucial importance to *conduct extended information campaigns* in countries of origin and transit countries most affected by illegal migration with the active participation of the European External Action Service and the EU Delegations operating in third countries.

In trying to effectively manage and reduce the ever increasing waves of illegal migration of yet unseen scale, there is no alternative to complex and comprehensive measures effectively coordinated on the Union level (coupled with substantial financial resources), as well as veritable and mutually supportive action by the Member States for the full implementation of the relevant acquis of the Union.

7 Asylum policy

7.1 Historical retrospect

1. Originally an organisation of economic integration, the European (Economic) Community (EEC/EC) *did not have competence*, for several decades, over certain areas of home affairs which traditionally belonged to the Member States, such as the regulation of territorial asylum and asylum policy. The seed of cooperation between the Member States in the areas of justice and home affairs was planted by the *TREVI Group* (*'Terrorisme, Radicalisme, Extrémisme, Violence Internationale'*), which started operation in the mid 1970's as an informal gathering of experts – without legal basis in the founding treaties and driven by practical necessity. From 1984 onward, it was followed by the informal meeting and conference of the ministers of home affairs and justice which was held twice a year (e.g. in their meeting on the 30 November 1992 in London the ministers of home affairs defined, for the first time, the terms 'safe third country' and 'manifestly unfounded asylum applications').

These fora only briefly discussed cooperation in areas related to asylum, which was first put into black letter law in the 1990 *Convention implementing the Schengen Agreement*,[594] in the form of technical and coordinative rules determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. It is clear from the above that the groundwork for the common asylum policy was laid down outside the institutional framework of the EEC/EC, by certain Member States wishing to proceed faster and deeper in integration. These norms were replaced by a self-standing international agreement: the 1990 *Dublin Convention*. In this respect, the beginning of EU-wide regulation on asylum shows similarities with the Schengen cooperation, and this acquis was likewise incorporated into the institutional architecture of the European integration process.

2. The Maastricht *Treaty on the European Union* (TEU) of 1992 – having created the so-called pillar structure, which existed until December 2009 –, elevated asylum policy to the rank of so-called 'issues of common concern', *as a part of the third pillar* of the EU (in Chapter IV of original TEU).[595] Intergovernmental cooperation in this area had to be conducted in accordance with the 1951 Geneva Convention relating to the Status of Refugees which could not result in the harmonization of the legal systems of the Member States; it merely proposed the establishment of traditional (intergovernmental) international agreements,

594 Chapter 7 (Arts. 28-38) of the Convention implementing the Schengen Agreement.
595 Art. K1. of original TEU.

and it only required the exchange of information and consultation between the Member States in order to better coordinate their activities.[596]

The special, supranational decision-making process of the first pillar, the so-called supranational Community method, was not applied in the third pillar of the EU, instead, it operated through unanimous decision-making processes typical of traditional intergovernmental organisations, and – for lack of Community law – with special, mostly 'soft' legal instruments (joint actions, common positions, etc.). In addition, the European Parliament was excluded from the legislative procedure (it was merely consulted), and the jurisdiction of the European Court of Justice was also rather limited in this area. During the period beginning with the entry into force of the Treaty of Maastricht in November 1993, cooperation within the EU framework in asylum related issues was still in such an embryonic state, that only one common position was issued: on the common interpretation of the term of refugee included in the 1951 Geneva Convention. This was followed by the Council's decision in 1995 on the minimum guarantees of asylum related procedures, and the agreement between the then Member States on temporary protection, and the distribution of responsibilities in relation to the refugees fleeing from the current Balkan conflict, in particular, the Bosnian War.

3. The next significant change was brought about by the *Treaty of Amsterdam* signed on 2 October 1997 (entered into force on 1 May 1999). It elevated certain 'issues of common concern', including *asylum policy* as part of the cooperation in justice and home affairs renamed the '*Area of Freedom, Security and Justice'* (AFSJ) to the '*Community level*'. With this reform asylum policy was moved to *Title IV* of the Treaty Establishing the European Community (TEC), now in the form of a fully-fledged first pillar policy, equipped with all the instruments of secondary legislation, and with the autonomy and structural characteristics of EC law (direct applicability, direct effect, primacy). Considerable legal progress – in legal framework and Community competence – was hindered by the fact that the five years following the entry into force of the Treaty of Amsterdam served as a kind of *transitory period* and as a result, in the areas of cooperation incorporated into the first pillar as of 1 May 2004 – such as asylum policy – decision-making mechanism differed from the general Community procedures. For instance, during this five year period the Council could not only act on the basis of proposals from the Commission, as an institution with the monopoly of initiating legislative proposals, but on the basis of proposals submitted by any of the Member States. In addition, despite the fact that the co-decision procedure had already become widespread by then, under this policy field the European Parlia-

596 Art. K2. and K3. of original TEU.

ment had only to be consulted, and Member States had the power of veto in most issues.[597]

4. Asylum policy, which has become part and parcel of Community law and a shared competence with the Member States, appeared as one of the objectives of TEC as an organic part of the 'Area of Freedom, Security and Justice'. The founding treaties envisaged the elaboration of *a number of Union level measures*. Title IV of the TEC, inserted by the Treaty of Amsterdam, foresaw measures in the following areas:

- harmonisation of the refugee laws of the Member States (in accordance with the 1951 Geneva Convention and its 1967 Protocol);
- establishing common minimum standards on the reception of asylum seekers in Member States, on asylum procedures in Member States, on procedures in Member States for granting or withdrawing refugee status;
- criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a third-country national in one of the Member States;
- promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons.[598]

These objectives regularly appeared in the five year strategic plans of the European Council – which fill framework of the AFSJ laid down in the founding treaties with substance by providing guidelines on specific policies.

5. After the expiry of the five year period defined in the Treaty of Amsterdam an important *change* occurred *in the decision-making process* of the area of asylum policy. The common standards and principles of cooperation in asylum matters were almost completely adopted, and as of *December 2005*, the *co-decision procedure* applied, i.e., the Council and the European Parliament became co-legislators. That is to say, after the establishment of the first phase (2003–2005) of the Common European Asylum System (CEAS) the second phase was launched in rather different political and institutional context, that entailed a number of challenges, unforeseen difficulties, as well as unavoidable compromises.

7.2 The aims of the Common European Asylum System

1. In relation to EU asylum policy, Article 67(2) TFEU declares the following as a rather *general aim*: 'It shall frame a common policy on asylum […] based on solidarity between Member States, which is fair towards third-country nationals.'

597 Steve Peers, *EU Justice and Home Affairs Law*, Oxford University Press, 2012, pp. 19–20.
598 Art. 63 (1)–(2) of the consolidated version of TEC as amended by the Treaty of Amsterdam.

2. Chapter 2 of the Title V of the TFEU defines *specific, more detailed objectives* in Article 78:

> '(1) The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.'

The text of Article 78(1) TFEU is about the formation of 'a common policy on asylum, subsidiary protection and temporary protection'. In addition, paragraph 2 of the same Article introduced the expression Common European Asylum System in primary law, which constitutes a closer and more profound form of harmonisation and EU level action compared to the 'common policy' and minimum standards employed so far. The provisions quoted above also showcase that the text of the Lisbon Treaty unambiguously differentiates among various types of international protection: refugee status in accordance with the 1951 Geneva Convention, the so-called subsidiary protection which does not amount to refugee status, and the so-called temporary protection which is applied in case of mass immigration.[599] In addition, references to minimum standards were removed from the text of the TFEU's relevant provisions –they now refer to 'common' standards. Furthermore, the ultimate ambitious goal to establish '*a uniform status of asylum for nationals of third countries, valid throughout the Union*' [Article 78 (2) lit. a) TFEU] was foreseen.

EU action is still *embedded in international refugee law*; therefore, this policy must be invariably in compliance with the 1951 Geneva Convention and its 1967 Protocol, including the principle of non-refoulement having the character of customary law. What is more, as a new element, harmonisation with other relevant agreements has to be ensured when forming EU policy (e.g. with the 1959 European Agreement on the Abolition of Visas for Refugees accepted within the framework of the Council of Europe with regard to other Member States, or with the 1980 European Agreement on Transfer of Responsibility for Refugees[600]).

3. *Further aims* of the Common European Asylum System are included in strategic policy guidelines endorsed by the European Council (cf. Article 68,TFEU), including among others the *Stockholm Programme* for the period be-

599 Peers 2014, pp. 303–305.; Marianne Dony, *Droit de l'Union européenne*, Editions de l'Université de Bruxelles, Brussels 2012, pp. 454–455.

600 *1959 European Agreement on the Abolition of Visas for Refugees (CETS No.: 031)*; *1980 European Agreement on Transfer of Responsibility for Refugees (CETS No.: 107)*. Agreements available: conventions.coe.int.

tween 2010 and 2014, and the *Ypres Guidelines* setting the direction for the development of this policy area until 2020 (the latter ones adopted by the European Council meeting on 26-27 June 2014). According to these, the European Union needs an efficient and well-managed asylum policy, which is based on the principles of *solidarity* and the *fair sharing of responsibility* set out in the founding treaties (Article 80 TFEU) and their effective implementation. It is essential that asylum seekers – irrespective of the fact in which Member State they submitted their application for asylum – should receive *equivalent treatment* with regard to the *conditions of admission*, and the *same treatment* with respect to *procedure standards and legal status*. The aim is to treat similar cases similarly, and to achieve congruent results. While the Common European Asylum System should promote a high level of protection, due attention must be paid to fair and efficient procedures facilitating the *prevention of abuse*. Moreover, the *full transposition and actual implementation* of the achievements of the Common European Asylum System into national law should receive absolute priority in the upcoming period. This way, based on the common normative system and close cooperation equal conditions are expected to develop, ensuring guarantees of identical procedures and protection for asylum seekers in the whole Union. In line with the above the role of the *European Asylum Support Office* should also be reinforced, in particular with regard to promoting the uniform implementation of EU acquis. The convergence of practices implemented by the Member States will contribute towards increasing *mutual trust* in this field.

7.3 Legal bases

1. The *entry into force of the Treaty of Lisbon on the 1 December 2009* indicated a qualitative change in the formation of EU asylum policy. The Treaty of Lisbon brought about *horizontal changes* in the functioning of the Area of Freedom, Security and Justice: the ordinary legislative procedure was introduced which meant that the European Parliament became a co-legislator to the Council in almost all respects; qualified majority decision-making became the general rule; the jurisdiction of the Court of Justice of the European Union was extended to this area; third pillar legal acts were abolished *pro futuro*, thus, all legal acts adopted after 1 December 2009 took the form of secondary EU law (regulation, directive, decision or recommendation, opinion). EU *asylum competences* continue to belong to shared competences [Article 4(2) lit j) TFEU].

2. Due to the modifications enacted by the Treaty of Lisbon, *measures* which can be adopted by the EU include the following, according to Article 78(2) TFEU:

> '(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
> (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
> (c) a common system of temporary protection for displaced persons in the event of a massive inflow;
> (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
> (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
> (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
> (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.'

Article 78(3) TFEU proposes measures to deal with an emergency situation caused by a mass inflow of third-country nationals:

> 'In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.'

In addition, it is worth mentioning the so-called *solidarity clause* (Article 80 TFEU) which states that '[asylum policy] and [its] implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.'

3. The above powers of the EU institutions laid down in the founding treaties were supplemented and placed into a strong human rights context by the elevation of the *EU Charter of Fundamental Rights* to the level of primary EU law simultaneously with the entry into force of the Treaty of Lisbon. This novel layer of fully binding rights (forming also the standard of review in respect of secondary EU law) declares not only *the right to asylum* (Article 18) and the *principle of non-refoulement* (Article 19), but it also defines numerous other rights in relation to asylum seekers and recognized refugees or those who enjoy international protection (e.g. the prohibition of torture and inhuman or degrading treatment and punishment – Article 4; the right to freedom and security – Article 6; respect for private family life – Article 7). The *Court of Justice of the European Union* has already cited and applied the EU Charter of Fundamental Rights in its most recent case-law concerning asylum, and in turn it has also interpreted EU asylum acquis in light of the Charter – on more than one occasion extensively, creating independent EU law categories.[601]

601 See e.g.: the judgment of 28 July 2011 in Case C-69/10, Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration; judgment of 21 December 2011 in Joined Cases C-411/10 and C-

7.4 The establishment and the legal instruments of the Common European Asylum System (2003–2013)

1. EU institutions began to elaborate common legal norms constituting the first phase of the '*Common European Asylum System'* (CEAS) already envisioned in the 1999 Tampere Programme. This initiative originated from their intention to make the European Union a unified area of protection for refugees and other persons in need of international protection on the basis of common humanitarian values shared by all Member States as well as through applying the 1951 Geneva Convention comprehensively. In order to achieve this ambitious objective, secondary EU acquis enacted between 2000 and 2005 introduced harmonised, common norms in the *following specific areas*:

- the assignment of a Member State responsible for application for asylum submitted in one of the Member States on the basis of a prescribed set of criteria and related principles (in the form of the Dublin II Regulation replacing the 1990 Dublin Convention and its implementing regulation);[602]
- facilitating the designation of responsible Member State, and to filter duplicate asylum application establishing EURODAC for the comparison of fingerprints;[603]
- the definition of common measures in the event of a mass influx of third-country nationals, and thus giving protection while ignoring individual evaluation, or the implementation of sharing burdens (the so-called temporary protection directive);[604]

493/10, N.S. v Secretary of State for the Home Department and M.E. e.a. v Refugee Applications Commissioner; judgment of 22 November 2012 in Case C-277/11, M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General; judgment of 6 June 2013 in Case C-648/11, The Queen, on the application of MA, BT, DA v. Secretary of State for the home Department intervener The AIRE Centre (Advice on Individual Rights in Europe) (UK); or lastly, the judgment of 30 January 2014 in Case C-285/12, Aboubacar Diakite v. Commissaire general aux refugies et aux apatrides, and respectively the judgment of 2 December 2014 in the Joined Cases C-148/13 - C-150/13, A, B, and C v. Staatssecretaris van Veiligheid en Justitie.

602 Council Regulation 343/2003/EC of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum appliation lodged in one of the Member States by a third-country national [OJ L 50, 2.25.2003., p. 1.]; Commission Regulation 1560/2003/EC of 2 September 2003 laying down detailed rules for the application of Council Regulation 343/2003/EC establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [OJ L 222, 9.5.2003., p. 10.].

603 Council Regulation 2725/2000/EC of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [OJ L 316, 12.15.2000., 1.]; Council Regulation 407/2002/EC of 28 February 2002 laying down certain rules to implement Regulation 2725/2000/EC concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [OJ L 62, 3.5.2002., p. 1.].

604 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of ef-

- on minimum standards for the qualification and status of persons who need international protection (conventional asylum status or subsidiary protection) (Qualification Directive);[605]
- laying down minimum standards for the reception of asylum seekers (Reception Conditions Directive);[606]
- on minimum standards on procedures in Member States for granting and withdrawing refugee status (Procedures Directive);[607]
- in order to facilitate the above mentioned legislative package the European Refugee Fund[608] was established in 2000, the last (third) period of which lasted from 2008 to the end of 2013, as part of the so-called SOLID funds.

The *first phase* of the CEAS was completed by the end of 2005. The first phase aimed to harmonise the legal frameworks of the Member States on the basis of common minimum standards ensuring fairness, efficiency and transparency. A considerable corpus of EU legal acts (regulations, directives and decisions) was elaborated in this interval spanning a couple of years. Qualitatively, however, the system was found wanting: e.g. it altogether managed to realise minimum harmonisation, and as a result of Council decision-making alone, it mostly represented the interests of major Member States, affording a great leeway to Member States and hardly enforceable rules; in addition, this was only an intermediate phase serving the implementation of short-term goals. The realisation of long-term aims, namely the second phase of the Common European Asylum System followed subsequently.

2. The high political incentive for establishing the second phase of the Common European Asylum System was provided by the so-called Hague Programme, which intended to complete the CEAS by 2010. It is also added that this has to be preceded by the revision of the EU *acquis* on asylum constituting the first phase in 2007. In order to realise the latter, the European Commission submitted a *Green Paper* in 2007 on the future Common European Asylum System,[609] and at the same time initiated a comprehensive consultation procedure to

forts between Member States in receiving such persons and bearing the consequences thereof [OJ L 212, 8.17.2001., p. 12.].

605 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country national or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [OJ L 304, 4.30.2004., p. 12.].

606 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [OJ L 31, 2.6.2003.,p. 18.].

607 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [OJ L 326, 12.13.2005.1, p. 13.].

608 European Parliament and Council Decision 2007/573/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' and repealing Council Decision 2004/904/EC [OJ L 144, 6.6.2007., p. 1.]

609 Green Paper on the future Common European Asylum System COM(2007) 301 final, Brussels, 6 June 2007.

determine what kind of options are available and into which directions further development might extend within the framework of EU law. According to the Commission, the '*the ultimate objective pursued at EU level is thus to establish a level playing field, a system which guarantees to persons genuinely in need of protection access to a high level of protection under equivalent conditions in all Member States while at the same time dealing fairly and efficiently with those found not to be in need of protection.*'[610] In addition, the document emphasises that the second phase of the common asylum policy has to serve to enhance the general quality of the procedures and to boost the capacity of all stakeholders involved in the asylum process, as well as to eliminate former deficiencies by pursuing legislative harmonisation based on high standards.[611]

3. Partly on the basis of the experience gathered from the consultation on the Green Paper, the Commission published the *Policy plan on asylum* in 2008,[612] which focused on the revision of the existing asylum acquis, reworking it in light of new developments with the dual purpose to increase the standard of protection set up by common norms as well as to further harmonise domestic legal frameworks of Member States. Furthermore, the 2008 Policy plan stated: the task of the CEAS is to provide unified legal standards and norms, common instruments and cooperation mechanisms which guarantee the availability of high quality international protection standards during the whole asylum procedure, from the reception of asylum seekers to the full integration of those receiving protection, in addition to maintaining the integrity of the asylum system while eliminating abuses.[613] In order to realise these aims, the Commission proposed several legislative drafts following December 2008, which were intended to build up the second phase of the CEAS.

4. The *Stockholm Programme*, which served as the AFSJ strategic policy paper in the period between 2010 and 2014, repeated the main objectives of the common EU asylum policy already laid down in the founding treaties and the earlier programmes (Tampere Programme, Hague Programme). At the same time, the Stockholm Programme urged the Council and the European Parliament to increase their efforts to complete the Common European Asylum System by 2012 at the latest, including providing for a unified legal status of persons recognised as refugees or granted subsidiary protection.[614] The same had already been formulated in the strategic guidelines adopted under the French presidency of

610 Ibid. 2.
611 Ibid. 3.
612 Policy plan on asylum – An integrated approach to protection across the EU {SEC(2008) 2029} {SEC(2008) 2030} COM(2008) 360 final, Brussels, 17 June 2008.
613 Ibid. 12.
614 The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, OJ C 115, 4 May 2010, p. 1.

the Council: the *European Pact on Immigration and Asylum* finalized in October 2008 set out to establish 'a European framework for asylum'. The Commission's *Action Plan* outlined the main directions of EU asylum policy for the period following the entry into force of the Treaty of Lisbon more precisely, since it made the Stockholm Programme optional and furthermore laid down guidelines and tasks envisaging concrete actions.[615]

5. As far as *legislative measures* are concerned, instead of designing a new legislative package for realizing the ambitious aims of the TFEU completely replacing and going beyond EU norms constituting the first phase of the CEAS, the Commission merely set out to *recast* the Dublin II Regulation, the EURODAC Regulation and its implementing rules, the Reception Conditions Directive, the Procedures Directive, as well as the Qualification Directive. A further proposal sought to facilitate the extension of *extend* long-term residence status to persons receiving international protection.

These legislative drafts (the so-called asylum package) contained more precise, more detailed and more accountable rules in comparison to the provisions elaborated exclusively by the Council during the first phase of the CEAS, while at the same time granting greater freedom to Member States in the ambit of implementation. As a result, provisions were often rendered opaque and operated with vague notions. Moreover, these drafts were conceived with the intention of eliminating existing differences between the legal statuses of persons who were either recognised as refugees or received subsidiary protection (see e.g. the extent of the validity of the residence permit; the possibility of extending long-term residence to both groups of persons; the unification of access to labour market).

The legislative process of constructing the second phase of CEAS and the negotiations within the Council as well as among the co-legislators progressed very slowly, and was met with resistance on numerous points, sometimes even coming to a halt. The elements of the so-called asylum package were submitted gradually by the Commission between December 2008 and spring 2012. On several occasions, the Commission had to withdraw its original proposal because of the clear resistance demonstrated by the Member States. This was the case with the new Reception Conditions Directive and the new Asylum Procedures Directive in the fall of 2010 (new proposals were submitted by the Commission in July 2011), and the same situation ensued with regard to the EURODAC Regulation. Finally, it was only the fourth version submitted in 2012 which was accepted. In the negotiation of the EURODAC Regulation the most heated debates between the Council and the European Parliament centered on the question of

615 Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme. COM(2010) 171 final, Brussels, 20 April 2010.

granting Member States' law enforcement authorities access to data stored in the EURODAC system. Due to the deadlock in negotiations the original package-approach failed, hence the EU acts constituting the second phase of the Common European Asylum Policy were conceived in a number of steps.

First, *Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC (of 25 November 2003 concerning the status of third-country nationals who are long-term residents) to extend its scope to beneficiaries of international protection and subsidiary protection* (2011/51/EU European Parliament and Council Directive)[616] was successfully adopted by the co-legislators. The Member States were to transpose the directive in their domestic law by 20 May 2013.

Second, the *recast Qualification Directive* was adopted by the co-legislators in autumn 2011. Compared to the other legislative proposals, this triggered the least number of conflicts, and the articulation of interests was moderate. Directive 2011/95/EU of the European Parliament and the Council,[617] however, is less ambitious, thus it does not introduce an asylum status that would be valid and mutually equivalent in all the Member States. With respect to eliminating secondary movements ('*asylum shopping*') between Member States, the recast directive re-regulated the qualification of international protection and the content of the protection granted, in a more detailed and unified manner, with a few improvements (e.g. the extension of the notion of family member to a third-country national who is responsible for the child, and the further approximation of asylum and subsidiary protection statuses). The deadline for the transposition of the directive expired on 21 December 2013.

The remaining proposals, namely the Dublin III Regulation, the recast EURODAC Regulation as well as the also revised Reception Conditions and Asylum Procedures Directives, were agreed by the Council in June 2013, and they were also adopted by the European Parliament. As regards the directives, Member States had two years to transpose them into their legal systems (the deadline for both directives expired on 20 July 2015).

616 European Parliament and Council Directive 2011/51/EU of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [OJ L 132, 5.19.2011., p. 1.].

617 European Parliament and Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [OJ L 337, 12.02.2011., p. 9.].

The *recast EURODAC Regulation*[618] established the criteria and mechanisms for the law enforcement authorities of Member States and the EUROPOL to access the EU fingerprint database for law enforcement purposes, and a European Agency for the operational management of EURODAC through operating large-scale IT systems in the Area of Freedom, Security and Justice. The regulation was to be directly applied by Member States from 20 January 2015.

The *Dublin III Regulation*[619] – which was directly applicable from 19 January 2014 – and its *Implementing Regulation*[620] redressed former deficiencies of the Dublin System, ensuring the harmonisation of the standards laid down in the EU asylum acquis accepted thus far, as well as facilitating the management of situations when the asylum system of a Member State is under an exceptionally great pressure. As far as the latter is concerned, it establishes early warning, emergency and crisis management mechanisms in cooperation with the European Asylum Support Office and the Member States.

Compared to the preceding directive, the *revised Reception Conditions Directive*[621] contains major novelties, for example, it lays down far more detailed standards for asylum detention, prescribes the application of alternatives to detention (residence in a designated location, reporting obligation, financial warranty); moreover, it increases the quality of reception conditions by diminishing differences between Member States strengthening the guarantees afforded to applicants, especially to vulnerable applicants with special reception needs. The new directive also enhances the rights of applicants to employment (compared to the previous legislation, the new directive claims to provide access to the labour

618 European Parliament and Council Regulation 603/2013/EU of 26 June 2013 on the establishment of – Eurodac – for the comparison of fingerprints for the effective application of Regulation 604/2013/EU establishing the criteria and mechanisms for determining the Member State responsibility for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation 1077/2011/EU establishing a European Agency for the operational management of large-scale IT systems in the Area of Freedom, Security and Justice (recast). [OJ L 180, 6.29.2013., p. 1.].

619 European Parliament and Council Regulation 604/2013/EU of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. [OJ L 180, 6.29.2013., p. 31.].

620 Commission Implementing Regulation 118/2014/EU of 30 January 2014 amending Regulation 1560/2003/EC laying down detailed rules for the application of Council Regulation 343/2003/EC establishing the criteria and mechanisms for determining the Member State responsibility for examining an asylum application lodged in one of the Member States by a third-country national. [OJ L 39, 2.8.2014., p. 1.]

621 European Parliament and Council Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection [OJ L 180, 6.29.2013., p. 96.].

market for asylum seekers 3 months earlier, i.e., at most 9 months after the submission of the application).

The *recast Asylum Procedures Directive*,[622] among others, defines a uniform procedure for facilitating the consistent implementation of the asylum acquis and simplifies applicable norms. The directive unequivocally states that asylum applications shall be assessed in accordance with both forms of international protection, and it also incorporates the special needs of vulnerable persons into the procedure also placing considerable emphasis on the further training of asylum authorities' staff in order to further unify Member State practices.

6. Besides the legislative acts constituting the second phase of the CEAS, *supplementary measures* must also be mentioned, which *facilitate the practical application* of the recast asylum acquis and aim to *unify* the implementation practice of Member States, thereby increasing solidarity among the Member States.

With its headquarters in Malta, the *European Asylum Support Office (EASO)*[623] has operated as an independent EU agency since June 2011, carrying out an essential mandate by coordinating the support given to Member States facing a massive influx of asylum seekers; what is more, if needed, the EASO is entitled to send so-called asylum support groups (consisting of experts from other Member States) to the Member State in need. In spring 2012 the Council and the European Parliament defined the *common EU priorities for refugee resettlement* from third countries.[624] In addition, *relocation projects* are also taking place as an expression of EU solidarity among the Member States (the transfer of recognized refugees among the Member States, e.g. the EUREMA project from Malta to other EU Member States; or more recently, the emergency relocation mechanisms organizing transfers from Italy and Greece[625]).

7.5 Financing the Common European Asylum Policy

The common norms on asylum cannot be efficiently implemented without allocating *financial resources* to the policy, implying a system of EU resources reformed by the current multiannual financial framework of the EU for the period

622 European Parliament and Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection **[**OJ L 180, 6.29.2013., p. 60.].

623 European Parliament and Council Regulation 439/2010/EU of 19 May 2010 establishing a European Asylum Support Office [OJ L 132, 5.29.2010.].

624 European Parliament and Council Regulation 281/2012/EU of 29 March 2012 amending Decision 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' [OJ L 92, 3.30.2012.].

625 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [OJ L 239, 15.9.2015] and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [OJ L 248, 24.9.2015].

between 2014 and 2020. The European Refugee Fund established in 2000, together with two other migration solidarity funds (the European Return Fund and the European Fund for the Integration of third-country nationals) were merged into the new *Asylum, Migration and Integration Fund (2014–2020)*,[626] which was finally allocated EUR 3.137 billion.[627] Compared to the budget for the previous seven years (2007–2013) allocated to the former funds, the financial resources of the new fund increased considerably, which is a clear sign that European decision-makers recognized the significance of migration and asylum. Member States' *national programmes* were adopted in 2015, and applications for the realisation of projects supported by the new fund and aimed at combating illegal migration started arriving in spring 2016 (CEAS objectives, as well as actions eligible for funding are included in Chapter II of the regulation).

7.6 Rules on national implementation

1. Among the legal acts enacted by EU institutions in the area of asylum we may equally find regulations that are directly applicable and produce direct effect, ones that, at the most, require supplementary implementing measures by the Member States, as well as directives that provide Member States with considerable freedom in adopting national implementing measures, and generally define the objectives to be pursued within the act's general framework. Such freedom applies to the establishment of the Member States' *institutional system related to asylum* (the Commission must only be informed about the asylum authorities), although certain *minimum conditions* must also be met in this area. The revised Reception Conditions Directive requires Member States to take various actions *to improve the efficiency of their reception system*, e.g. with due respect to their constitutional structure, Member States are required to put in place relevant mechanisms in order to ensure that appropriate guidance, monitoring and control are established in the competent institutions. In addition, they are also required to provide a professional staff and allocate the resources necessary to fulfil the needs arising from the admission of and the care provided for asylum seekers. The revised Asylum Procedures Directive foresees similar requirements with respect to authorities dealing with asylum procedures, adding also that *regular trainings* must be provided for the members of the staff, who must be sufficient in number and possess appropriate knowledge. Member States, in liaison with

626 European Parliament and Council Regulation 516/2014/EU of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC [OJ L 150, 5.20.2014.].

627 Available: http://ec.europa.eu/dgs/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund/index_en.htm. (Accessed: 1 March 2016).

the Commission, must take all appropriate measures to maintain *direct cooperation and an exchange of information* between the competent authorities.

2. Nevertheless, as a prerequisite to participating in and accessing the resources of the *Asylum, Migration and Integration Fund*, Member States must establish, and submit to the Commission for approval, multiannual *national programmes* – currently for the period of the multiannual financial framework spanning 2014 and 2020. This is preceded by so-called *policy dialogues* between Member States and the Commission at the level of senior officials in accordance with Regulation (EU) No 514/2014 (the so-called Horizontal Regulation) laying down general provisions on the Asylum, Migration and Integration Fund and other AFSJ-funds.[628] Policy dialogues must focus on achievable and results of national programmes, assessing the needs and priorities of Member States in the funded areas, considering the baseline situation in the Member States concerned as well as the objectives of the relevant legislation. The outcome of the dialogue serves as a guideline for establishing national programmes, and provides an indicative date for the Member States when to submit their national programmes to the Commission in order to allow sufficient time for approval. National programmes on asylum policy are primarily intended to facilitate, on a national level, the implementation of the Common European Asylum System, and to ensure the effective and uniform application of union acquis in the area of asylum policy, including the proper functioning of the Dublin III Regulation. The so-called Horizontal Regulation also defines *the compulsory elements* of national programmes (e.g. a detailed description of the baseline situation in the Member State; an analysis of requirements in the Member State and the national objectives and strategy designed to meet those requirements; information on the monitoring and evaluation framework to be put in place; indicators to be used to measure progress; the identification of the competent authorities; or the mechanisms to be used to publicise the national programme).[629]

As far as the *management* of the allocations of the Asylum, Migration and Integration Fund to the Member States is concerned, the Horizontal Regulation requires that Member States notify the Commission of the formal designation *at ministerial level of the Responsible Authorities in Member States responsible for the management and control of expenditure* as soon as possible following the approval of the national programme. This designation shall be made subject to the body complying with the designation criteria on internal environment, control

628 European Parliament and Council Regulation 514/2014/EU of 16 April 2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management [OJ L 150., 5.20.2014.]

629 Ibid., Art. 14.

activities, information and communication, and monitoring laid down in or on the basis of the Regulation.

In order to channel and adapt to the experiences of implementation, *in 2018* the Commission and the Member States will *revise* the situation in light of the so-called interim evaluations and the changes that took place in Union policies and the Member State concerned. Following this revision and in light of its results national programmes may be further adjusted.

7.7 Assessment of the EU asylum acquis

In terms of the quantity and complexity of the acquis adopted, the Common European Asylum System *may be considered a successful policy*, since the Union legal architecture of asylum is governed by more than half a dozen EU legal acts serving the unification and the approximation of laws respectively, while enhancing cooperation between Member States.

As far as the substance of the policy is concerned, *the question emerges* to what extent the new rules and standards meet the following strategic objectives: the establishment of a common procedure, a uniform status, a homogeneous framework, and a high level of harmonised protection in all Member States guaranteeing the consistent implementation of the 1951 Geneva Convention.[630]

The development of the asylum policy of the European Union and its legal framework will most certainly not come to a halt, as this area of European law is characterized by *permanent development*.[631] Therefore, we should expect further development, notwithstanding the fact that the most important challenge of the upcoming years will be *the proper transposition and application of the revised and renewed acquis related to asylum*, and its monitoring and enforcement by the Commission.

What shall be the *direction of these developments* in the upcoming period? On the one hand – due to the increasing judicial activism of the Court of Justice of the European Union, which is now entitled to full review in issues related to asylum and applies the EU Charter of Fundamental Rights – the interpretative, clarifying and complementing role of *case-law* is expected to become more prominent. This will all the more be the case since the revised norms designed to

630 Opinion of the European Economic and Social Committee on the Green Paper on the future Common European Asylum System (2008/C 204/17), Art. 1.3.

631 As early as 2010 the General Secretariat of the Council of the European Union compiled a compendium including the EU asylum acquis, as well as the universal and regional conventions on asylum and other *soft law* norms relevant in the context of EU asylum policy. The content of the volume is printed in small fonts, yet it nevertheless takes up about 500 pages. (General Secretariat of the Council of the European Union: *European Union legislation and other essential international instruments on international protection*, Brussels, July 2010).

eliminate the former regulatory deficiencies cannot be formed into a perfectly coherent, logical and self-inclusive system. On the other hand, the *Action plan on the Stockholm Programme* still includes measures that the Commission has not yet implemented, let alone the future action plan expected from the Commission on the *implementation of the Ypres Guidelines*. Other proposals are expected on the feasibility as well as the legal and practical implications to establish joint processing of asylum applications in the Union, on the legal and practical feasibility of the accession of the European Union as an independent international legal person to the 1951 Geneva Convention, and on the establishment at Union level of a mechanism for the mutual recognition of national asylum decisions.

Without doubt, we have challenging years ahead of us. And while the present legal situation is far from perfect, we may say that currently the European Union is the only regional international organisation in the world, which, acting in the most uniform manner possible, provides the highest level of protection to those seeking refuge from persecution and, at the same time, provides significant resources for capacity-building and the efficient operation of asylum systems in a community encompassing 28 states and 503 million people.

THE REGULATION OF AUDIOVISUAL MEDIA IN THE EUROPEAN MEDIA MARKET

Levente Nyakas

1 Introduction

To examine the definition, history and regulatory framework of the EU media policy, it is necessary to establish the basic conflict that strongly shapes EU media policy itself but, in a broader sense, also the views on EU media policy and the media regulation. The basic conflict in EU regulation comes from the dual nature of the media: they have both cultural and economic significance.[632] However, the various starting points lead to different policy and regulatory outcomes. The conflict outlined within EU media policy signifies the debate on the border between Member State and EU media policy and media regulation. This is because the more we perceive the media as a cultural service, the more the regulatory issue falls outside EU competence and belongs to Member State competence. Where we emphasise the economic importance, the other EU policies in support of competition and the common market come to the forefront and shape the EU's competence in the field of media regulation and at the same time affect Member State competence. EU media policy has to align this duality and the implied contradiction from the very outset, and it is likely that this duality was why the Treaty of Lisbon failed to enshrine media policy in the founding treaties.

2 The concepts of media policy, audiovisual policy and media regulation in the EU

Amongst the European Union's policies, EU media policy can be considered as a sectoral policy within the policy on culture, education and law. The name given is audiovisual and media policies.[633] The literature is still to determine the exact content of the EU's audiovisual and media policies and the delimitation between these two policies. It is a fact, though, that the Commission deals with

632 Perry Keller, *European and International Media Law: Liberal Democracy, Trade and the New Media*, Oxford University Press, 2011, p. 115.; Horváth Zoltán, *Kézikönyv az Európai Unióról* (Manual of the European Union), HVG-Orac, Budapest 2007, pp. 481–482.; Kende Tamás & Szűcs Tamás (eds.), *Structure of the European Union*, Complex, Budapest 2009, p. 1078.; Maria Simone & Jan Fernback, 'Invisible Hands or Public Spheres? Theoretical Foundations for U.S. Broadcast Policy', *Communication Law and Policy*, 2006/2, p. 287.

633 European Commission – Policies http://ec.europa.eu/policies/index_hu.htm.

these policies jointly, and their contents change dynamically due to the changing media environment and the Commission's policy in response to it. Its current content is set out in the so-called Digital Agenda,[634] one of the pillars within the EU growth strategy (Europe 2020).[635] Under this Digital Agenda, the Commission deals with media policies under the heading of Content and Media, together with, for example, digital culture.[636] Media policies[637] encompass two greater subjects: policies related to audiovisual and other media content, and policies related to the freedom of the media and media pluralism. The policy on *media content* focuses on the existing common sectoral economic regulatory framework (mainly on the AVMS Directive on the Single European Audiovisual Market), its implementation and the regulatory lessons learnt from it, but in addition to it, European cultural diversity and heritage also appear as goals to be supported.[638] Moreover, it includes the *international* activities pursued by the EU in the media field. This means, for example, EU enlargement and neighbourhood policy, trade policy (WTO, OECD), cultural policy (UNESCO), and other international treaties and commitments already established in other multilateral fora. The third area is the Commission's *convergence*-related activities, focusing primarily on the consequences of the merger between traditional media services and Internet services and which seek to provide appropriate media policy and regulatory replies to them. Finally, the policy on content *distribution*, aiming to create a single digital internal market environment ensuring that both consumers and the industry benefit from the distribution of digital content, also belongs here. In this latter case, the most important issues to be solved are essentially of a copyright law nature. Policies related to *the freedom of the media and media pluralism* aim to ensure the freedom, diversity and transparency of the European media environment, and in this field several projects have been launched (such as the Media Pluralism Monitor serving the measurability of media pluralism or the EU Media Forum), at the Commission's initiative.[639]On the basis of the above definition by the Commission, one can conclude first of all that, amongst the classic media sectors, EU media policy focuses mainly on the audiovisual sector, 'meaning the totality of areas related to the transmission of images and sound via various technical means'.[640] In other words, currently the printed

634 Digital Agenda for Europe, COM(2010) 245 final.

635 Europe 2020: A European Strategy for Smart, Sustainable, and Inclusive Growth. http://europa.eu/legislation_summaries/employment_and_social_policy/eu2020/em0028_hu.htm.

636 Digital Agenda for Europe. http://ec.europa.eu/digital-agenda/en.

637 Media Policies. http://ec.europa.eu/digital-agenda/en/content-and-media/media-policies.

638 Audiovisual Media Services Directive (AVMSD). http://ec.europa.eu/digital-agenda/en/audiovisual-media-services-directive-avmsd.

639 Media Freedom and Pluralism. http://ec.europa.eu/digital-agenda/en/media-freedom-and-pluralism.

640 Krisztina Kertész, 'A média szabályozása az Európai Unióban és Magyarországon. A jogharmonizáció folyamata az audiovizuális szektorban' (Regulation of the Media in the European Union and in

press, radio broadcasting or book publishing cannot be considered as subjects of the audiovisual policy. On the other hand, we believe that within the audiovisual policy there is a narrower area that can be delimited more precisely, which under the AVMS Directive can be called media service policy (formerly broadcasting policy[641]). Genuine European media regulation can be found in this latter area. The Commission and the individual EU institutions are the most active in this area. 'Policy' means the activities by the EU institutions (mainly by the Commission, and to a lesser extent also by the Parliament and the Council) related to the above-mentioned areas (strategy and main objectives, and their efforts made to this end – e.g. legislation, implementation). At the same time, due to the convergence referred to above, it includes any other issues related to media content service provision outside of the current legislation's scope that raise regulatory issues similar to those relating to audiovisual media services. The term media policy is furthermore assessed as a summary category within EU policies; it includes policies related to all media products in their broader sense (goods and services) thus obviously also the above referred audiovisual and media service policy.[642] EU media regulation can be linked the closest to the aforementioned media service policy, since actual legislation and budgetary decisions took place on these matters, and so did the recommendations and other strategic and analytical documents belonging to the *soft law* that defined subsequent regulation.

3 The basis of European Union media policy and media regulation

Already it can be perceived from the Commission's definition that the scope for EU media policy and the regulatory options arising from it are difficult to demarcate. We arrive at the same conclusion if we examine this issue from the aspect of the Treaties. The treaties of the European Union and the amending treaties also fail to contain express provisions on the regulation of the media and media policy. Below, we examine the legal basis for the EU's audiovisual and media service, i.e. for media policy in its narrower sense.

Hungary. The process of harmonisation of legislation in the audiovisual sector), *Médiakutató*, 2001/2, p. 96.

641 Harrison and Woods use the term 'broadcasting law and policy', see: Jackie Harrison & Lorna Woods, *European Broadcasting Law and Policy*, Cambridge University Press, 2007.

642 In his summary work Perry Keller uses the same definition in a similar context, see: Keller 2011, fn. 1.

3.1 EU audiovisual policy as cultural policy

Audiovisual policy first appeared amongst the Union policies, by way of reference, thanks to the TEU (Treaty of Maastricht), since the Treaty establishing the European Economic Community contained no provision expressly dealing with this field.[643] The audiovisual sector appeared in a half sentence in Article 151 (2) of the TEC as part of culture, basically identifying it with other cultural activities: 'Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action: (…) – artistic and literary creation, including in the audiovisual sector.' The cultural approach to this field is demonstrated by the fact that audiovisual policy was placed amongst the Commission's Culture, Education and Youth policies.[644]. It is important to note here that cultural policy itself appeared as new community policy with the Treaty of Maastricht (1993), with the underlying key objective of the TEU: widening the economic and trade integration with areas that bring the European Union closer to EU citizens. In Article 3 (1)(*q)* of the TEC, the requirement for the Community to contribute to the flourishing of the Member States' cultures was listed as a community objective.[645] Within this, a further objective was to strengthen the sense of belonging to European unity, and to legitimise the European integration via this.[646]The content of the above cited Article of TEC could lead to the obvious conclusion that the audiovisual area is clearly a cultural domain, and as such, its regulation exclusively belongs to Member State competence. Apart from the identification referred to above, this is suggested by Article 151 (5) of the TEC, which permitted the Community only to adopt 'incentivising measures' in the field of culture and made it subject to the co-decision power of the European Parliament, and in addition it excluded the harmonisation of legislation in this area. This same idea is supported by the protocol adopted jointly with the Treaty of Amsterdam and attached to the EC Treaty (Amsterdam Treaty Protocol[647]), which strengthens Member State competence over their public service broadcasting system, subject to certain conditions which we deal with below. What is more, one can conclude that the TFEU resulting from the Treaty of Lisbon took over the entire content of the TEC on cultural policy.[648] There was a change only in decision-making: instead of the una-

643 Kende & Szűcs 2009, p. 1079.
644 Media Freedom and Pluralism. http://ec.europa.eu/digital-agenda/en/media-freedom-and-pluralism.
645 Art. 3 (1)(q) of the TEC.
646 Horváth 2007, p. 478.
647 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts – Protocol annexed to the Treaty of the European Community – Protocol on the system of public broadcasting in the Member States, OJ C 340, 10/11/1997 p. 0109.
648 See: Art. 167 of the TFEU.

nimity so far, the Union could adopt incentivising measures in ordinary legislation, where the Council decides by a qualified majority.[649]

3.2 Audiovisual policy as sectoral economic policy

On the basis of the above, it can be established that, apart from the audiovisual sector, which was classified into culture, neither the TEC nor the TFEU that replaced it contain a separate express provision on the media sector. Hence, the basis of the EU media policy and regulation was determined by its economic nature. The competence of the EU was underpinned by the Court of Justice, which upheld in the Sacchi Case[650] that television broadcasting also enjoys the protection afforded by Article 60 of the EEC (then Article 49 of the TEC; currently Article 56 of the TFEU), i.e. the protection for the free movement of services – of course the 'physical goods' (equipment, appliances) are subject to the free movement of goods requirement. Later this recognition served as a basis to revise the national rules and secondary EU legislation, and for the subsequent harmonisation of legislation. The importance of the Sacchi Case is therefore that the Court upheld that the EEC Treaty (i.e. its provisions ensuring the free movement of services) is also applicable to television broadcasting. One should not forget that the freedom to provide services represents one of the main freedoms for the establishment of the single European market. At the same time, the conclusions in the Sacchi Case meant the recognition of broadcasting as a single market economic activity, which represented the diametric opposite of Member States' ideas, where public service media services represented the cultural approach to and model of media services that provided the basis for the Member State competence in the field of radio and television broadcasting. In the period between 1980 and 1990, when the harmonisation of legislation started, a fierce debate developed on whether the EU is entitled to regulate a purely cultural service, i.e. some argued against the dual nature of media service, that in addition to being cultural it is also economic.[651] The importance of the Sacchi Case was not that it turned out that the EU has competence in the cultural field but in the statement made by the Court of Justice that Member State competence in cultural fields is restricted by the general economic competences of the EU – namely its other horizontal policies.[652] The true nature of this statement is also visible in the context of the Commission's public service media service state aid cases. Against

649 Zoltán Horváth & Bálint Ódor, *Az Európai Unió szerződéses reformja* (The Treaty reform of the European Union), HVG-Orac, Budapest 2008, p. 310.
650 Judgment of 30 April 1974 in Case 155/73, Giuseppe Sacchi v. Italy, [1974] ECR 409.
651 Oliver Castendyk & Egbert Dommering & Alexander Scheuer (eds.), *European Media Law*, Kluwer Law International, The Hague – London – Boston 2008, p. 93.
652 Harrison & Woods 2007, p. 68.

those arguing for the public service (cultural) approach, who advocated unburdened national competence with reference to the cultural nature of broadcasting, the Court of Justice reinforced its interpretation provided in the Sacchi Case.[653] Moreover, the EEC Treaty's concept of services was extended by the Court of Justice to all forms of transmitting electromagnetic signals, i.e. to Internet, multimedia and telecommunication activities.[654] From the case law of the Court of Justice, the so-called Debauve Case stands out by paving the road for the opening up and liberalisation of national media markets by *abolishing discriminatory measures* against foreign broadcasters.[655] In addition, it also stated that in the absence of harmonised legislation, member States can set restrictions (such as a ban on advertising) against non-resident broadcasters but only if they treat all services equally, irrespective of their member State of origin, their nationality or the place of establishment of the company providing the service.The discrimination test developed by the Court of Justice in the Sacchi Case (i.e. that national rules that do not directly discriminate against broadcasters from other Member States are allowed) changed profoundly in the Bond van Adverteerders Case[656] and created a balanced situation between Member States and the EU. Namely, the Court of Justice concluded in the above case that if a Member State media regulation restricts the free provision of services, these can only be restrictions, the necessity of which can be justified. Thus the *discrimination test* has been replaced by the restriction test, which opened more opportunities for the EU against Member State media regulation, since free trade can be subject to non-discriminatory rules within the internal market (indirect restrictions). In this way, the relationship between the EU and Member State regulation is reversed, since via the TEC the justifiability of Member State rules became the focus of the debate.[657] In the case law of the Court of Justice, we have to note the so-called ERT decision,[658] where the Court of Justice linked the EU law and the ECHR. The Court of Justice stressed the importance of general principles and in

653 The following judgments cite the Sacchi Case: Judgment of 18 March 1980 in Case 52/79, Procureur du Roi v. Debauve and others [1980] ECR 833 at 8., Judgment of 18 June 1991 in Case 260/89, ERT v. DEP [1991] ECR 2925 at 20-25., Judgment of 25 July 1991 in Case 353/89, Commission v. the Netherlands, [1991] ECR 4069 at 38, Judgment of 16 December 1992 in Case 211/91, Commission v. Belgium, [1992] ECR 6757 at 5, Judgment of 5 October 1994 in Case 23/93 TV10 SA v. Commissariaat voor de MEDIA, [1994] ECR 4795 at 13 and 19.

654 See: Judgment of 18 March 1980 in Case 52/79, Procureur du Roi v Marc J.V.C. Debauve and others, [1980] ECR 00833., Judgment of 5 October 1994 in Case C-23/93, TV10 SA v Commissariaat voor de Media, [1994] 04795., Judgment of 26 April 1988 in Case 352/85, Bond van Adverteerders and others v. the Netherlands [1988] ECR 2085., Judgment of 8 September 2005 in Joined Cases 544/03, Mobistar SA v. Commune de Fléron and 545/03 Belgacom Mobile SA v. Commune de Schaerbeek [2005] ECR 7723.

655 See: Case 52/79. Procureur du Roi v. Debauve and others Paras. (11) and (15) to (16).

656 Case C-352/85 Bond van Adverteerders and others v. the Netherlands.

657 Harrison & Woods 2007, p. 69.

658 See: Case 260/89 ERT v. DEP.

particular that of fundamental rights in connection with the free movement of services. It upheld in the above judgment that any justified restrictions of the provision of services under the rules on media services must be interpreted in the light of the freedom of expression afforded in Article 10 of the ECHR.

3.3 EU competition policy and Member State media regulation

The situation is identical in terms of the relationship between EU competition policy and media services to the one shown by the case law of the Court of Justice in connection with guaranteeing the free movement of (media) services, namely the justifiability of the Member State media regulation regime comes to the fore. Similarly to the activities of the Court, the Commission balances the economic and cultural nature of audiovisual services in its proceedings.[659] Articles 107 and 108 of the TFEU (ex Articles 87 and 88 of the TEC) on state aid strike the balance between the necessity and admissibility of state intervention into market freedoms and the protection of competition.[660] The issue of state aid comes up in the context of Member State media regulation with regard to public service media services, since public service media service providers are publicly funded institutions and so their funding is considered to be state aid.

3.4 The EU's regulatory competence in the media field

It follows from the above that EU media regulation restricts itself to media service as an economic service (activity); the EU adopts the measures required to establish and ensure the functioning of the internal market [Article 26 of the TFEU]. The possibility for the harmonisation of legislation is set out in Articles 114 and 115 of the TFEU, and for services even more specific rules follow from Article 53 (1) of the TFEU in conjunction with Article 62 of the TFEU.[661] The EU has no regulatory powers in the field of *culture* (with regard to the cultural nature of media services); however, as we saw, the Court of Justice and the Commission have carried out, via the application of Article 56 of the TFEU and the competition rules, deregulation, i.e. limited the Member States' room to manoeuvre (negative regulation).

In the area of audiovisual media, the TVWF Directive was the first piece of legislation that summarised the harmonisation rules for television broadcasting as a sector-specific standard. The amending AVMS Directive extended the subject matter of the regulation to all audiovisual media services. Other sectoral

659 Harrison & Woods 2007, p. 71.
660 Castendyk, Dommering & Scheuer 2008, p. 213.
661 Ibid., p. 92.

harmonisation Directives indirectly affecting media services are, for example, Directives on satellite broadcasting and cable retransmission,[662] on tobacco advertising,[663] on misleading and comparative advertising,[664] and on e-commerce.[665] However, audiovisual services are not subject to the Directive on internal market services;[666] its Article 2 (2)(*g)* exempts them from that Directive, irrespective of the manner of their production, distribution and transmission.

3.5 Relationship between Member State and EU media regulations

This relationship between the national rules adopted under the harmonisation rules (secondary legislation) and the primary legislation (TFEU) is as follows: Member States cannot adopt stricter or more detailed rules where an EU legal act, a Directive, carries out a complete harmonisation of legislation unless Member States are expressly authorised by that law to do so. Such express authorisation is set out in Article 3 of the AVMS Directive: 'Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the areas covered by this Directive, provided that such rules comply with Community law and do not distort competition.'

However, the legislation adopted by Member States in this way must comply with other EU legislation. Regulation of the cultural aspects of media services continues to remain an exclusive Member State competence.[667]

662 Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10. 1993.

663 Directive 2003/33/EC of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ L 152, 20.06.2003).

664 Directive 2006/114/EC of the European Parliament and of the Council concerning misleading and comparative advertising (codified version), OJ L 376/21, 27.12.2006.

665 32000L0031: Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000.

666 Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market, OJ L 376, 27.12.2006.

667 Castendyk, Dommering & Scheuer 2008, pp. 93–95.

4 A historical outline of European audiovisual media regulation

4.1 Early regulation

The necessity for media regulation emerged among EU legislators in the early 80s; this could be traced back to two closely interlinked factors. As of the 1970s, the Member States were subject to increasing pressure to allow commercial broadcasting in their (public service) media systems, based otherwise on state monopolies. The success of the commercial model, that questioned the state monopoly-based European media model,[668] which was dominant from 1945 until the 1980s, was largely supported by the so-called Oil Crisis and the world economic recession caused by it. The evolving world economy crisis 'highlighted in the developed countries (…) that the traditional concept of the welfare state cannot be maintained any longer';[669] as such the monolithic nature of the public service media system arising from the welfare state system was also questioned.In the EU, the economic crisis caused the deepening of the European integration to stop, by creating a so-called *Eurosclerosis* (1966–1986) and *Euroscepticism*. The financial and economic crisis hit hardest in Western Europe, with its developed industry but poor in raw materials, forcing the states to transform the economic structure. Eurosclerosis dissolved only after a decade had passed, and European integration gained a new momentum only as of the early eighties. This led to the Single European Act in 1986, which aimed at the perfection of market integration and genuine market liberalisation, and the establishment of a single internal market appeared here as an objective with a set deadline to achieve (by 31 December 1992).[670] In addition to the economic factors, the enforcement of commercial broadcasting was assisted by technological progress, namely the emergence of satellite and cable broadcasting methods. At Member State level, the entry of the new distribution networks created a rival to the so far dominant terrestrial broadcasting, on which the Member States based their broadcasting monopoly, due to their scarce nature. National (public service) media systems, based on the scarcity of frequency and operating in isolation, were faced, all of a sudden, with commercial television broadcasting departed from the territory of a given state, which could be provided irrespective of borders.

668 Jan van Cuilenburg & Denis Mcquail, 'Media Policy Paradigm Shifts: Towards a New Communications Policy Paradigm', *Journal of Communication*, 2003/18, pp. 181–207.

669 Mihály Gálik & Gábor Polyák, *Médiaszabályozás* (Media regulation), KJK-Kerszöv, Budapest 2005, p. 304.

670 Tamás Kende & Tamás Szűcs, *Európai közjog és politika* (European public law and policy), Comp-Lex, Budapest 2006, pp. 45–54.

The history of European media regulation, in its narrow sense, can be divided into two periods. The first period can be characterised by the establishment and perfecting of the common European standards for television services, the TVWF Directive (1980–1997). The other period (1997–2007) can be seen as the review of the TVWF Directive's regulatory system and the establishment of convergent regulation.

In summary, we can conclude that, as of the early eighties, commercial television had every reason to trust in the support of the EC, since a market environment favourable for it was created throughout the European platform. As such, they became indirect reasons for the development of European media regulation. Out of the four fundamental freedoms, the literature and also the Court of Justice earlier interpreted the freedom to provide services strictly; for a long time it was linked to the provider of that service and the requirements it was subject to and, via this, the freedom of establishment came to the forefront. The change was brought along by the great strengthening of the service market, with technological progress and new cross-border communication services in the background.[671] A step in this process was the emergence of satellite services, but the genuinely great explosion was brought along by the Internet and the penetration of information society services via it.

4.2 Towards common regulation – establishment of the TVWF Directive

The European Parliament's Hahn Report (1982)[672] can be considered as the starting point for European media policy and media regulation. The main reason for it is that the Hahn Report linked European integration and the information function of broadcasting; it claimed that no European integration could be achieved while broadcasting remained subject to national supervision. The idea legitimising European integration was a reaction to Euroscepticism. In addition to the necessity of certain elementary harmonisation of the European media market, it also claimed that this harmonisation had to promote the awareness among Member State citizens of Community policies in order to share responsibility. In this context, the Report declares that genuine (political) unification in Europe – in addition to economic integration – can only be achieved with the existence of a European identity, which can be created via appropriate information on the EU. The vision of establishing a common European television service, intended as a

671 András Osztovits (ed.), *Az Európai Unió alapító szerződéseinek magyarázata* I–III. (Explanation to the founding Treaties of the European Union), CompLex, Budapest 2011, p. 1414.

672 W. Hahn, Report drawn up on behalf of the Committee on Youth, Culture, Education, Information and Sport on radio and television broadcasting in the European Community, Working Documents 1981-82, Document 1-1013/81, EU European Parliament Document, 23 February 1982.

key tool for creating the above mentioned identity (never fulfilled), was born alongside this idea. In this Report, the main regulatory subjects of harmonisation also appeared, such as the protection of minors and rules on advertising. The theses of the Hahn Report were summarised by a European Parliament resolution.[673] Compared to the intentions appearing in the Hahn Report and in the European Parliament resolution, the objective of the evolving European media regulation policy changed significantly: it was not focused on exporting the public service model to a European level but to creating common market sectoral regulation.

The so-called Hutton Report of the European Parliament (1984) reviewed the challenges faced by the envisaged harmonisation of legislation in the broadcasting field. It laid down that the key objective of the EEC is to ensure cross border free trade and marketing activity. At the same time, it concluded that the regulatory differences present in broadcasting could hamper cross border television (and satellite and cable media service distribution). The Report saw the main obstacles as being in the following areas: trademark protection, copyrights, advertising restrictions and the rights of presenters. The Report considered it appropriate to have a harmonisation of legislation that was somewhat trailing in nature, that took established practice into account. There were numerous views that did not consider Community regulation to be necessary but believed in Code of Conducts established by broadcasters instead.

The so-called Arfé Report by the European Parliament (1984) essentially set out a *legislation* timetable. On the technical side, it requested the Commission to interpret the principle of four freedoms in a Green Paper, and to assess Member State legislation in the field of the media, i.e. whether the harmonisation of legislation could be implemented at all. It outlined the subjects for examination (division of transmission time amongst national, European and other production programmes; anti-dumping regulation on motion pictures; self-regulation on the length and types of advertising; the protection of minors; copyright protection).

The Green Paper preparing the TVWF Directive[674] already clearly set aside the vision for establishing a common European television service, and outlined the bases of common market sectoral regulation , which essentially created the economic conditions for free television without borders, i.e. a service of a substantially economic nature. According to certain authors, the Green Paper reinforced the link between European integration and the social function of the media. According to the Green Paper, Europe cannot be built on economic interests

673 Resolution on radio and television broadcasting in the European Community, OJ C 08,05/04/1982 P. 0110.

674 Communication from the Commission to the Council Television without Frontiers – Green Paper on the establishment of the Common Market for broadcasting, especially by satellite and cable COM (84) 300 final Brussels, 14th July 1984.

only. The Green Paper is basically a reply expressing concern over the negative harmonisation (case law) of the Court of Justice. It links the political freedoms recognised by international treaties (freedom of information, opinion, and expression) with the intention of cross-border broadcasting. At the same time, the Green Paper and the draft TVWF Directive puts a lot more emphasis on cultural interests than the finally adopted version.[675] However, in our opinion, the Green Paper intended to establish the common market of broadcasting within the EC. The objective of the Green Paper was the harmonisation of legislation and the implementation of the freedoms enshrined in the TEC; at the same time, it demonstrates the importance of broadcasting in integration (free and democratic Member State structures), and the significance of the TEC in the context of free exercise and reception of broadcasting. The Green Paper analyses the relationship between the TEC and cultural activities. In this regard, it makes it clear that the TEC applies to all activities carried out for *remuneration*. Intellectual (cultural) works and the related activities are such activities, since their authors benefit from the implementation of these four freedoms. In the relationship between the TEC and broadcasting, the Green Paper concludes that the latter is considered as a service under the TEC. On the other hand, the objective of regulation is to abolish the obstacles to the provision of this service and to ban the introduction of new restrictions, and to ensure the freedom of Community-wide media service distribution and reception.

4.3 The TVWF Directive

Five years were necessary for the adoption of the sectoral Directive 89/552/EEC (TVWF Directive) that created a single market in the audiovisual field. This Directive laid down common minimum standards for television within the EC, by leaving the Member States to adopt more stringent or more detailed rules that do not contradict the basic objectives of the Directive. One of the achievements of the TVWF Directive was the regulation of jurisdiction issues by declaring that in each case there must be one (and only one) Member State entitled and required to act for the implementation of the Directive's provisions (Article 2). In addition to the country of origin principle (i.e. that, for a certain television broadcaster, the law of the state with jurisdiction over that broadcaster must apply) it also declared the freedom of reception and distribution of programmes from other Member States and via this declaration it ensured the freedom to provide services. Its further achievement was the creation of common definitions (such as television broadcasting, advertising, etc.), and setting out common minimum standards for advertising and sponsorship (quantity and publication rules), the

675 Harrison & Woods 2007, p. 89.

protection of minors and *human dignity*, and the right of reply. It is worth highlighting its protectionist (quota) rules aiming to strengthen the European audiovisual industry, under which television broadcasters had to reserve more than 50% of their broadcasting time for European works, and 10% of their broadcasting time or budget for European works created by producers independent from them.

The first amendment of the TVWF Directive took place in the eighth year after its adoption, with the main objective of increasing legal certainty in the common audiovisual market in the light of the case law established in the meanwhile.[676] The most pronounced part of this amendment was the rules of jurisdiction proposed by the Commission in 1995 in the light of the rich case law of the Court of Justice.[677,678] Accordingly, the amended Directive created a very complex system for the determination of jurisdiction,[679] which kept its structure in the 2007 fully transformed version of the TVWF Directive (its new name: AVMS Directive). In addition, the amended Directive, among other things, introduced new concepts and clarified earlier ones, put more emphasis on the protection of minors, and provided that events of particular importance for society in a Member State cannot be broadcasted in a way that excludes the significant part of the viewers in that Member State from them. The main provisions of the TVWF Directive had essentially been implemented in Hungary by the adoption of the Radio and Television Broadcasting Act in 1996; the 1997 amendment was transposed in 2002.[680]

676 Directive 97/36/EC of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 202, 30.7. 1997.

677 Susanne Nikoltchev, 'Jurisdiction over Broadcasters, EC-Rules, Case Law, and an Ever-Changing Audiovisual Landscape', in: André Lange & Susanne Nikoltchev (eds.), *Transfrontier Television In The European Union: Market Impact And Selected Legal Aspects*, The European Audiovisual Observatory, Strasbourg 2004. pp. 16–20.

678 Report on application of Council Directive 89/552/EEC on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ L 298, 17.10.1989.). Proposal for a European Parliament and Council Directive amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. COM (95) 86 final, 31 May 1995.

679 Nikoltchev 2004, pp. 22–26.

680 Act XX of 2002 on the Amendment of Act I of 1996 on Radio and Television Broadcasting for harmonisation of legislation purposes.

4.4 Towards the adoption of the AVMS Directive

The year 1997 was a significant milestone in European media policy, not only due to the revision of the television regulatory framework but also because the alignment of media regulation with the digital and convergent environment started, with the Commission in the lead: 'currently and in the upcoming years the most comprehensive and important phenomenon in the world of telecommunication, IT and electronic media is the convergence of these three areas, reflected in the unification of their technologies, the merger of their markets and the efforts to harmonise their regulations.'[681] In European level, one of the basic documents of this concept is the Green Paper on Convergence, analysing the above mentioned phenomenon and its effects in the telecommunication, media and information society sectors.[682] The Communication closing the debate on the Green Paper made significant findings in terms of content regulation.[683] It advocated for the separation of the transmission and content regulation, provided that the principle of horizontal regulation applied within individual areas. The above mentioned paper justified this separation as follows: 'It does not automatically follow that the delivery of different services over a single network or via a single service platform makes those services the same.'[684] Furthermore, it is an outstanding outcome of the consultation on this Green Paper that within the regulation of content, the nature of service as well as the related public policy objectives must be kept in mind. The issue of integrating public service media into a new environment is mentioned as a separate problem, as well as the issue of state aid to European 'premium contents'.

In the field of media regulation, determination of the regulatory subject became the key issue in the new, digital and convergent environment, i.e. to establish what precise services should be subject to regulation in a digital and increasingly Internet-oriented environment. Community regulation answered this question relatively quickly. The report named after Commissioner Marcelino Oreja[685]

681 Gyula Sallai & Imre Abos, 'A távközlés, információ és médiatechnológia konvergenciája' (The convergence of telecommunication, information and media technology), *Magyar Tudomány*, 2007/7, p. 844.

682 Green Paper on the convergence of the telecommunications, media and information technology sectors and the implications for regulation – Towards an approach for the information society COM (97) 623 final.

683 The Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation. Results of the Public Consultation on the Green Paper [COM (97) 623]. COM (99) 108 final, 9 March 1999.

684 Green Paper IV.2 Tackling the barriers – The regulatory issues; subheading: 'A need for new definitions?'.

685 'The Digital Age: European Audiovisual Observatory: Report from the High Level Group on Audiovisual Policy', chaired by Commissioner Marcelino Oreja. 26.10.1998 Report from the High Level Group on Audiovisual Policy (Oreja Report).

gave a clear answer to this question, by stating that the nature of the service determines the regulation of the content. According to the Oreja Report, where a certain service provides information to the public, or a certain content is subject to copyright protection, then it is considered as public communication, and as such it is subject to the same public service principles that form the basis of the regulation of traditional broadcasting. In this way, the definition explained opens up the audiovisual content regulation towards new services that show similarity to the essential defining feature of broadcasting, namely the power to form opinions. The Digital Communication of the Commission already treats the issues raised in the Green Paper as subject to consensus, i.e. that 'need for separate approaches to the regulation of the transport of electronic signals and the infrastructure used for this on the one hand, and the regulation of content including audiovisual content on the other'.[686] The above mentioned regulatory and delimitation principles are set out in the Community regulation in the so-called Framework Directive on communication networks and services.[687] The Commission's Digital Communication from 1999 envisaged ordering a review of the TVWF Directive. The 2002 fourth report, preparing for this review[688] amongst other issues analysed the subject matter of the TVWF Directive (broadcasting) and compared it with information society services. The 2003 Communication of the future of regulation[689] already carefully raises the possible expansion of the TVWF Directive's subject matter and takes a small but firm step towards information society services by stating that information society services have not reached the level of effect on society and the opinion-forming power of television broadcasting, and so it is not yet necessary to implement the horizontal content regulation concept (also covering the latter).[690] (That is, it does not exclude this possibility at a later time.)The Commission Communication published in June 2005[691] made it clear that the time for intervention had come, and in view of the level of convergence the introduction of a uniform content regulation concept could not be delayed any further. In Liverpool, the Commission formally closed the consultation that started in 2003 with a view to review the TVWF Directive and on 13 December 2005 it adopted its proposal on the amendment of

686 Communication from the Commission, Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age COM(1999) 657 final (Digital Communication).

687 Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002. Recitals (5) and (6).

688 Fourth Report from the Commission on the Application of Directive 89/552/EEC COM(2002) 778 final 30 (Fourth Report).

689 Communication from the Commission, The Future of European Regulatory Audiovisual Policy COM(2003) 784 final 21-22. (Communication of the future of regulation).

690 Ibid., p. 14.

691 'i2010 – A European Information Society for growth and employment' Brussels, 1.6.2005 COM (2005) 229 final.

the TVWF Directive.[692] The main conclusion in the Commission's proposal was that a single audiovisual sector must be envisaged. They viewed the TVWF Directive to be transformed as something that makes the unjustified regulatory differentiation between identical or similar media content increasingly serious. As such, in order to create legal certainty for concurrent audiovisual services competing in the same audiovisual market as broadcasting, common rules had to be established. The resulting horizontal regulation was expressed in the development of the definition of audiovisual media service. In the development of the common concept and the horizontal regulation, the 2005 judgment of the Court of Justice, interpreting the concept of broadcasting, was very important.[693] The subject matter of the proposal for the AVMS Directive became the key for new regulation, requiring a new way of thinking from the regulator in the field of media regulation. The main concept in the Commission's proposal was sustained in the course of the legislation, both in the 2006 European Parliament legislative resolution,[694] and in the AVMS Directive, adopted in 2007.[695]

4.5 The AVMS Directive

The main achievement of the AVMS Directive was the extension of the subject matter to cover a part of the information society services, to on-demand audiovisual services. We can put it that, in media regulation, convergence had an effect in two directions: on the one hand, new services had a *deregulatory* effect on the regulatory burdens of broadcasting, developed under a state framework, and, on the other hand, a part of the regulatory subjects attached to traditional broadcasting was applied to the information society services that were created outside of the state framework and which had not been subject to any content regulation so

692 Proposal for a directive of the European Parliament and of the Council amending Council directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities Brussels, 13.12.2005 COM(2005) 646 final 2005/0260 (COD) (proposal for the AVMS Directive).

693 Judgment of 2 June 2005 in Case 89/04, Mediakabel BV v. Commissariaat voor de Media, [2005] ECR 04891.

694 European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (COM(2005)0646 – C6-0443/2005 – 2005/0260(COD)).

695 Directive 2007/65/EC of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Text with EEA relevance), OJ L 332, 18.12.2007.

far, apart from certain provisions in the E-commerce Directive.[696] The determination of the wider subject matter's content was not easy; this is reflected in the Recitals of the AVMS Directive dealing with this issue, which tried to outline the definition of audiovisual media services [AVMS Directive, Recitals (21) to (28)]. In the matter of jurisdiction (Article 2 of the AVMS Directive), the most important principle continues to be the country of origin principle, which is obviously linked to the freedom of establishment, since services establish themselves in the Member State where the business conditions are the most favourable for them. However, Member State regulation is strongly present with regard to the freedom of establishment, since Member States continue to be entitled to establish more detailed or more stringent rules than those in the Directive [Article 4 (1)]. The Directive tries to deal with the issue of mala fide *circumvention of the law*, but only with regard to television. This Directive scrupulously ensures that the exclusion rules on the circumvention of law do not conflict with the country of origin principle, i.e. it tries to align the EU economic interest with the Member State cultural interest. As such, the range of reasons giving rise to exclusion can aim at consumer protection, the protection of minors and cultural policy objectives. At the same time, the latter leaves great scope for Member State regulation. Otherwise, the procedure to establish and prove the circumvention of the law [Article 4 (2) to (5)] is rather complicated, and Member State media regulatory authorities, more precisely their cooperation abilities, play a strong role in it; ultimately they can request assistance from the Commission.

This Directive continues to ensure the free movement of media services (freedom of reception and transmission) [Article 3 (1)]. At the same time there is a new element, with regard to restrictability, in view of the emergence of on-demand services, in the AVMS Directive. It differentiates between restrictions depending on whether they affect television broadcasting or on-demand media services [Article 3 (2) to (6)].

The most important feature of the AVMS Directive's regulatory system is its two-tier (or gradueted) regulation, under which regulation is aligned to the features of the service. In other words: although television broadcasting and on-demand audiovisual media services have been placed in the same market by the Directive, due to their different features, they are not subject to the same level and nature of regulation. Therefore, the Directive sets common minimum standards (Chapter III), and rules departing from the common ones have been laid down separately (Chapter IV deals exclusively with provisions applicable to on-

696 32000L0031: Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000.

demand audiovisual media services, while Chapters V to IX exclusively cover provisions applicable to television broadcasting). Common rules cover three larger topics: reporting obligation, principles and the great part of regulation on commercial communications. Most and the most detailed of the specific rules on individual services relate to television broadcasting. These are the rules on exclusive rights, short news reports, programme quotas, certain forms of advertising, the protection of minors and the right of reply. For on-demand media services, only rules for the protection of minors and programme quotas are set out separately. This system of dual level regulation is replicated in the Hungarian Press Freedom Act and the Media Act; the first contains the common and general rules applicable to all media content services, and the second mainly contains specific provisions on media services.

The rules indicated as principles above (Articles 6 and 7) provide for a ban on incitement to hatred and ensuring access to audiovisual services for the disabled. This latter became a basic requirement in the digital era, since the capacity increase and technology provides the opportunity to take care of every member of society and to ensure access to information and entertainment for them as well. There are numerous innovations amongst the common rules for communication (Articles 9 to 11). The Directive contains co- and *self-regulation* [Article 4 (7)], and although it provides for incentives of regulatory solutions as a Member State obligation, its wording can be classified rather as a recommendation. This interpretation is corroborated by Recital (44), which states that this Directive does not 'oblige Member States to set up co- and/or self-regulatory regimes'.

As regards the Member States' regulation on the institutional system, a significant innovation is included in the AVMS Directive, since it not only mentions regulatory authorities supervising the media as bodies responsible for compliance with the Directive's provisions, but it sets requirements for national regulatory authorities. In technical terms, it implements it in a special way, since these requirements become clear from the relevant Recitals (94) and (95) in conjunction with the provision in the Directive (Article 30). The emphasis is shifted to cooperation (Commission – Member State; Member State – Member State); at the same time, the independence of the authority emerges as a requirement. Independence has received a different interpretation in individual Member States, this is acknowledged in the text by the '[t]hey are free to choose the appropriate instruments according to their legal traditions and established structures' clause.

4.6 Outlook

In its meeting of 23 and 24 October 2014 in Rome, the Italian EU Presidency launched the compliance review of the AVMS Directive, consisting of a comprehensive amendment rather than small-scale clarifications of the Directive.[697] The main reason for this review was to handle the new developments in media consumption[698] and the change in the media landscape.[699] The Commission took the new developments into account and reviewed the AVMS Directive provisions in the framework of a *REFIT*[700] procedure. The Commission presented its *legislative proposal*[701] on 25 May 2016 which touches upon the following regulatory areas of the AVMS Directive:[702]

1. *Extension of the subject matter of the Directive* to Video-sharing platforms (such as youtube) only when it comes to combat hate speech and dissemination of harmful content to minors. The proposal's protective rules have to be implemented in the form of co-regulation. The grounds for prohibiting hate speech will be aligned to those of the Framework Decision[703] on combating certain forms and expressions of racism and xenophobia.
2. *Renewal of country of origin principle (COO)* means the simplification of the rules determining jurisdiction over media services; the establishment of obligations to Member States to inform about the providers under their jurisdiction and the clarification of cooperation procedures when the limitation of COO principle is permitted.

---

697 Council conclusions on European Audiovisual Policy in the Digital Era. Education, Youth, Culture and Sport Council meeting Brussels, 25 November 2014.

698 Gilles Fontaine & Christian Grece, On-demand Audiovisual Markets in the European Union (2014 and 2015 developments), Report prepared by the European Audiovisual Observatory for DG Connect, November 2015. http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=14346.

699 Cisco Visual Networking Index: Forecast and Methodology, 2014–2019. May 27, 2015. http://www.cisco.com/c/en/us/solutions/collateral/service-provider/ip-ngn-ip-next-generation-network/white_paper_c11-481360.pdf.

700 REFIT Evaluation and Impact Assessment of the EU Audiovisual Media Services Directive 2010/13/EU (AVMSD) <http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_cnect_006_cwp_review_avmsd_iia_en.pdf>.

701 Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, OJ L 95, 15.4.2010. Brussels, 25.5.2016, COM/2016/0287 final - 2016/0151 (COD).

702 The following overview was prepared under Commission's 'A media framework for the 21st century' <https://ec.europa.eu/digital-single-market/en/revision-audiovisual-media-services-directive-avmsd>.

703 Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6.12.2008.

3. *Commercial Communications:* the proposed modifications aim at reducing the burden of TV broadcasters while maintaining, and even reinforcing those rules seeking to protect the most vulnerable.
4. *Promotion of European works:* the proposed modifications aim at enhancing the promotion of European works in the field of on-demand services e.g. imposing a minimum quota obligations (20% share of the audiovisual offer of their catalogues) and an obligation to give prominence to European works in their catalogues.
5. *Protection of Minors:* the proposal simplifies the obligation to protect minors against harmful content and also introduces the so called 'descriptive system' under which the media service providers have to provide sufficient information to viewers about the nature of the harmful content.
6. *Institutional novelties:* the proposal introduces provisions guaranteeing the audiovisual regulators' independence from industry and government; gives bigger role to ERGA.[704]

The legislative proposal is sent to the European Parliament and to the Council for a codecision procedure.

704 European Regulators Group for Audiovisual Media Services (ERGA).

MONETARY POLICY FRAMEWORK IN THE EUROZONE[705]

István Ábel, Kristóf Lehmann and Zoltán Szalai

1 Introduction

The monetary policy of the European Central Bank (ECB) is described in detail in the publication titled *Guideline of the European Central Bank on monetary policy instruments and procedures of the Eurosystem.*[706] This chapter gives a brief overview of the features and the strategy of the monetary policy of the ECB, and describes the so-called two-pillar approach, which is used by the ECB to consider the factors that influence the achievement of its objectives. The presentation of the set of instruments describes how the Eurosystem implements monetary policy decisions by using the monetary instruments. Following the presentation of the set of instruments, we will discuss some issues regarding central bank transparency and communication. We will pay special attention to the discussion of the relations between monetary policy instruments and the liquidity needs of banks.

2 Monetary policy strategy of the European Central Bank

2.1 General ex ante requirements against the monetary policy strategy, defined by EMI[707]

Prior to the development of the ECB strategy, the participating central banks defined the requirements it should meet, based on European experiences and theoretical results. These were as follows:[708]

a) Efficiency, i.e. allow the achievement of the objective;
b) Transparency (prospective nature);

705 Work in progress: preliminary draft – please do not quote without prior agreement with the authors.

706 Guideline of the European Central Bank on monetary policy instruments and procedures of the Eurosystem. 20 September 2011, http://www.ecb.europa.eu/ecb/legal/pdf/02011o0014-20130103-hu.pdf.

707 European Monetary Institute, which was the predecessor of ESCB and ECB. Among other things, EMI worked out the framework of monetary strategy which was first used by the ESCB and the ECB established in the middle of 1998. Following the review in 2003, the strategy was modified.

708 Ágnes Horváth & Zoltán Szalai, 'Monetary policy instruments in phase III of EMU', *Külgazdaság*, 1998/12.; Ágnes Horváth & Zoltán Szalai, 'The European Economic and Monetary Union, The monetary policy strategy of the ECB (manuscript)', *MNB Occasional Papers*, No. 12, 2005. www.mnb.hu/Root/Dokumentumtar/MNB/Kiadvanyok/mnbhu_mnbtanulmanyok/mnbhu_muhelytanulmanyok/mnbhu_muhelyt/mt12.pdf.

c) Accountability (retrospective nature);
d) Focus on the medium term (allow the central bank to respond to short-term diversions from the ultimate objective in a flexible way, without greater losses in output);
e) Continuity, i.e. build on the practices and experiences of the central banks of the EU;
f) Be in line with the institutional independence of the ESCB.

Several options were considered in the formulation of the strategy. They included the interest rate pegging, the nominal income targeting, the exchange rate targeting, the monetary targeting and the inflation targeting systems. In the selection of the proper monetary policy strategy required for the achievement of price stability as the primary objective, the possibility of interest rate pegging, nominal income targeting and exchange rate targeting were discarded, because these objectives have no clear relations with inflation, they are not efficient for large and relatively closed economies, and they are not under the direct control of the ESCB. The remaining two options, which have been used successfully in a number of countries around the world, i.e. the inflation targeting and the monetary targeting approaches were also discarded, because they were not found flexible enough. Instead, an intermediate solution was selected, which was expected to cover the full range of risk factors affecting the price stability, and thus allow for the consideration of interest rate decisions in monetary policy decisions.[709] The selected 'two-pillar' solution can be understood as a combination of the two remaining options.

2.2 The two-pillar stability-oriented monetary policy of the ECB

The monetary policy strategy of the Eurosystem relies on the experiences and practices of European central banks. However, the selected strategy is not a mechanic application of the strategy of one or more central banks (not a purely monetary aggregate or inflation objective), but primarily a unique *combination and adaptation* of the above two strategies.[710]

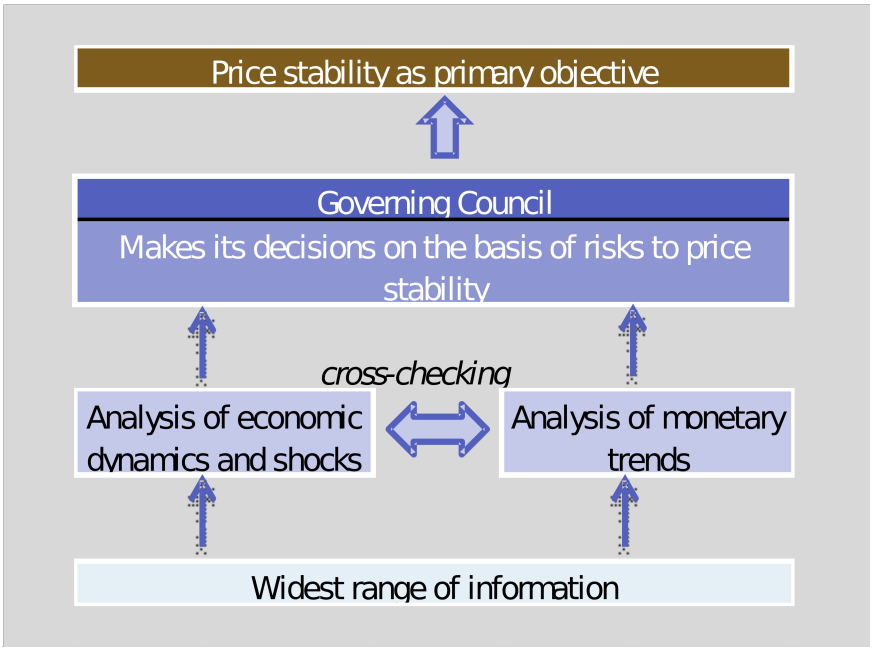
709 Otmar Issing, 'The ECB's Monetary Policy Strategy: Why did we choose a two pillar approach? The Role of Money and Monetary Policy in the Twenty-First Century,' Fourth ECB Central Banking Conference, 2006, http://lasilsladi.org/files/live/sites/iheid/files/shared/iheid/research/projects/historical_imagination/roleofmoneyen2008en.pdf.

710 Ágnes Horváth & Zoltán Szalai 2005, ECB, 'A stability-oriented monetary policy strategy for the ESCB', Press Release, European Central Bank, 13 October 1998. https://www.ecb.europa.eu/press/pr/date/1998/html/pr981013_1.en.html.; ECB, The stability-oriented monetary policy strategy of the Eurosystem, ECB Monthly Bulletin, January 1999 European Central Bank, https://www.ecb.europa.eu/pub/pdf/mobu/mb199901en.pdf.; ECB: The implementation of monetary policy since august 2007, ECB Monthly Bulletin, July 2009, http://www.ecb.europa.eu/pub/pdf/mobu/mb200907en.pdf.; Otmar Issing 2006.

Monetary strategy is neither a strict system of rules nor a model, it only provides a framework for the monetary policy. Within this framework, all information is used in decision-making.

The stability-oriented monetary policy strategy consists of *three main* parts. A numerical inflation target which defines price stability as its primary objective. The achievement of price stability is supported by two pillars: on the one hand, the wide-ranging evaluation of certain monetary, financial and non-financial indicators that facilitate the assessment of the development of prices in the future, and on the other hand, the monitoring of a wide monetary aggregate, which is analysed by defining numerical reference values. (Chart 1)

Chart 1: The two-pillar monetary policy framework of the ECB[711]



Pursuant to the definition adopted in 1998, price stability means that the year-on-year increase in the Harmonized Index of Consumer Prices (HICP) is less than 2 per cent on the medium term. This implied a range of 0-2 per cent, which is consistent with the values defined by the national central banks before the establishment of the euro area. The lower value was not explicit: the lower limit of

711 See: The Monetary Policy of the ECB, European Central Bank, 2011. http://www.ecb.europa.eu/pub/pdf/other/monetarypolicy2011en.pdf.

0 was concluded from the fact that the term 'price increase' was included in the definition. Therefore deflation is not in the acceptable range, either. This interpretation was confirmed in the review of the strategy in May 2003, in the course of which as a result of the criticisms[712], the definition was clarified as follows: the above defined inflation should remain below 2 per cent, but close to that.[713] It is low, but positive (i.e. not zero inflation), because the HICP, similarly to any other consumer price index, overestimates the actual inflation (e.g. because of quality improvement and change in composition). Also, in the case of nominal price and wage rigidities or non-negative interest rates, a low but positive inflation helps adjustment.

The price stability of the euro area is measured with the HICP indicator calculated by Eurostat. The HICP regarding the Member States is defined in a harmonized way by the statistical offices of the individual Member States. The HICP referring to the whole euro area is a weighted average of Member State indicators (consumer baskets),[714] where the weights correspond to the consumption of individual countries compared to the entire zone. (The Member States' weights are shown in Table 1.)

Table 1: Share of inflation of the euro area Member States in HICP[715]

Country	Weight (%)	Country	Weight (%)
Germany	27.7	**Finland**	1.90
France	20.6	**Ireland**	1.4
Italy	17.7	**Slovakia**	0.7
Spain	12.0	**Slovenia**	0.4
Netherland	5.0	**Luxemburg**	0.3
Belgium	3.6	**Lithuania**	0.2
Austria	3.3	**Estonia**	0.2
Greece	2.6	**Cyprus**	0.2
Portugal	2.1	**Malta**	0.1

712 According to criticisms, the definition was not symmetric, as it only defined the upper limit, and did not define the lower limit. As the danger of deflation was not completely negligible in 2001-2003, this may have also contributed to the clarification of the quantitative definition of price stability.

713 ECB, The outcome of ECB's evaluation of its monetary policy strategy. *Monthly Bulletin*, June 2003. https://www.ecb.europa.eu/pub/pdf/mobu/mb200306en.pdf?46029e553855eeb9a82c96669626eec1

714 The consumer basket of the individual Member States is defined on the basis of the relative weight of various product types – e.g. energy and food prices, industrial products and market services price index – in consumption.

715 See: ECB, Harmonised indices of consumer prices, breakdown by purpose of consumption, last release: 17 July 2014. https://www.ecb.europa.eu/stats/prices/hicp/ html/hicp_coicop_inw_ 000000. 4.U2W.en.html.

3 Transmission mechanism of monetary policy in the Euro area

3.1 Transmission mechanism: the impact of monetary policy on inflation and output

Monetary policy affects the economy via multiple channels (Chart 2). These channels together are called the monetary transmission mechanism.[716] The transmission mechanism can be divided into two main phases. In phase one, the instruments directly influenced by the central bank have an impact on the money, capital market yields and the liquidity situation. In phase two, these monetary and financial changes influence the spending and saving decisions of businesses and households. In responce to the changes in demand, the players who represent the demand side of the economy change their output and prices and thus determine the development of inflation and growth. The impacts of the monetary policy on the real economy are basically influenced by the so-called nominal rigidities (e.g. wages are not flexible downwards) and imperfections of price development occurring for other reasons. Prices respond to the changes in monetary conditions partially and with a delay. Pricing behaviour is primarily influenced by expectations regarding inflation, but competition, official price regulations and tax changes, as well as the features of collective wage agreements also play a role.

3.2 Operating principles of monetary policy

Because of the delays and imperfections in the monetary transmission mechanism, the ECB defined five key principles for its monetary policy:[717]

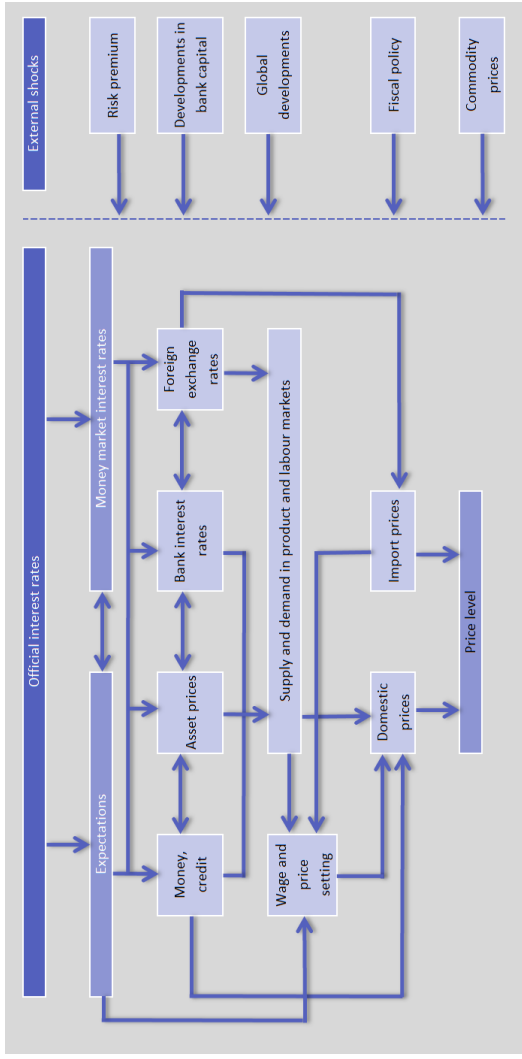
(1) Ensure well-functioning money markets: Money markets play a key role in the operation of the interest rate channel. In the case of poorly-operating money markets, central bank decisions reach money markets slowly and in a cumbersome way, and this weakens the effects of monetary policy on price stability.

(2) Pursue forward-looking and preventive monetary policy: As decisions made in the present are only able to influence the development of the price level with a certain delay, monetary policy has to consider what decisions are required

716 ECB: Monetary Policy Transmission in the Euro Area, a Decade After the Introduction of the Euro. Monthly Bulletin. May 2010 European Central Bank. https://www.ecb.europa.eu/pub/pdf/other/mb201005en_pp85-98en.pdf?8a8ee1cdd17680cc37476dc06fdff531.

717 The description follows Mihálovics Zsolt and Szabó Dániel's training material (2014) titled Monetary policy strategy and instruments of the European Central Bank.

Chart 2: Schematic diagram of transmission mechanism.[718]



718 See: The Monetary Policy of the ECB 2011, p. 59.

in the present to ensure price stability in the future. In this sense, monetary policy should be forward-looking and preventive.

(3) Focus on medium term: Transmission delays make it impossible for the monetary policy to offset the impacts of unexpected shocks on the price level on the short term, therefore monetary policy should concentrate on the medium term, so that its decisions could help avoid effects strengthening the cyclical nature of real economy.(4) Anchor inflation expectations: The efficiency of monetary policy is greatly influenced by the extent it is able to tie inflation expectations to its inflation objective. Therefore the central bank has to declare its inflation objective, as well as the monetary policy required for the achievement of the objective, i.e. it has to communicate its decisions to market players in a transparent way.

(5) Rely on a wide range of information: monetary policy decisions should rely on the widest possible range of relevant information.

4 Implementation of monetary policy decisions[719]

In the monetary policy transmission, it is usually the formulation of short-term interest rates that plays the key role. By formulating the main interest rates, the monetary policy influences the level of short-term nominal interest rates in the economy, which – through the various real economy channels – influence the spending and saving decisions of households and businesses, the monetary as well as financial processes and ultimately the price level.

The central bank influences monetary conditions by changing the main interest rates and the money market liquidity situation. The central bank influences money market interest rates not only through the changing of the liquidity situation, but indicates its intention to change the monetary policy directly, too, by modifying the main interest rates. With the monetary policy operations, the central bank ensures the proper operation of money markets. This is facilitated by regular refinancing and other operations extended to credit institutions, which allow them to manage their temporary liquidity surplus/deficit.

4.1 Review of the operating framework of the Eurosystem

The elements of the set of monetary policy instruments can be divided into three main groups. These groups are open market operations, central bank standing fa-

719 The description follows Mihálovics Zsolt and Szabó Dániel's MNB training material (2014) titled Monetary policy strategy and instruments of the European Central Bank.

cilities, and credit institutions holding mandatory reserves on accounts with the Eurosystem.

With the open market operations, the interbank rates are kept close to the main interest rate, within the interest rate corridor. The lower and the upper limits of the interest rate corridor are provided by the interest rate of the standing facility (o/n loan and deposit).

4.1.1 Open market operations

Open market operations play an important role in the monetary policy of the Eurosystem, in the steering of interest rates, in managing the liquidity situation in the market, and in signalling the stance of monetary policy. With regard to their aims and regularity, the Eurosystem's open market operations can be divided into four categories: main refinancing operations, longer-term refinancing operations, fine-tuning operations and structural operations. As far as the applied instruments are concerned, reverse transactions[720] are the most important type of open market instruments of the Eurosystem, and they can be applied in all four of the above operation categories, while ECB debt certificates may be used in operations to reduce structural surplus.

4.1.1.1 Main refinancing operations (MRO)

Main refinancing operations are the most important open market operations carried out by the Eurosystem, and they play a key role in steering the interest rates, managing the liquidity situation of the market and signalling the stance of monetary policy. These are regular liquidity-providing reverse transactions with a weekly frequency and a maturity of normally one week.[721] In order to make sure that the Eurosystem is protected from financial risks, lending is always against proper collateral.

Before the crisis, MRO operations made up the vast majority of liquidity offered to the banking system, but during the crisis they lost their importance to some extent, as the banks tried to get liquidity with longer and longer terms, so they preferred longer-term refinancing operations.

720 Reverse transactions mean ‘repo’ operations. In these operations, the Eurosystem sells or purchases acceptable collateral under repurchase or repo agreements, or performs lending against a collateral made of acceptable collateral items. Reverse transactions are primarily used for main refinancing operations and longer-term refinancing operations, but they can be applied for structural and fine-tuning operations, too.

721 Before March 2004, the term of MROs was 2 weeks.

4.1.1.2 Longer-term refinancing operations (LTRO)

The Eurosystem also performs regular refinancing operations. Before the crisis, their term was basically three months, therefore they offered additional and longer-term refinancing for the financial sector. In the performance of longer-term refinancing operations, the Eurosystem does not, as a rule, intend to send signals to the market, and therefore normally acts as a rate taker.

Therefore – before October 2008 – the longer-term refinancing operations were carried out in the form of tenders of variable interest rate, and from time to time the ECB indicated the expected transaction volume of subsequent tenders. Under exceptional conditions, the Eurosytem may perform longer-term refinancing operations under tenders of fixed rate, too. For example, 3-year LTROs were carried out at fixed interest rate in 2012, and others with average MRO interest rate during the term of the LTRO.

Before the crisis, the ECB carried out LTRO operations with terms of only 3 months, and that made up merely 20 per cent of the liquidity offered to the whole banking system. When financing channels were shrinking as a result of the global financial crisis and the euro loan crisis, the ECB increased the terms of LTROs. First, in March 2008, to 6 months, then LTROs of 12 and 36 months were carried out. As of the end of 2011, the vast majority of the liquidity available in the system since the start of the 3-year LTRO operation was provided by the LTROs.

4.1.1.3 Fine tuning operations (FTO)

Fine-tuning operations (FTO) are executed on an ad-hoc basis with the aim of managing the liquidity situation in the market and steering interest rates. The purpose of the fine-tuning deposit or loan tenders is to smooth the effects on interest rates caused by unexpected liquidity fluctuations. Neither the frequency, nor the term of the operations is standardised, they are usually carried out as quick tenders. The ECB had been offering liquidity to the banking system without any limitations since March 2008, but these operations at the end of the reserve period did not serve their original purpose, only increased the volatility of interbank rates at the end of the reserve period.[722] Therefore the FTO operations at the end of the reserve period were stopped in December 2011.

Among the ECB fine-tuning operations, the one-week deposit tender needs to be mentioned. This is used to withdraw the surplus liquidity that gets into the banking system under the Securities Market Programme (SMP).

722 ECB, The eurosystem's experience with fine-tuning operations at the end of the reserve maintenance period (2006), *ECB Monthly Bulletin*, November 2006. https://www.ecb.europa.eu/pub/pdf/other/pp83-91_mb200611en.pdf.

The third important application of fine-tuning operations is the FX swap tender (foreign currency swap deal). This was actually used after the outbreak of the global financial crisis. In September 2008, responding to the significant global demand for the dollar, the Fed signed swap agreements with the big central banks, including the ECB. Under the swap agreement, the Fed extended dollar liquidity to the ECB under a euro/dollar FX swap deal, which was transferred by the ECB to the banks of the Eurosytem with terms of 1 or 3 months. During the crisis, there was a great demand for this operation on several occasions, and this was also obvious from the more expensive dollar liquidity.

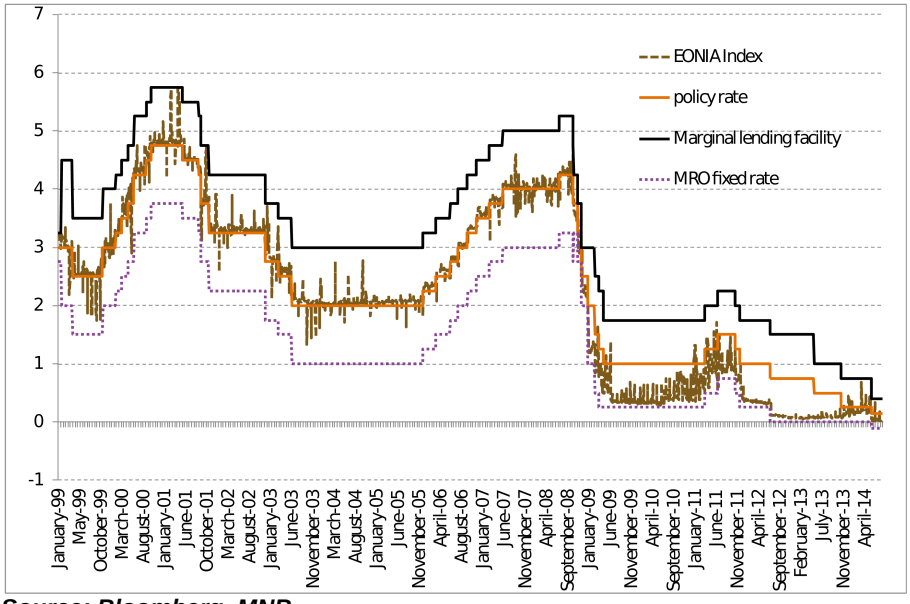
4.1.1.4 Structural refinancing operations

In addition to reverse transactions, the transformation of the structure of the money market liquidity is served by outright transactions and the issuance of debt certificates, too.

4.1.2 Central bank standing facilities

In the Eurosystem, two standing facilities are available. Standing facilities are aimed at providing and absorbing overnight (O/N) liquidity, signal the general stance of monetary policy and bound overnight market interest rates, which can fluctuate within the interest corridor, between the rates of overnight deposit and loan standing facilities. Therefore the decision-making body of the ECB, the Governing Council moves the interest corridor to limit the values between which the interbank rates may fluctuate.

Chart 3: The interest rate corridor: Development of the steering ECB interest rates and the EONIA



Source: Bloomberg, MNB

Within the framework of the marginal lending facility the credit institutions may receive from the national central banks, against eligible collaterals, overnight (O/N) liquidity in so far as they have sufficient collateral assets.

Within the framework of the deposit facility the credit institutions may place overnight deposits with the national central banks of the Eurosystem. Under normal circumstances the clients may avail themselves of the deposit facility without deposit limits or other restrictions.

***Table 2: Monetary policy operations of the Eurosystem*[723]**

Eurosystem monetary policy operations					
Monetary policy operations	Transaction type		Maturity	Frequency	Procedure
	Liquidity-providing	Liquidity-absorbing			
Open market operations					
Main refinancing operations	Reverse transactions	-	1 week	Weekly	Tenders
Longer-term refinaicng operations	Reverse transactions	-	3 months	Monthly	Tenders
Fine-tuning operations	Reverse transactions	Reverse transactions	Non-standardised	Non-regular	Quick tenders
	FX swaps	Collection of fixed-term deposits			Bilateral procedures
		FX swaps			
Structural operation	Reverse transaction	Issuance of ECB bonds	Standardised / Non-standardised	Regular and non-regular	Tenders
	Outright purchase	Outright sales	-	Non-regular	Bilateral procedures
Central bank standing facilities					
Lending facility	Reverse transactions	-	Overnight	At the discretion of counterparties	
Deposit facility	-	Deposits	Overnight	At the discretion of counterparties	

4.1.3 Minimum reserve requirement

As a third instrument, the Eurosystem obliges the credit institutions to place a minimum reserve on their account held with their national central bank. The purpose of the minimum reserve requirement system is to stabilise the money market interest rates. Each credit institution must hold a certain percentage of part of its own customer deposits (and certain other bank liabilities) on the deposit account kept at its national central bank during the reserve maintenance period of

723 See: ECB, Guideline of the European Central Bank on monetary policy instruments and procedures of the Eurosystem. 20 September 2011. http://www.ecb.europa.eu/ecb/legal/pdf/02011o0014-20130103-hu.pdf.

approximately one month. In order to stabilise the interest rates, the minimum reserve system permits the credit institutions to comply with their reserve requirements on the average of the period.

Such compliance on the average of the reserve maintenance period means that in theory the credit institutions may benefit from lending in the money markets and simultaneously underperforming the reserve requirements on a time proportion basis as long as their lending rates are higher than those expected in the period left from the reserve maintenance period. Otherwise, i.e. when the money market interest rates are temporarily low, the credit institutions may borrow in the interbank market, which they may use for the settlement of their minimum reserve obligations in advance. The purpose of this type of 'arbitrage' opportunity is to ensure that the money market interest rates remain relatively balanced within the interest period, thus the market forces stabilise the interbank overnight rates and there is no need for the central bank's frequent intervention in the money markets.

This averaging provision helps smooth the interbank rates within the reserve maintenance period, but at the end of the period the banks are no longer able to carry forward their liquidity surplus or deficit. This partially explains the surge of the interbank rates experienced occasionally at the end of the reserve maintenance period[724] (EONIA[725]).

Thus the minimum reserve requirement system helps stabilise the interbank rates, and it also has an important role in the increase of the structural liquidity shortage in the banking system. The fact that the credit institutions place required reserves with the national central banks increases the structural demand for the central bank credit facility, which makes it easier for the ECB to shape the money market interest rates via the regular, liquidity allotment tenders.

The rate of the reserve requirement is determined as a percentage of the reserve base, and it is referred to as required reserve ratio. Initially this was 2 per cent and then, at the end of 2011, it was reduced to 1 per cent. The reserve base includes balance sheet components such as the deposits and debt securities with maturity less than 2 years.

The credit institution may reduce their required reserve by a so-called lump sum of maximum EUR 100,000. The purpose of this is to reduce the administrative costs related to the management of the extremely low reserve requirement.

724 ECB managed the liquidity situation at the end of the reserve maintenance period by fine-tuning operations (until the end of 2011, when it terminated those as they no longer reduced but rather increased the volatility of the interbank rates at the end of the reserve maintenance period.)

725 The EONIA (Euro Overnight Index Average) is the weighted average of the overnight unsecured lending transactions initiated in the interbank market by the banks of the euro area member states. Szilárd Erhart & András Kollarik, *The launch of HUFONIA and the related international experience of overnight indexed swap (OIS) markets*, April 2011, www.mnb.hu/Root/Dokumentumtar/MNB/Kiadvanyok/mnbhu_mnbszemle/mnbhu_msz_201104/erhart-kollarik.pdf.

If the product of the [reserve base x reserve ratio] is at least EUR 100,000, the lump sum discount is EUR 100,000, while if the amount is less than that then it is the product of the [reserve base and the reserve ratio].

4.2 Measures applied by the ECB in the wake of the crisis[726]

During the global financial crisis that commenced in 2007, followed by the debt crisis in 2010, the real economic performance declined and disturbances appeared in the operation of the financial intermediary system and the money markets. The willingness to lend and to take risks lessened, a number of sub-markets became inoperable, and the government bond rates of certain member states of the euro area significantly increased. The European Central Bank (ECB) – similarly to the other large central banks – responded by fast interest rate cuts; however one of the key elements of the responses to the crisis was the transformation of the tools and mainly the introduction of unconventional instruments, which helped stabilise the financial markets.[727]

The ECB, similarly to the other large central banks, responded by fast interest rate cuts; however one of the key elements of the responses to the crisis was the transformation of the tools and mainly the introduction of unconventional instruments, which helped stabilise the financial markets. The Governing Council of the ECB started to introduce the unconventional instruments going beyond the interest policy (i.e. the so-called enhanced credit support), targeting the banks.[728]

4.2.1 Liquidity allotment assets

The liquidity allotment assets essentially include the loans and refinancing schemes provided to the financial intermediary system. This is the most widely used group of measures, the objective of which is to stabilise the key financial

726 Below we present the new instruments and their impacts on the various money and capital markets based on J. Krekó et al., 'International experiences and domestic opportunities of applying unconventional monetary policy tools', *MNB Occasional Papers*, 2012, www.mnb.hu/Root/Dokumentumtar/MNB/Kiadvanyok/mnbhu_mnbtanulmanyok/mnbhu-mt100/MT100.pdf, and Thimann et al., *The ECB's monetary policy response to the crisis*, European Central Bank, February 2013. https://editorialexpress.com/cgibin/conference/download.cgi?db_name=MMF2012&paper_id=191.

727 Krekó et al., 2012; Kristóf Lehmann, Róbert Mátrai & György Pulai, 'Measures taken by the Federal Reserve System and the European Central Bank during the crisis', *MNB Bulletin*, October 2013. http://www.mnb.hu/Root/Dokumentumtar/MNB/Kiadvanyok/mnbhu_mnbszemle/mnbhu_msz_20131030/lehmann.pdf.

728 See: ECB, 'The ECB's response to the financial crisis', *ECB Monthly Bulletin*, October 2010 https://www.ecb.europa.eu/pub/pdf/other/art1_mb201010en_pp59-74en.pdf. ECB, 'The ECB's non-standard measure – impact and phasing-out', *ECB Monthly Bulletin*, July 2011. https://www.ecb.europa.eu/pub/pdf/other/art1_mb201107en_pp5569en.pdf?300d40b2029025b0e92608ffdc1ba983.

markets, reinstate the transmission and to strengthen the banks' lending capacity via mitigating the banks' liquidity strains.

In the market situation following the bankruptcy of Lehman, on 8 October 2008 – as a first step – the Governing Council opted for the unlimited standing facility of the Main Refinancing Operations (MRO) tenders under the base rate. From that time on the banks of the Eurosystem could avail themselves of central bank liquidity in unlimited amounts, as long as they could offer adequate collateral.

However, the unlimited standing facility helped only those banks that had eligible collaterals of sufficient volume and quality to receive collateralised loans from the ECB. In order to enable the banks to refinance the larger part of their assets and not to be dependent on the frozen interbank market, the ECB widened the range of the eligible collaterals in several rounds and also reduced the credit rating threshold. The risks of the more lenient criteria were offset by the more thorough analysis of the counterparty risks and the stricter risk management processes.

The prolongation of the maturity of the liquidity allotment operations also served the easing of the banks' liquidity strains. Prior to the crisis the ECB pursued long-term refinancing operations (LTROs) only with 3-month maturity. Since the financing channels narrowed down for some of the banks, the ECB increased the maturity of the LTROs, first to 6 months in March 2008, and later on also to 12 and 36 months. The unfolding of the debt crisis in the euro area necessitated a response that was capable of ensuring the banking system's liquidity even in the medium term. In December 2011 it came to LTROs of 3-year maturity under unlimited standing facility, after which a major part of the liquidity that was present in the system was provided by the LTROs (Chart 2).[729] With the 3-year LTRO the ECB managed to mitigate the negative impact of the sovereign risks on the banking system and prevented the credit crunch; however, it managed to reduce the government bond yields of the peripheral countries only temporarily.[730] Later on, with the significant improvement of the situation of financial markets in the euro area, the banks started to repay the 3-year LTRO loans faster than expected.

Within the framework of the FX-swap tenders the Federal Reserve System provided the ECB with dollar liquidity in the form of euro/dollar FX-swap trans-

729 At this time the decision to reduce to reserve requirement to 1 per cent and to expand the range of eligible collaterals was made.

730 The ECB referred to the liquidity allotment measures – together with the purchase of collateralised bonds and the FX-swap tender — as 'enhanced credit support'. As a result of the programme the balance sheet total of the ECB, as well as the volume of the liquidity available for the credit institutions of the euro area considerably increased, while the drying up of the interbank markets jeopardised the stability of the banking system.

actions, which the ECB passed on to the banks of the Eurosystem for 1- and 3-month maturity also in the framework of FX-swap operations. The world's large central banks started the regular FX-swap tenders on 18 September 2008 in response to the dollar liquidity demands that soared as a result of the bankruptcy of Lehman, in the course of which certain central banks (the Canadian, British, Japanese, Swiss central bank and the ECB) provided the banks with dollar liquidity, with the help of Fed, against local currency.[731]

4.2.2 Covered Bond Purchase Programme (CBPP)

The Governing Council of the ECB decided on the launch of the Covered Bond Purchase Programme, CBPP[732] at its meeting held on 7 May 2009. The covered bond market is one of the most active bond market segments of the euro area. Covered bonds are long-term debt securities used by the banks for the refinancing of their long-term, typically housing, loans. The purpose of the programme was to mitigate the covered bond market disturbances, reduce the spreads, boost liquidity and through that to encourage primary issuance. With the primary and secondary market purchases the ECB wanted to support the liquidity of specifically this sub-market, and to ease the financing conditions of the credit institutions and corporations, as well as to encourage the credit institutions to maintain or even expand, if possible, their lending.

Within the framework of the CBPP ECB purchased covered bonds in the total value of EUR 60 billion between July 2009 and June 2010. Once the programme was announced the covered bond spreads immediately started to narrow, the issuing activity increased and the market liquidity came close to the pre-crisis levels. On 6 October 2011 the ECB Announced the launch of the second programme (CBPP2), in the framework of which it planned to purchase covered bonds in the primary and secondary markets in the amount of EUR 40 billion between November 2011 and October 2012. The covered bond spreads started to decrease more significantly only at the end of 2011 – beginning of 2012, which was also contributed to by the impact of the 3-year LTRO tenders. The decrease of the spreads did not prove to be lasting; by June 2012 the spreads once again reached the levels before the announcement of the programme.

731 The ECB also concluded swap agreement with the Chinese central bank. The agreement is for three years and its upper limit is CNY 350 billion (when the yuan is provided by the ECB) and CNY 45 billion (when the euro is provided by the Chinese central bank). The ultimate goal was to ensure the smooth flow of the increased bilateral trade.

732 Covered bonds are derivative debt securities secured by the cash flow from mortgage loans or loans granted to the public sector. Upon the potential bankruptcy of the issuing credit institution these loans represent the collateral and they guarantee the repayment of the bonds.

4.2.3 Securities Markets Programme (SMP)

In the first half of 2010 the debt crisis of the euro area commenced by the fact that the market started to discount into an approaching bankruptcy of Greece. Considering the utmost importance of the government securities market in the private sector lending, as well as its role in the banks' balance sheets and in the liquidity operations, all this considerably deteriorated the transmission of the steering interest rates to the real economy.

In order to mitigate the functional disorders of the bond market and to reinstate the transmission, the ECB launched its securities market programme (SMP), in the framework of which the ECB purchased primarily the bonds of the peripheral countries. The ECB wanted to reduce the sovereign risk spread, which in the long run was deemed excessive and not justified by the fundaments, and thereby to avoid the self-fulfilling sovereign crisis in the case of the countries hit by the debt crisis.[733] After its launch it somewhat stabilised the markets, generating an immediate and material fall in the government bond yields. However, the central bank government bond purchase alone was unable to reinstate the market confidence in the peripheral countries of the Euro area, and the ECB could not successfully reduce the long-term yields of the peripheral countries.

4.2.4 Outright monetary securities sales-purchase transaction programme (OMT)

The purpose of the Outright Monetary Transactions (OMT) programme announced in August 2012 was to manage the debt crisis. Fearing the breakup of the monetary union the government bond yields of the euro area's peripheral countries soared; the previous measures (e.g. SMP) were no longer able to reduce the spreads as necessary. As part of the OMT the ECB committed to purchasing the shorter maturity (maximum 3 years) government bonds of the given country in the secondary market in unlimited volume, provided that the country participates in an EU/IMF programme and implements fiscal adjustment. These guarantees (purchase only in the secondary markets, only shorter term bonds, not necessarily held until maturity and the purchase is conditional upon certain criteria) were integrated with the aim to prove that the purpose of creating the instrument was not to finance the budgets. OMT, as opposed to SMP, has no upper limit, but it is tied to strict structural conditions.

733 The soaring yields attributable to the high outstanding debt alone materially deteriorate the sustainability of the government debt, which leads to the continued increase of the expected return and becomes a self-reinforcing process.

The programme was contested in legal terms as well; according to the judgement of the German Court of Constitution it is not compatible with the German constitution. However, as they believe that the European law prevails over the German constitution, the opinion of the European Court of Justice may be decisive. According to the expert opinion prepared of the European Court of Justice its application does not conflict with the European law.

4.2.5 Negative deposit rates[734]

After having contemplating the possibility of negative deposit rates for several years, on 5 June 2014 the ECB introduced it in accordance with the market expectations, when it decided on a 10 basis point interest rate cut and reduced all of its steering interest rate by this magnitude. Thus the MRO rate fell from 25 to 15 basis points, the deposit standing facility rate from 0 to -10 basis points, while the overnight collateralised loan interest rate was reduced from 75 to 40 basis points. On 5 September this was followed by an additional cut of 10 basis points, pushing the deposit standing facility rate down to -20 basis points.

4.2.6 TLTRO (Targeted Long Term Refinancing Operation)

The ECB's objective with the targeted LTRO, announced on 5 June 2014, was to stimulate the private sector lending and the real economy, in a way that ensures that the banks use it, as opposed to the 3-year LTROs, not for the purchase of government bonds. Although, even if they do so, they do not have to fear material sanctions other than that they have to repay their 4-year loans after 2 years. On the other hand, the periphery government bond yields have already fallen to a low level and no longer hold out the promise of the same potential profit as at the turn of 2011/2012 when the 3-year LTRO was introduced, or even anything close to it.

4.2.7 Asset-backed Corporate Securities Purchase Programme (ABSPP)

The ECB expressed several times in 2013 that it would like to stimulate the securitised loan market (the asset-backed securities (ABS) market) thereby promoting the financing of the small- and medium-sized enterprise (SME) sector. The Asset-Backed Securities Purchase Programme (ABSPP), together with the third covered bond purchase programme, form part of the asset purchase programme announced in autumn 2014. The ABSPP commenced in the last quarter of 2014 by selecting the partners providing securities services. The guiding prin-

734 Nielsen et al., *Implications of negative rates – the Danish experiences*. Danske Bank Research. 27 May 2014. http://danskeresearch.danskebank.com/link/ResearchECB4230514/$file/Research_ECB_4_230514.pdf.

ciple is that those securities purchases are governed by the current ECB regulations, which specify the range of eligible collaterals for central bank operations and the related risk management. The measures are expected to contribute to bringing inflation closer to the central bank's inflation target.

4.2.8 Asset purchase programme extended by the purchase of government bonds

In January 2015 ECB Governor Mario Draghi outlined the essence and background of the extended securities purchase programme. In the framework of this the ECB will purchase private and public securities in the secondary market in the amount of HUF 60 billion monthly, between March 2015 and September 2016 – according to the current plans – until the inflation expectations permanently shift towards the target. Thus, in theory, the period of the programme is not fixed, but rather depends on the evolution of inflation expectations. The volume of the programme is around EUR 1,000 billion, but it also includes the former unconventional (ABS, CB) asset purchases. In terms of volume this is roughly in line with objective, mentioned several times, for the ECB's balance sheet to reach at least EUR 3,000 billion instead of the current EUR 2,000 billion.

80 per cent of the risks related to the purchased securities are borne by the national central banks, while the remaining 20 per cent are borne by the ECB, as reported by ECB. In the case of credit events the first risks are borne by the national banks, which usually do have the necessary funds for this. The eligible collaterals include only investment grade securities with rating applied to the eligible collaterals for central bank operations. Securities with lower rating may be accepted only subject to special conditions, e.g. if the issuer country implements an adjustment programme approved by IMF-EU-ECB. In addition, in order to mitigate the risks and market impacts, issuer limits (33 per cent) and series limits (25 per cent) will be also applied.

Distributive Policies of the Union

COMMON AGRICULTURAL POLICY

Marcel Szabó and Balázs Tárnok

1 Common agricultural policy in the European Union

Agriculture and fisheries (with the exception of marine biological resources) belong to the European Union's shared jurisdiction. Union regulations provide for and implement common policies with regards to agriculture and fishing. The common agricultural policy is one of the EU's redistributive policies.

The reason behind making agricultural policies common Union policies is that in order to reach their main goals, namely, to boost agricultural production, to enable continuous affordable produce supplies and to ensure the decent living standards of agricultural workers, it is necessary to financially support agriculture and regional development, which is easier to accomplish with shared policies. The existence of a common policy ensures that member states do not follow different agricultural agendas, furthermore, it enables the same rules to be applied in the common market, with the purpose of avoiding significant market fluctuations.[735]

With its 28 Member States, the EU has some 12 million farmers with a further 4 million people working in the food sector. The farming and food sectors together provide 7% of all jobs and generate 6% of European gross domestic product.[736]

2 The history of agricultural policy

From the 1950s, thanks to the common agricultural policy and the widespread use of more developed agricultural production technologies and instruments, the volume and quality of agricultural production started to extremely intensively develop in the area of all Member States of the European integration. Accordingly, a growing number of agricultural producers were able to and wished to benefit from the advantages of the intervention prices provided within the framework of the common organisation of agricultural markets.

With the development of mass production and the accumulation of product stocks, a significant part of the products became unmarketable at the agricultural

735 Agriculture – The European Union Explained, Publications Office of the European Union, Luxembourg 2014, http://europa.eu/pol/pdf/flipbook/en/agriculture_en.pdf, p. 6.

736 Ibid., p. 4.

market, so the integration was forced to comply with the buying up policy previously promised as an obligation.[737] The threshold price guaranteed in the common agricultural policy of the European Community was still favourable enough to make producers interested in continuing production. This produced mountains of butter and lakes of milk at the refrigerator storehouses of the European Union. The huge volume of unsellable products caused immense tension. The common agricultural policy generated significant tension at the international level as well since, through the growing independence from the world market prices and the subsidised export prices it contributed to the distortion of the global agricultural market. This process led to a budgetary crisis of the European Community in the 1980s. (For more details, see the chapter concerning the European Union's regional policies.)

In the mid-1960s Sicco Mansholt, Agricultural Commissioner of the Community intended to make the agricultural policy of the EU sustainable in the long run by promising further help and support to farmers producing in great volumes, while shutting down small farms that seemed unable to survive on their own. For farmers unable to pursue profitable agricultural production on their own, he wished to ensure the opportunities of early retirement and retraining. The Mansholt Plan triggered a general outcry among agricultural producers and entrepreneurs in Europe so it was discarded rather soon.

The fundamental reform of the agricultural policy of the European integration was implemented by carrying out the programme worked out by the Irish Ray McSharry in 1992. As a result, the buy-up prices laid down in the organisations of agricultural markets were lowered and there was an attempt to compensate for the missing incomes for agricultural producers by direct income subsidies. The underlying philosophy of the McSharry Plan is attempting to help small-scale producer agricultural entrepreneurs. Since 1992, the agricultural policy has aimed not only to preserve the high standard of European agricultural production but also to sustain the traditional lifestyle and the cultural landscape influenced by agriculture, which also help preserve the fundamental European social structures. From the mid-50s to 1992, the ratio of agricultural producers in society fell from 20% to 5% and at the same time the preservation of the rural lifestyle and cultural landscape plays an important role in the value system of the whole society and the European integration. The reform encouraged producers

737 While the *intervention price* is a price for which the European Union guarantees to buy the product from the producer, the *threshold price* is a uniform wholesale price established considering the most adversely producing region in the area of the Union. The significance of the threshold price is that it determines the price for which agricultural products may be imported to the area of the European Union from third countries. If agricultural products are imported to the area of the EU from outside the EU, the EU is entitled to imposing agricultural levies, i.e. order that the importer pay the difference between the import price and threshold price to the budget of the European Union.

to switch from intensive production methods and from increasing yields to more extensive production methods and reduce the ratio of lands involved in agricultural production, in order to achieve which agricultural producers could get direct subsidies for setting aside arable land.[738]

Within the framework of Agenda 2000 programme[739] institutional buy-up prices continued to be reduced. The common agricultural policy underwent new significant changes as a result of the reform package passed in 2003. The essence of the reform was providing uniform, area-based payments to agricultural producers, which thus produced income for agricultural producers and entrepreneurs irrespective of the agricultural production. Producers were obliged to keep cultivated areas in good agricultural and environmental condition, whereby a legal basis was created for the European Union to attempt to resist the liberalisation pressure of the world market in the long run by raising quality standards to an extent that producers outside the EU would probably be unable to meet.

In 2007, by setting up the multi-annual financial framework, the financial framework funding the common agricultural policy was transformed. The European Agricultural Guidance and Guarantee Fund (EAGGF) existing since the common agricultural policy was established, was replaced by two new common funds to finance the respective pillars of the common agricultural policy: the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Rural Development Fund (EARDF).[740] The aim of the separation was to ensure that rural development be given a more marked and independent image and control. The 2007–2013 multi-annual financial framework reduced agricultural expenditure by 9% compared to previous years, while rural development subsidies significantly grew.[741] In the budgetary period spanning from 2014 to 2020, the amount of 373.7 billion euros is allocated to common agricultural policies. This accounts for 38.9 % of the 28 member states' predicted financial commitment.

Europe's agriculture through time:

- *1957*: The Treaty of Rome creates the European Economic Community.
- *1962*: The common agricultural policy is born.
- *1984*: The CAP falls victim to its own success. Farms become so productive that they grow more food than needed.

738 The reform brought about significant results in the grain sector primarily. As a result of the set-aside and fallow program, grain production in the EU became more competitive.

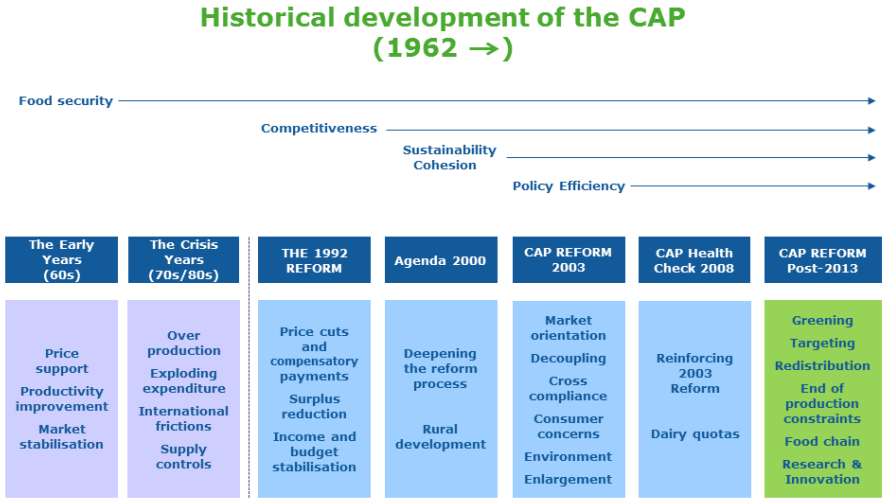
739 It was on 16 July 1997 that the European Commission passed the Agenda 2000 programme package, including the major tasks and challenges of the EU for the coming years as well as the related draft budget. With reference to the CAP it was primarily the WTO obligations (reducing agricultural and export subsidies) and the challenges of the eastward enlargement of the EU that had significance.

740 Council Reg. 1290/2005/EC on the financing of the common agricultural policy provides for setting up the two funds, OJ L 209, 11.8.2005.

741 The EU's budget for rural development for the period of 2014–2020 and with reference to the 28 Member States is EUR 95 billion altogether.

- *1992*: The CAP shifts from market support to producer support. Price support is scaled down, and replaced with direct aid payments to farmers.
- *2003*: The CAP provides income support. A new CAP reform cuts the link between subsidies and production. Farmers now receive an income support payment, on condition that they look after the farmland and fulfil environmental, animal welfare and food safety standards.
- *2013*: The CAP is reformed to strengthen the competitiveness of the sector, promote sustainable farming and innovation and support jobs and growth in rural areas.

Historical development of the CAP[742]



3 Objectives of the Common Agricultural Policy

To establish a common agricultural policy was among the objectives of the European integration since the foundation of the European Economic Community, i.e. since 1957.[743] The objectives for which the member states of the European

742 http://ec.europa.eu/agriculture/cap-history/cap-history-large_en.png.

743 The historically developed comparative disadvantage because of which the European agriculture based on family farms needed protection from the overseas competitors active in large-scale agriculture had a major role in the creation of the Common Agricultural Policy.

integration set out to establish a common agricultural policy were made clear in Article 39 of the Treaty of Rome. Article 39 determines the objectives of the common agricultural policy in five points:

1. In the mid-1950s, the most important target of agricultural policy was still *to increase the volume of agricultural production*. It was in the middle of the fifties that the means of production and chemicals appeared by which, following the high technology attainable at the time, agricultural production could be rapidly and to a great extent increased.

2. After World War II, a significant part of the population even in Western Europe suffered from starvation or malnutrition as a result of the post-war adversities, so in 1957 it was reasonable that *ensuring a fair standard of living for the population* was formulated as an objective to be achieved by the founding states of the European Union.

3. *To stabilise markets* appeared as the third objective of the agricultural policy. While in the case of industrial production the lack of solvent demand on the consumer side in the product concerned is the major barrier to production, agricultural production is prone to weather adversities. Drought or extreme weather conditions may result in very limited agricultural yields and send product prices skyrocketing. Farmers who are able to harvest despite the extreme weather conditions may profit at the markets, while those who have no market access for years because the vast majority of their yields gets destroyed by frost or otherwise due to unfavourable agricultural conditions, may not be able to continue agricultural production for the lack of sufficient funds, running short of the means that would make continuing agricultural production reasonable. One may think that the ideal environmental and natural conditions, abundant sunshine and rain at the right time may prevent problems for agricultural producers but this is not so in reality, either, since overproduction may reduce prices to such an extent that producers are unable to sell their produce even for the price they were produced. Thus, by stabilising markets, the European integration aims to enable farmers suffering from drought, hail and natural disasters for decades to stay on the market and continue agricultural production nevertheless. Even if mass agricultural production would weaken market prices, agricultural producers should get sufficient support from central funds to prevent loss-making sales.

4. *To assure the availability of supplies*: the implementation of this principle presupposes a balance in the availability of European agricultural products, which are free to distribute and sell in the whole area of the European integration, as a result of which no citizen in the European integration suffers from a lack of access to the range of good quality and decently priced products whose production is enabled by the agricultural policy.

5. *Acceptable prices* are also among the fundamental objectives of the common agricultural policy since the agricultural policy must serve not only the pro-

ducers' but also the consumers' interests and it must be ensured that the high-standard products produced as a result of the agricultural policy can be purchased by all citizens of the European Union at prices that constitute no excessive burden on them relative to their situation.

4 Fundamental Principles of the Common Agricultural Policy

The Treaty of Rome laid down the basic principles of the common agricultural policy, which can be summarised as follows[744]:

1. *The principle of market unity* means that any obstacle to the free movement of agricultural products must be removed. What this principle most importantly means is thus that the founding members of the European integration wished to mutually open their own markets to agricultural products. The implementation of the principle of market unity certainly required setting common competition rules as well as market organisation rules for the EU agricultural policy. In the European integration, the single market was implemented by creating what are referred to as organisations of agricultural markets.

2. By virtue of the *principle of Community preference* the European integration overtly undertakes in front of the international community to prefer, even in the economic sense, their own products to other agricultural products produced elsewhere in the world. This means that the European integration protects the agricultural market against the markets of the agricultural products of the world economy by various market protection instruments, certainly by customs duties primarily, as well as by other market protection instruments. As is well known, with reference to industrial products the EU is an advocate of the principles of free trade at the international market, and in the area of the common trade policy, which refers to setting uniform rules in the EU with reference to the international trade of and customs tariffs on industrial products, the European integration is clearly a champion of creating free market conditions and removing factors blocking trade. They wished to consistently implement this approach both in the GATT as well as its legal successor currently in force, the WTO. Since the enforcement of the principles of free trade at the world market are among the objectives of the WTO also with reference to agricultural products, the European Union, with their common agricultural policy principles, is in conflict with the rules of international free trade. The principle of Community preference does not refer to the volume of agricultural production exclusively but also to the preservation of the production method based on private farms and intensive cul-

744 The principles were passed at the conference convened in Stresa, Italy, in 1958.

tivation in contrast to large-scale corporate estates with genetically manipulated monoculture plantations, which destroy village community cultures and force the rural agricultural population preserving a special rural culture to move into urban areas and become rootless.[745]

3. *The principle of financial solidarity* means that establishing and maintaining the common agricultural policy has required extraordinary financial instruments of the member states of the European integration.[746] It was in 1962 that the member states of the European integration set up the European Agricultural Guidance and Guarantee Fund,[747] i.e. EAGGF. Member States of the European Union are obliged to support the European Agricultural Guidance and Guarantee Fund by set payments, since it is the operation of this common fund that ensures the financial background of the agricultural policy.

In working out the common agricultural policy and the special methods for its application, account shall be taken of:[748]

a) the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions;
b) the need to effect the appropriate adjustments by degrees;
c) the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole.

5 Legal basis

5.1 Primary law: Articles 38–44 TFEU

Article 38 (1) TFEU
The Union shall define and implement a ***common agriculture and fisheries policy****.*

The European Union defines shared policies regarding agriculture and fisheries, which qualify as redistributive policies. (See the introductory chapter for the reasoning behind a shared policy.)

745 Keeping almost half of the population of the EU in rural areas and keeping agriculture alive are essential means for the survival of rural communities. Agricultural policy currently faces the additional challenges that the life expectancy of people working in agriculture is constantly on the rise, and the field of agriculture is decreasingly attractive for the young population. The EU wishes to promote agricultural careers among the young generation by extensive financial support.

746 One more reason why the financial support for the common agricultural policy has major significance especially for new Member States is that the income of people engaged in agriculture is on the average 40% lower than that of entrepreneurs in other fields.

747 The Guarantee Fund of EAGGF serves for financing the intervention policy; the Guidance Fund, the sectoral structural policy.

748 Art. 39 (2) TFEU.

Article 40 (1) TFEU
In order to attain the objectives set out in Article 39, a common organisation of agricultural markets shall be established.

For the common organisation and regulation of agricultural markets see chapter 6.2.

Article 43 TFEU
*1. The **Commission shall submit proposals** for working out and implementing the common agricultural policy, including the replacement of the national organisations by one of the forms of common organisation provided for in Article 40(1), and for implementing the measures specified in this Title. These proposals shall take account of the interdependence of the agricultural matters mentioned in this Title.*
*2. The European Parliament and the Council, acting in accordance with the **ordinary legislative procedure** and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy.*
*3. The **Council**, on a proposal from the Commission, **shall adopt measures** on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities.*

For the role of specific institutions in the common agricultural policy, see chapter 6.1.

5.2 Secondary law: Regulations (EU) Nos 1303 to 1308/2013

The secondary legislative material on the common agricultural policy of the Union is provided by EU regulations 1303–1308/2013/EU

a. common provisions,
b. on the European Social Fund,
c. on support for rural development,
d. on the financing, management and monitoring of the common agricultural policy,
e. establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy,
f. establishing a common organisation of the markets in agricultural products.

6 Functioning and tools of the CAP

6.1 The role of EU institutions in the CAP

6.1.1 Decision-making – the Council and the European Parliament

The Treaty of Lisbon brought about a considerable change with regard to the agricultural policy. Article 42 and Article 43 (2) of the Treaty on the Functioning of the European Union specify what is referred to as the *ordinary legislative procedure* as the legislative procedure to be used in the common agricultural policy. This produces a significant change as regards the making of the agricultural policy since before the common agricultural policy was adopted by the Council within the framework of a consultation procedure with the Parliament not participating, while since 1 December 2009, the European Commission, the Parliament and the Council have had the opportunity to influence the agricultural policy within the framework of an ordinary legislative procedure.[749]

Agricultural policies are regulated by the Treaty of Lisbon as common policies, which means that both the European Union and its member states can issue legislative acts regarding this policy. However, member states can pursue this scope of authority only to the degree in which the European Union has not enacted its jurisdiction, or has given up on the right to do so.

Regular legislation is not always the standard procedure during decision making. Decisions on fixing prices, levies, subsidies and quantitative restrictions are, however, passed by the *Council exclusively*, based on the Commission's recommendation and without the Parliament involved. Accordingly one can await interesting developments, the more so because several EU Member States relate the agricultural policy of the EU to the informal German-French deal related to the foundation of the European Economic Community, according to which the French asked for support for the French agriculture and French agricultural producers in return for granting access for the German industry to marketing positions in France.[750]

749 The Treaty of Lisbon lists agricultural policy under the shared competence fields, according to which both the European Union and individual Member States may develop legal acts in the area of the common agricultural policy. Member States may, however, exercise this competence only to the extent that the EU has failed to exercise or refrained from exercising its competence.

750 The country that currently benefits most from the European agricultural policy is probably not France any longer but less developed regions that have joined since then, like Greece, Portugal and Spain. Considering this one should not think thus that the status quo related to the agricultural policy of the EU is completely cast into stone.

6.1.2 European Commission

The Commission issues recommendations with regards to the development and enacting of agricultural policies.[751] The market regulations of the Union, and the further rulings needed to accomplish the goals of the common agricultural policy are provided for, through ordinary legislative processes, by the European Parliament and the Council, upon consultation with the European Economic and Social committee.[752]

Article 291 of the Treaty of the Functioning of the European Union stipulates that the European Commission may, for the implementation of EU acts made within the framework of the ordinary legislative procedure as well as in its competence delegated otherwise, make legislation with reference to the common agricultural policy. Since there are numberless detailed rules that must be designed with reference to the common agricultural policy, which in many cases are of a rather technical nature, the legislative competence delegated to the European Commission, restricted and based on authorization, may have significant weight in future and prove an authority for the Commission for legislation comparable to the legislative competence ensured by the comitology.

6.2 Common organisation of agricultural markets and the European market organisation

In order to attain the objectives set out in Article 39, a common organisation of agricultural markets shall be established. This organisation shall take one of the following forms, depending on the product concerned:[753]

(a) common rules on competition;
(b) compulsory coordination of the various national market organisations;
(c) European market organisation.

Article 40 (2) TFEU
The common organisation established in accordance with paragraph 1 may include all measures required to attain the objectives set out in Article 39, in particular

- *regulation of prices,*
- *aids for the production and marketing of the various products,*
- *storage and carryover arrangements and*
- *common machinery for stabilising imports or exports.*

751 Art. 42 (2) TFEU.
752 Art. 42 (1) TFEU.
753 Art. 40 (1) TFEU.

The most important means of organising the European agricultural policy is the common organisation of the markets in agricultural products.[754]

The common organisation of agricultural markets sets the *intervention price*, i.e. the price for which the European Union guarantees to buy the product from the producer. Intervention prices aim to keep the prices of EU agricultural products high, thereby stimulating farmers and agricultural business owners in the EU for production.

The organisation of agricultural markets sets a *threshold price* as well, which is a uniform wholesale price established considering the most adversely producing region in the area of the European Union. The threshold price is always higher than the intervention price and is based, considering producers producing under unfavourable conditions, on the sale price implemented in the region with the most unfavourable conditions. The significance of the threshold price is that it determines the price for which agricultural products may be imported to the area of the European Union from third countries. If agricultural products are imported to the area of the EU from outside the EU, the EU is entitled to imposing agricultural levies, i.e. order that the importer pay the difference between the import price and threshold price to the budget of the European Union.[755]

The organisation of agricultural markets of the EU also includes the *system of export subsidies*. The European Union helps its Member States and producers, certainly under specific, set conditions, to market their agricultural products in other countries of the world with the support of the European Union.[756]

It should be noted here that the European Union does not support, however, that countries viewed as third countries from the point of view of agricultural export to the area of the European Union could promote the access of their products to the EU market to an extent beyond a certain level. The European Union mobilises significant instruments in order to prevent third countries from marketing agricultural products in the EU using considerable state subsidies (See details in the chapter concerning the European Union's common commercial policy.)

754 In Hungary, promulgated in Act XVI of 2003.

755 A decision made at the Uruguay Round of the GATT (1986–1994) obliged the EU to abolish the system of levies. Instead the EU currently applies the system of adjustable, variable tariffs.

756 Export subsidies have become necessary due to the accumulation of surplus products primarily. Since prices at the world market are usually lower than those at the internal market, agricultural products produced in the EU appear at external markets usually at significantly lower prices, so the Union is forced to subsidise the export activity.

6.3 Rural development

In keeping with the Europe 2020 strategy and the general goals of the common agricultural policy, the regional policy of the EU for the period of 2014 to 2020 is aimed at realising three main targets:

- making agriculture more competitive
- ensuring that our society handles natural resources in a sustainable manner and takes the necessary steps towards tackling the problem of climate change
- the viability of rural enterprises and communities needs to be supported through balanced regional development, amongst others through the creation and maintenance of workplaces.[757]

Financing is partly ensured by the European Regional Development Fund (ERDF), partly by member state, regional and private funding.

7 The future of the CAP

7.1 Reforming the CAP

In November 2010 the Commission summarised in a communiqué that in the financial framework for 2014–2020, the following should be considered when designing the community agricultural policy: (i) the requirement of sustainable food production (which means providing safe and sufficient food, especially with regard to global processes), (ii) the requirements of sustainable farming and the fight against climate change (according to which environmental aspects must often be preferred to economic aspects and the right compensation for this must be found), and (iii) the preservation of the diversity of rural regions.

It is an essential element of the concept outlined by the Commission that direct subsidies must continue to have a place in the Community's agricultural policy of the future; according to the Commission, their role is indispensable for sustaining agricultural activity in Europe, and at the same time the conditions of providing these subsidies should be considerably revised. A component related to ecological competitiveness must be included and subsidies must be made fair, too. It is primarily active agricultural producers actually in need of support that must be subsidised, while above a certain amount subsidies are no longer justified and do not reflect the taxpayers' interests or expectations, either. In addition, innovation and efforts for the fight against climate change must be given a more prominent role in rural development programmes. Based on the concept out-

757 http://ec.europa.eu/agriculture/rural-development-2014-2020/index_hu.htm.

lined, in October 2011 the Commission presented to the Council and the European Parliament a draft financing plan for the common agricultural policy from the year 2014, related to the 2014–2020 financial framework, on which a political agreement was reached in June 2013.

7.2 The reform of the CAP in 2013

The 2013 reform was the latest stage in this as yet unfinished CAP adaptation process.[758] The new agricultural policy reorganizes direct payments, making them fairer, more specific and eco-friendlier. The most recent reforms, in 2013, shifted the focus towards:

- greener farming practices,
- research and the spread of knowledge,
- a fairer support system for farmers,
- a stronger position for farmers in the food chain.

The broad outlines of the CAP for the period 2014–2020 concern:

(1) Converting decoupled aid into a multifunctional support system. In accordance to this, support systems become aim oriented, replacing the previous system which provided general income support. The new support instruments are built on a multifunctional system consisting of several elements. The new system focuses on basic payments based on the number of eligible hectares, which can be awarded only to 'active farmers'. Further to this, the new system favours ecological solutions not compensated for by the market, support given to young farmers and extra income support in areas with natural constraints. The new unified system also provides for a redistributive payment, which can increase the amounts allocated for the first 30 hectares of each holding and it also strengthens the position of small farms, by introducing a subsidy system which enables the simplified granting of amounts under 1250 euros.

(2) Consolidating the two pillars of the CAP. The first pillar finances direct payments and market provisions at the expense of the European Agricultural Guarantee Fund (EAGF), whereas the second pillar finances regional development with payments from the European Agricultural Fund for Rural Development. (EAFRD). Further to this, the flexibility of handling the two funds increases, as, from 2015, member states have the right to regroup financing from one fund to the other.

(3) Consolidating single CMO tools to provide safety nets for use solely in the event of price crises or market disruption. The new system, intended to be a 'safety net', would become effective only in case of price wars or market turbu-

758 Regs. (EU) Nos 1303 to 1308/2013 OJ L 347, 20.12.2013.

lence. Furthermore, it has been confirmed that all measures of supply control will be ceased: the sugar quota will be discontinued in 2017, vine planting rights will be replaced in 2016 with a permit system.

(4) A more integrated, targeted and territorial approach to rural development. Better coordination of rural measures with the other structural funds is also envisaged. The wide range of existing instruments within the second pillar of the CAP is to be simplified so as to focus on support for competitiveness, innovation, 'knowledge-based agriculture', establishing young farmers, sustainably managing natural resources and ensuring balanced regional development.

(5) Adequate consumer information. The main goal of this guideline is to enable consumers to make informed decisions when purchasing a product. With this aim, the Union has set up quality control systems, and introduced labels stating the geographical origin and the production method of goods.

(6) Promoting innovation in farming and food processing. The aim of the reform introduced in 2013 is to increase production alongside decreasing environmental impact, mostly with the help of European research projects. One such project is the reuse of agricultural bi-products and waste as an energy source.

(7) Encouraging fair trade relations with developing countries. This goal is supported by the removal of export subsidies on EU agricultural products and by the simplification of importing procedures for produce coming from developing countries into the EU.

7.3 Financing the CAP

7.3.1 The characteristics of the 2014–2020 Multiannual Financial Framework

The European Parliament ratified the new Multiannual Financial Framework for 2014-2020 on the 19th of November 2013. The total amount allocated for 'Sustainable Growth: Natural Resources', which includes funding for agricultural policies, is of 373.17 billion euros. This accounts for 38.9 % of the 28 member states' predicted financial commitment.

The governments of the member states share the responsibility of financing the CAP, as per prior agreements, therefore the funding of agriculture is also handled from a common source. The financing is thus provided at EU level, and not by the member states themselves, as opposed to the majority of other policies. The amount of agricultural spending for 2014-2020 makes up for a much lower percentage of the shared financial framework than previously.

As a share of the EU budget, farm spending has dropped sharply from its peak in the 1970s of nearly 70% to around 38% today. It is therefore important to place the budget of the common agricultural policy within the context of all pub-

lic expenditure within the EU. When seen in this context, the budget of the policy is small – it constitutes only 1% of all public expenditure in the EU.[759] Furthermore, since 2004 the EU has welcomed 13 new member countries without any increase in farm spending and as a result the spending per farmer is much lower today than in the past.

7.3.2 The funding of the CAP with regards to Hungary

Extending the agricultural policy to the Central-East European region[760] was a critical point in the relations of Central-East European countries and the EU as well as in the accession talks. West-European countries opined that West-European farmers had received the area-based subsidies as compensation for the gradual but significant reduction in the buy-up prices of the common agricultural market organisations, to prevent that their agricultural production become infeasible. Accordingly Member States of the Union thought, prior to the eastward enlargement, that, while the advantages provided by the common agricultural market organisations would certainly extend to Central-East European farmers to the same extent as to their Western counterparts, the former would not receive any direct payments. The stance of Central-East European countries was, on the other hand, that all farmers should be entitled to the same extent of area-based subsidisation right from the day of accession. The two parties' antagonistically contrary stances could be resolved by lengthy negotiations only, as a result of which an extremely long transitional period from 2004 to 2013 was set, during which Central-East European farmers only gradually reached the level of area-based subsidies granted to their West-European counterparts.

For the period between 2014 and 2020, Hungary has been allocated 1.9 billion euros more worth of agricultural funding than from the previous, 2007–2013, budget. While in the previous period Hungary's share of the CAP was 2.4%, in the present budgetary period it has risen to 3.2%. The annual agricultural funding framework of the country will be of 1.27 billion euros.[761]

759 Agriculture – The European Union Explained, p. 7.

760 As a consequence of the enlargements in 2004 and 2007, there are approximately 14 million people working in agriculture and another 4 million in the food processing industry. The two sectors cover 7% of the jobs in the EU and produce 6% of the Union's GDP.

761 Czerván György, Undersecretary of the Regional Development Ministry, 2014.01.18. http://www.nak.hu/tamogatasok/15-szabalyozas/hataridok/1771-magyarorszagnak-1-9-milliard-euroval-tobb-jut-a-kap-forrasokbol.

Redistributive Policies of the Union

REGIONAL POLICY OF THE EUROPEAN UNION

Petra Lea Láncos and Balázs Tárnok

1 Introduction

1.1 Regional disparities

The European Union is among the most affluent regions of the world. However, it is marked by serious inequalities at the internal level between its Member States and its different regions. In 2007 a study on Regional Disparities and Cohesion[762] compiled by civil society organizations was presented to the European Parliament's Committee on Regional Development. The study sought to develop methodologies for assessing and addressing regional disparities. The study tied into a popular trend negating the earlier approach that GDP would be the only appropriate indicator for assessing development and well-being.

> 'Even before the start of the financial and economic crisis in 2007, a feeling emerged that something had gone wrong in the economy, despite relatively high growth rates and declining unemployment. At least in Europe, economic growth seemed decoupled from subjective well-being, while there were rising concerns about its ecological consequences. The discussion gained prominence in 2008 with the 'Commission on the Measurement of Economic Performance and Social Progress', better known as the Stiglitz-Sen-Fitoussi Commission (SSFC). Although a lot of similar initiatives had been started in the past 40 years, this Commission sparked off a new broad debate. It became widely known in the European political sphere under the headline of 'Beyond GDP' (European Commission, 2009).'[763]

However, for lack of a better indicator, discrepancies are still ascertained in terms of GDP. Naturally, the factors leading to a given productivity rate and rising inequalities are numerous, depending on infrastructural background, the quality of human resources, research and development, the level of employment, access to public institutions and services, environmental factors, etc. These factors determine the level of development and prospects of regions on the long term.

---

762 Regional disparities and Cohesion: What strategies for the future. Directorate General Internal Policies of the Union, Policy Department Structural and Cohesion Policies, May 2007. p. VII-VIII. http://www.europarl.europa.eu/hearings/20070625/regi/study_en.pdf.

763 Georg Feigl, Sven Hergovich & Miriam Rehm, 'Beyond GDP: can we re-focus the debate?', in: David Natali & Bart Vanhercke (eds.), *Social developments in the European Union*, ETUI aisbl, Brussels 2013, p. 63.

Considering the deviation from the European average, the study found that the main territorial imbalance stems from the gap between the old and new Member States in terms of economic development. In contrast, as regards the 'old' EU-15 countries, the analysis of regional values reveals that the main reason for territorial imbalances is the dominance of the main metropolitan areas over the rest of the national territory.

> 'By way of comparison, the same analysis applied to the New Member States reveals three types of territorial imbalances. First, an East-West gradient can be observed in all countries, with the Western parts performing better than their Eastern counterparts. Second, the presence of significant disparities between predominantly urban and rural regions tends to suggest that rural areas do not follow the same pace of development as urban ones. Thirdly, the New Member States experience particularly acute processes of polarization opposing the largest metropolitan areas to their surrounding regions.'[764]

Within the EU, the richest European region, Inner London in the UK boasted a GDP equaling 225% of the EU15 average in 1997. The very same year, the GDP of the poorest region, Ipeiros in Greece, reached 42%. With the CEEC's, the contrast is even sharper: the GDP of the poorest region in Bulgaria Yuzhen was 23% of the EU15 average in 1998.

Wealth inequalities were sharply increasing *within the Member States* themselves, too: with Inner London being the wealthiest region in Europe in 1997, the GDP of the poorest region of the UK (Cornwall and Isles of Scilly) amounted to merely 70% of the EU15 average. The divide between large cities and rural areas draws attention to the *centre-periphery* problem that is a typical symptom of the disparities in regional development.

But there is a further cleavage separating *'old' and 'new' Member States*: the EU15 and the Central and Eastern European States. According to Ákos Kengyel, following the accession of the CEEC-s, the EU's average GDP dropped by almost 13 %, because the GDP in the 'new' EU Member States only reached 30-40% of the former EU15 average.[765] Over 90 % of the population of these 'new' Member States live in regions with a per capita GDP below 75 % of the EU25 average, rendering them eligible for assistance.[766]

764 Regional disparities and Cohesion 2007, p. VIII.

765 Ákos Kengyel, *The Future of EU Cohesion Policy. Working Paper, Endogenous Development – Added Value of Intervention – Regulatory Frameworks*, Department of World Economy, Corvinus University of Budapest. p. 6. http://unipub.lib.uni-corvinus.hu/580/1/Kengyel_wp2012a.pdf.

766 Nothing has changed since the '90s – 6th Monitoring Report on Europe 2020 and the European Semester, 2015. https://portal.cor.europa.eu/europe2020/pub/Documents/Monitoring%20Report%202015.pdf, p. 7.

1.2 The effects of regional disparities

It has been held that significant regional disparities could be a barrier towards further economic and political integration in the EU. Apprehension of citizens living in poorer regions could compromise the European project, i.e. public support for European integration could dissolve. Furthermore, the low purchasing power of certain regions could decrease potential economic growth in the EU: the widening of European integration through the amassing of new markets would be pointless, if the relevant population were not in the position to take up the growing output of European industry and agriculture. Another problem could be posed by mass migration from declining regions toward large cities, leaving whole villages or old industrial towns with an aging population and no active workforce. On the long run, outbound migration can result in a situation where the development of the affected region is hampered by the fact that both active workforce that could attract investment and purchasing power that would attract development are lacking. Based on the above considerations, regional cohesion, convergence was regarded a necessary condition for EU integration. Evidence shows that free market forces do not necessarily lead to the gradual catching up of regions lagging behind. In fact, disadvantaged regions may be left behind for good. Following WWII economic and social planning has become an accepted model of public government. Economists found that combining public policies and public spending could amount to a more efficient and reasonable economic system. On a European scale this means that greater regional cohesion may be achieved by a European regional policy, redistributing funds and shaping regional policy goals on the Union level.

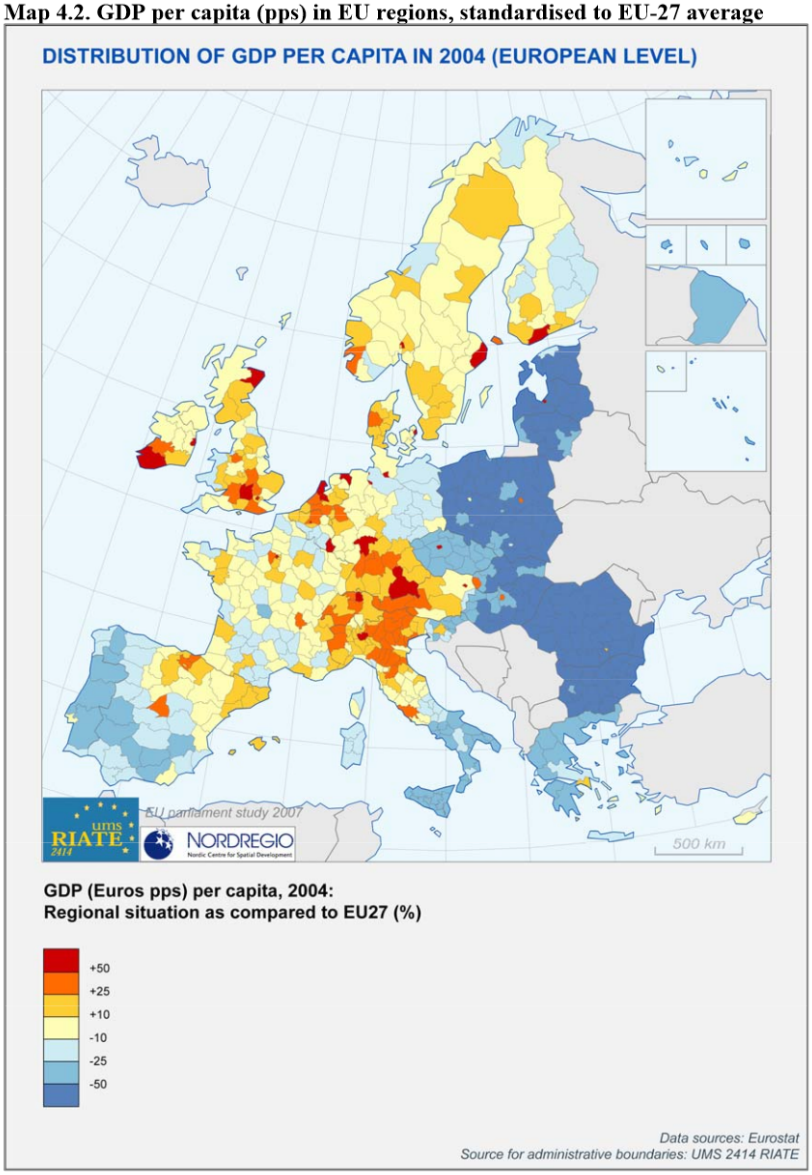
2 Aims and basic concepts of regional policy

European regional policy is aimed at assisting disadvantaged regions in improving their factors of development: the level employment, the quality of human resources, the density of infrastructure, the quality of the environment, etc. Fast developing regions attract investment capital and enterprise, guaranteeing further development.

European regional policy is based on the *financial solidarity* between the Member States – contributions from richer Member States are channeled towards poorer countries and regions through different development programs. The EU has devoted an increasing share of its budget to its regional policy. Today, this amounts to more than 1/3 of its overall budget. Almost a quarter of EU citizens live in regions where GDP per capita is below 75% of the EU average,

Figure 1. GDP per capita (pps) in EU regions, standardised to EU-27 average[767]

Map 4.2. GDP per capita (pps) in EU regions, standardised to EU-27 average



767 Regional disparities and Cohesion 2007, p. 54.

which makes these regions eligible to receive assistance from the EU in the framework of its regional policy programs.

Regional policy efforts of the EU have yielded some outstanding results: at the time it joined the EC, Ireland's GDP was around 65 % of the EC average – today however, it is one of the highest in the EU. With the further accession of different Member States, European regional policy has also been restructured and developed, according to the different needs and peculiarities of the new Member States. It remains to be seen, whether the newly joined Member States shall be winners or losers in framework of the redefined European regional policy.

Economic and social cohesion policy: the bundle of development goals, measures and programs designed to facilitate *catching up* for certain regions. This entails the concerted development of a determined socio-economic community, which may be defined based on economic, social or geographical conditions. The development goals and the measures assigned to it are based on numeric/aggregated data of a given community lagging behind (eg.: GDP, institutions per person, workplace – population ratio, etc). The term economic and social cohesion was introduced by the Single European Act (SEA). The target group for the realization of economic and social policy are the regions.

Structural policies: the bundle of development measures and programs designed to eliminate certain structural deficiencies. Structural deficiencies may be inherent in certain sectors of industry (such as mining, steel, farming or textiles). The goal is to enable shifting from an unproductive industry to an innovative one, benefiting the entire region. The typical target group for implementing structural policies are the regions, the main means for realizing structural policy aims are the so-called Structural Funds.

Regional policy: comprises goals, measures and procedures aimed at fostering economic and social cohesion and eliminating long-term structural deficiencies of certain regions. The *rationale* behind this system is that the EU should be able to function as a homogenous unit in terms of economic productiveness, the regions should be able to maintain their population and offer sufficient amount of workplaces, the regions should be competitive but at the same time maintain their traditional social and economic particularities worthy of harboring as regional values.

Regional policy is designed to compensate poorer regions from European funds. It is a redistribution system at the Union level, however, the goal of the policy is not to reallocate funds unconditionally to poorer regions, but to help them restructure and reinvent themselves in order to catch up: 'This is not about charity, but for the benefit of all' (Ákos Kengyel).

3 The first steps towards an EC regional policy

3.1 1952–1967: Silence of the Treaties

The original version of the Treaty of Rome made no mention of Structural Funds or of a Community cohesion (regional) policy. Each Member State had its own regional policy at the time and the EU considered it its duty merely to ensure that the national policies did not contradict the aims of the Community. Thus, the first phase of European integration lacked a common regional policy of the Member States. The EEC Treaty merely foresaw the establishment of a *European Social Fund* (ESF, set up in 1960). The main goal of the ESF is to promote employment, and to increase the geographical and professional mobility of the labour force. The fund concentrates on the area of re-training, focusing on the training of young people and the long-term unemployed.

The question may arise: why was there no common regional policy in the early stage of European integration? On the one hand, the first six Member States of the EC were among the most developed states of Europe, there were no serious differences in their level of development (apart from some regions of Italy). On the other hand, in the period following the war, Member States hoped that what with the economic boom poorer regions could make use of their 'comparative advantages' and catch up to the prospering regions. Later, the recess in economic growth during the oil crises of the 70s and the accession rounds including the UK and Ireland threw light on the necessity of dealing with the question of underdeveloped or declining regions. While the UK had declining industrial regions, Ireland was by far the poorest Member State of the EC. Furthermore, empirical data showed that declining regions were not catching up without intervention.

3.2 1967–1986: Regional policy efforts with no Treaty basis

3.2.1 DG Regio and the ERDF

In 1967 the Merger Treaty came into effect, which enabled the establishment of the DG dealing with Regional issues in the Commission (DG Regio). At the Paris summit of the heads of state and government in 1972, the decision on setting up the European Regional Development Fund (ERDF) was taken, which made it possible for the fund to start operation in 1975. Its establishment represented the first acknowledgement of the need for a Community-level cohesion policy. Its goal was to correct regional imbalances within the Community. Issues to be addressed were the dominance of the agricultural sector, problems related

to industrial change and structural unemployment. Regional disparities were to be corrected by funding the creation of new jobs by investing in different industrial or services sectors. However, the ERDF was not an efficient instrument for pursuing regional development aims. This was because the funds to be allocated to each MS were determined in advance, and the Commission had consequently no leeway to channel funds towards the regions most in need. Later on during the early 80s this fixed system of allocation was abolished and a competitive system for acquiring funds was established under the supervision of the Commission.

The Member States proceeded to coordinate their respective regional policies and created a system for governing the national funding of regions based on the categorization of regions from the most developed to the poorest (4 categories).

3.2.2 Reform of the ERDF allocation system

The fixed national quota-system of the ERDF was hindering efficient intervention by limiting the possibility of allocating funds to the regions most in need.

In 1977 the *Agreed National Quotas* were the following:[768]

Belgium	1.5 %
Denmark	1.3 %
France	15 %
Germany	6.4 %
Ireland	6 %
Italy	40 %
Luxembourg	0.1 %
Netherlands	1.7 %
United Kingdom	28 %

Although the quota-system was upheld, so-called non-quota aid was also made available for restructuring declining industries. The Commission had discretion over the allocation of non-quota aid. Here, the Commission started to use program-contracts, where not single projects, but bundles of projects initiated and elaborated in cooperation with the Member States were funded. Because the impact of Community regional policy remained limited due to the inflexible ERDF quota system and the lack of coordination between national regional policies, the Commission proposed the reform of the system in 1984. The subsequent Council decision replaced the quota and non-quota aid system, and 'quantitative guidelines' set the minimum and maximum limits of funding for each Member State, conditional upon satisfactory projects submitted within the given

768 See: Ian Bache, *Politics of European Union Regional Policy. Multi-Level Governance or Flexible Gatekeeping?* Sheffield Academic Press, 1998, p. 56.

funding period. The program approach was extended to merely 20% of the ERDF funds.

***Distribution of ERDF funds among Member States (1985) 'Quantitative Guidelines'*[769]**

	Lower limit	Upper limit
Belgium	0.9	1.20
Denmark	0.51	0.67
Germany	3.76	4.81
Greece	12.35	15.74
France	11.05	14.74
Ireland	5.64	6.84
Italy	31.94	42.59
Luxembourg	0.06	0.08
Netherlands	1.00	1.34
United Kingdom	21.42	28.46

The constraints of quantitative guidelines were evidence of the Member States seeking to regain control over the major aspects of the policy (gatekeeping). However, it was also obvious, that the Commission had the expertise and the support of the European Parliament and the Council to bring forward proposals for the reform and the development of the policy.

3.3 Southern Enlargement

With the accession of Spain and Portugal regional inequalities within the European Community grew drastically: the population of the EC living in *least favored regions* (GDP under 50 % of the EC average) doubled. In response, the so-called *Integrated Mediterranean Programs* were established. These were important as forerunners to the ensuing regional policy reforms, as they foresaw an enhanced involvement of the Commission in all phases of the programs, with no influence exercised by the Member States. This supplied the Commission with important experience and independence in regional policy affairs.

The European Community was pushing toward the completion of the single market (White Paper on the Completion of the Single Market of 1985)[770]. There was a widespread fear that the move toward the single market would lead to the

769 See: Bache 1998, p. 61.

770 Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28–29 June 1985) COM(85) 310, June 1985. http://ec.europa.eu/white-papers/pdf/com85-310-internal-market_en.pdf.

concentration of wealth in the most affluent regions of the EC, leaving poorer regions lagging behind and causing even greater inequalities.

4 The Single European Act and the formalized European regional policy

4.1 Legal basis

In response to the deep-seated fears described above, cohesion became the new principle of integration enshrined in the Single European Act. The SEA created the primary law basis (Art. 130 a-e) of regional policy by defining the institutional and legal framework of the common regional policy, which was to be filled out by secondary law. According to Article 130 a: 'the Community shall aim at reducing disparities between the various regions and the backwardness of least-favored regions.' The SEA also foresaw the reform of the structural funds to rationalize their operation. Based on Article 130, the primary law authorization for the enactment of legislation, the Council of Ministers adopted various Regulations, the most important of which is Council Regulation 2052/88/EC[771] determined the fundamental principles of regional policy.

4.2 Principles of regional policy

According to Council Regulation 2052/88/EC the fundamental principles of regional policy are the following:

1) *Concentration* – of regional policy measures around precisely defined priority objectives. Priority objectives are the goals listed as the objectives of structural funds.

2) *Programming* – primarily not individual national projects, but multi-task, multi-annual and possibly multi-regional projects are to be funded (so-called 'integrated programs'). The important contribution of the Structural Funds is that they finance multi-annual programs that constitute strategies programmed in a partnership with the regions, the Member States and the EC.

3) *Additionality* – Community funds are to be complementary to national funding, and do not replace national funding. Additionality is not to be equated with co-financing, for whereas additionality always presumes co-financing, it also means that it is only additional to MS funds already available for a stipu-

771 Council Reg. (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments; OJ L 185, 15.7.1988, p. 9–20.

lated development project. This is to guarantee that the national governments were utilizing the EU funding only as a supplement and not as replacement for the national development funding.

4) *Partnership* – closest possible cooperation between Commission and national/regional authorities must be ensured in every stage of the policy process (from preparation to implementation). In the course of cooperation special formal and informal networks evolve between the various regional and supranational actors.

The SEA had thus formally established the regional policy of the EC and ensured that the necessary secondary legislation could be passed under Article 130 of the EEC Treaty. Although the legal issues had been solved, there was another problem building up in the background, threatening the success of Community regional policy: the budgetary crisis of the EC which was threatening the successful funding of structural and cohesion policies.

5 The budgetary crisis and the Delors I and II packages

5.1 The budgetary crisis

In the early 1980s, the reform of the European Community budget was becoming increasingly pressing: a budgetary crisis was nearing. In the Commission 'Report to the Council and EP on the financing of the EC budget'[772] in 1987 the Commission acknowledges that 'the Community is at present faced with a budgetary situation which can only be characterized as being on the brink of bankruptcy.'[773] The Commissioner for the Budget and Financial Control, Henning Christophersen was even talking about a 'state of emergency'.

The budgetary crisis was developing due to:

a) *Continuously growing expenditure*: the Common Agricultural Policy (CAP) was becoming more and more expensive due to the overproduction of price guaranteed products eligible for price guarantees (70% of the total budget). However, only 30% of this expenditure went to the farmers themselves, the rest was absorbed by multinational trading companies.

b) Enlargement of the Community (Greece, Portugal, Spain) meant that these countries were entitled to *agricultural subsidies and regional aid*. According to the 1984 *Commission Proposal for Budgetary Discipline*: 'the budgetary effects of enlargement cannot be determined at the present stage of the negotiations with Spain and Portugal', but it foresaw that structural expenditure will grow

772 COM (87) 101 final. Commission report on the financing of the Community budget (28 February 1987). http://aei.pitt.edu/1370/1/Finance_Budget.pdf.

773 COM (87) 101 final. p. 2.

massively. And indeed, the Community budget doubled in six years (from ECU 18 400 million in 1980 to ECU 36 200 million in 1987). At the same time, structural spending in Spain and Portugal had to be constrained due to over-expenditure in the CAP.

c) *Revenue, however, did not grow*, while Margaret Thatcher was threatening to stall payments to Brussels altogether! Of the 3 'own resources', the customs duties on imports and agricultural levies were no longer increasing because of tariff cuts and food self-sufficiency in the Community. That meant that the third resource, transfers from national VAT revenues had to be increased from 1% to 1.4%.

d) Even the Commission acknowledged that the EC had sunk into a 'morass of *budgetary malpractices* needed to conceal or postpone the real financial implications of Community policies.' The Community was executing its policies without sufficient financial coverage. This meant that there had been a huge overproduction in the agricultural sector which had been offset by over-evaluating these stocks, also, budgetary deficits were simply rolled forward to the next budgetary periods disguising the actual deficit.

e) *Institutional crisis*: European Parliament tried to extend its influence by delaying the adoption of the budget, halting the budgetary procedure.

5.2 Delors I Package

The reform of EC budget was carried out under Jacques Delors (Commission President 1985–1994). The starting point of reform was the communication of the Commission in 1987 ('Making a success of the Single Act: a new frontier for Europe'[774]), commonly known as the Delors I Package. In 1992, a further communication known as the Delors II Package continued the reforms initiated in 1988.

The Delors I Package (1988) had two objectives. Firstly, to ensure the financing of the Community budget. A fourth own resource was established stemming from Member State transfers calculated on the basis of GNP: a balancing resource to fill in the deficit between expenditure and other own resources. Furthermore, the EC's total resources were capped at 1.15% of its GNP in 1988. Secondly, the package guaranteed the successful closing of annual budgetary procedures. An interinstitutional agreement was concluded between the European Parliament, Council and Commission in the summer of 1988. This agreement enhanced budgetary discipline and fixed Community expenditure for the

774 The Single Act: A new frontier for Europe Communication from the Commission (COM(81) 100) to the Council. 15 February 1987. http://aei.pitt.edu/1760/1/Single_act_COM_87_100.pdf.

next 5 year period ('financial perspective'). Budgetary spending for structural policies were doubled in this period from 17,2% to 27% of the overall budget.

In relation to the activities of the Structural Funds it foresaw the limitation of structural policies to merely 5 objectives:

Objective 1: to achieve the growth and adaptation of regional economies struggling with structural deficiencies;

Objective 2: to convert declining or devastated industrial regions by helping them shift to new industries;

Objective 3: to combat long term unemployment;

Objective 4: to integrate young people into the job market;

Objective 5: to restructure agricultural production and assist rural development.

Concentration of structural funds to these priority objectives was meant to facilitate the optimum allocation of resources and the elimination of disparities between regions.

The Commission proposed that the budgetary funds committed to the achievement of the 5 objectives be doubled by 1992. Moreover, funds were to be concentrated to benefit the least favored regions (primarily the regions in Portugal, Ireland, Greece, Spain, Southern Italy) to help them catch up.

Structural instruments of the Community were to be reformed as well:

a) instead of single projects, those programs were to be pursued which combined several policy aims;

b) decentralization of implementation was to be achieved;

c) instruments would either be limited to a certain geographical area (region, restructuring local industry) or would be of horizontal nature applying throughout the Community (eg.: employment measures).

In relation to the European Regional Development Fund it maintained that it should be the principal instrument for achieving Objectives No. 1 and 2 (adapting regional economies with structural deficiencies and converting declining industrial regions). 80% of ERDF funds were to be set aside for Objective No. 1. Apart from the programs initiated on the regional or national level, funds would be made available for so-called Commission initiatives. These initiatives encompassed technical assistance and the development of European interregional cooperation (by-passing Member State 'gatekeepers').

As regards the ESF, it was to pursue activities related both to Objectives No. 1 and 2, and Objectives 3-4 concerning combating long term unemployment and integrating young people into the job market.

The European Agricultural Guidance and Guarantee Fund (1962)[775] was to pursue aims covered by Objective No. 5 supporting rural development and the restructuring of agricultural production. Its Guidance Section was to take over the responsibilities of assisting regions dealing with structural agricultural deficiencies. Finally, aiding expenditures were harmonized with the agricultural policy framework.

5.3 Delors II Package

There was a series of problems leading up to the 1993 reforms. Firstly, the main issue was to deal with Member State concerns regarding the operation of the Structural Funds after the 1st reform. Secondly, Member States secured the eligibility of regions not meeting the objective criteria. Thirdly, Member States tried to regain control over the allocation of funds by securing individual quotas (eg.: Ireland). Fourthly, Member States were allowed to reduce their own spending on structural measures without infringing the principle of additionality. Poorer Member States pressed for a new compensatory mechanism besides the structural funds (faced with threat of veto on the Maastricht Treaty, other Member States conceded to setting up the *Cohesion Fund*). Finally, although Nordic Enlargement did not render a restructuring of the regional policy necessary, since all three Member States (Austria, Sweden and Finland) became net contributors of the EU, however, slight adjustments were to be made to include also the *scarcely populated regions* as areas eligible for regional policy funding.

The Delors II Package[776] was a renewal of the interinstitutional agreement in 1993, setting the financial perspectives for a 7 year period (1993–1999). At the time of economic recession important goals were set: decreasing agricultural spending and doubling Structural Fund allocation. Own resources were capped at 1.2%, then 1.27% of the Community GNP, and VAT resources were cut back to 1%.

Cohesion policy was to be centered around the following principles:

a) Independent Community action through the Structural Funds;

b) Commission ensuring coherence of EC and national cohesion measures;

c) Funds focus on 4 priorities: underdeveloped regions; industrial decline; long term youth unemployment; agriculture;

d) The programme-approach becomes the rule with decentralization and efficiency control.

775 Designed to support agricultural efforts of underdeveloped regions and to effectuate agricultural policy aims. More precisely it enables the aiding of private entrepreneurs by providing obligatory intervention prices; agricultural or production restructuring; development of agricultural sub-sectors.

776 Commission Communication COM (92) 2000 final: 'From the Single Act to Maastricht and beyond: the means to match our ambitions' 11 February 1992. http://aei.pitt.edu/2938/1/2938.pdf.

The *Cohesion Fund* was set up.[777] Its goal was to improve the environment and transport infrastructure. The Fund targeted Member States (not regions!) with a GDP below 90% of the Community average and financed up to 85% of the project finances. It also applied the system of quantitative guidelines.

Cohesion Fund Allocation Estimates 1994–1999:[778]

Quantitative Guideline	Actual	
Spain	52–58 %	55 %
Portugal	16–20 %	18 %
Greece	16–20 %	18 %
Ireland	7–10 %	9 %

The *Financial Instrument for Fisheries Guidance* (1993) was set up to ensure a sustainable balance between fishery resources and their exploitation, as well as to enhance the competitiveness of the fisheries sector and to assist in the development of regions dependent upon fishery. Funds are made available for fleet modernization, aquaculture development, protection of marine areas, processing and marketing of fish products.

On the proposal of the Bavaria *Committee of the Regions* was set up to deliver opinions on legislation dealing with, or affecting the regions. The influence and relevance of this body remains limited as of yet – it is a consultative body, with compulsory consultation in certain legislative fields (regional policy, transport policy, environmental policy, etc.), however its opinion is non-binding.

All in all, structural operations accounted for 27% of the Community budget in 1992 compared with 17% in 1987. The partnership built with the regions and the Member States was a method that worked, as was demonstrated by the extension of the cohesion effort to the five new *Länder* of the Federal Republic of Germany after reunification. Structural and cohesion policies proved successful, whether in terms of per capita national wealth, growth, job creation, environmental impact, foreign investment, etc.

According to some analysts 'the Second Delors package is the political translation of Cohesion into treaty terms. Indeed it makes Cohesion a significant policy, following the spirit of the European integration process'.[779]

777 Spain was worried it would become a net contributor and secured the support of other poorer MS for the establishment of a new mechanism outside the structural funds regime.

778 See: Bache 1998, p. 89.

779 http://www.ena.lu/.

6 Cohesion reports and the Agenda 2000

6.1 Cohesion reports

In accordance with Article 159 TEC every 3 years the Commission adopts a report on 'the progress made towards achieving economic and social cohesion (...). This report, if necessary, is accompanied by appropriate proposals'. The 1st Cohesion Report[780] was published in 1996. In the years between cohesion reports, a progress report on economic and social cohesion is published.

Even though a cohesion report should be published every 3 years, the Commission only presented the 2nd Report[781] in 2001 after the reforms foreseen in the Agenda 2000. These reforms related to the Structural Funds, financial allocations and eligibility criteria for support. The 1st Cohesion Report of 1996 was the basis for the reform proposals contained in the Agenda 2000. In March 1999 at the Berlin European Council summit, the Heads of State and Government concluded a political agreement on Agenda 2000.[782]

6.2 Agenda 2000

Agenda 2000 is an action program with the main objective to strengthen Community policies and to give the European Union a new financial framework for the period between 2000 and 2006 with a view to enlargement. Launched in 1999 in the form of 20 legislative documents it referred to the following priority areas:

1) *agricultural reform*, aimed at enhancing European agricultural competitiveness, at the same time taking into account the environment, simplifying and decentralizing the implementation of CAP legislation;

2) assisting candidate countries through establishing 3 *pre-accession instruments*:

- ISPA, a pre-accession structural instrument to improve transport and environmental infrastructures
- SAPARD, a pre-accession agricultural instrument for the long-term adjustment of candidate countries agriculture and rural development, and
- PHARE, an instrument for strengthening economic and social cohesion.

780 http://aei.pitt.edu/42144/1/1st_social_cohesion.pdf.
781 http://aei.pitt.edu/42147/1/2nd.v.2_report_social_cohesion.pdf.
782 Agenda 2000: For a stronger and wider Union. Document drawn up on the basis of COM(97) 2000 final. 15 July 1997. http://ec.europa.eu/agriculture/cap-history/agenda-2000/com97-2000_en.pdf.

Under SAPARD, approximately 500 million EUR went to support development in agriculture and rural areas. New MS were eligible for 21.8 billion EUR support from the Structural Funds.

3) adopting a *financial framework* for the 2000–2006 period, especially with a view to enlargement and budgetary discipline.

4) increasing the *effectiveness of Structural Funds and the Cohesion Fund* by improving the concentration of projects around key objectives. The Commission presented the proposal 'to narrow the gaps in wealth and economic prospects between regions.' Recognizing that the problem will be even tougher after enlargement because per capita income in the applicant countries amounts to only one-third of the Union's average, it proposed that the Structural Funds concentrate aid more firmly on those areas and regions whose local economies are clearly in need of revival.

With other words, it urged the implementation of a so-called *'new look regional policy'* with a) concentrated aid, b) focused funding and c) decentralized management.

6.3 New look regional policy

6.3.1 Concentrating aid

Concentrating aid was aimed at using the money from the Structural Funds more efficiently by reducing the number of priority objectives from 5 to 3. Around 70% of the total spending was assigned to regions lagging behind (objective 1). For the financial period between 2000–2006 the Agenda promised that 'the EU would maintain all of its current efforts in favor of economic and social cohesion.' In order to assuage the fears of poorer Member States, it emphasized that 'Member States current receipts from the Structural Funds will not be diminished as a result of enlargement'.

Chart 1: 'The new Structural Funds 2000-2006'[783]

	Objective 1	**Objective 2**	**Objective 3**
Problem:	Regions lagging behind in development	Regions in structural crisis	Regions that need support for education, training and jobs
EU funds available 2000-2006 (in billion €)	135.9	22.5	24.05
% of Structural Funds budget[784]	69.7 %	11.5 %	12.3 %
Which funds?	ERDF, ESF, EAGGF, FIFG	ERDF, ESF	ESF
% of population covered	22.2 %	18 %	Not relevant

Objective 1: Regions that are lagging behind
Regions that are 'lagging behind' mean regions with a per capita GDP below 75% of the EU average. At that time, 9 EU countries of the EU 15 had such regions. Eg.: the French overseas departments, the Azores, Madeira, the Canary Islands, as well as less populated parts of Finland and Sweden.

Objective 2: aimed at shifting regions out of crisis and into growth and jobs
Objective 2 regions need assistance in shifting from declining industries and activities. Here, high unemployment is caused by the decline of some traditional

783 See: Agenda 2000.
784 Remainder allocated to Community Initiatives.

industry which used to employ the majority of the local population. According to the Agenda 2000, around 18% of the EU's population lived in such areas.

Objective 3: aimed at funding education, training and employment to help people to adapt and prepare for change
This is an objective of horizontal reach, not targeting a certain region, but aimed at promoting human resources, to make citizens more qualified for work. Objective 3 funding is connected to the European Employment Strategy[785] and the National Action Plans for Employment.

6.3.2 Focused funding

Projects eligible for funding include:

a) policies to combat unemployment;
b) promoting equal opportunities for accessing the labor market;
c) helping to improve employment prospects through lifelong education and training systems;
d) measures to help adjustment to economic and social change;
e) improving the participation of women in the labour market.

Very importantly, the Agenda foresaw the so-called: *Transitional support***,** which guaranteed that regions eligible for funding under the 1994–99 arrangements which would lose entitlement under the redesigned program, could receive gradually decreasing payments until the end of 2005. This satisfied those regions that felt they were losing out, and compensated them for their losses under regional policy after enlargement.

6.3.3 Decentralized management of programs

A stronger application of the principle of subsidiarity was enforced, with the aim of taking decisions and implementing programs as close as possible to the people affected, fostering the sense of ownership of programs. Member States are to

785 The European Employment Strategy has been developed in order to encourage exchange of information and joint discussions by all Member States, thus trying to find solutions or best practices together which could help creating more and better jobs in every Member State.

How does this work in practice? The strategy consists mainly of a dialogue between the Member States and the European Commission, on the basis of official documents like the guidelines, recommendations and the annual joint employment report. This is complemented by a dialogue between the European Commission and the social partners and also the other European institutions, including the European Parliament, the European Economic and Social Committee and the Committee of Regions.

The Employment Committee, which is formed of representatives of the Member States and the European Commission, has a key role in the coordination of the objectives and priorities at the EU level. These objectives are organised along common indicators and measurable targets concerning employment.

take charge of the management of the programs and their financing. They are to guarantee that EU funds are being efficiently used and they must prevent, detect and correct any irregularities.

There are several advantages to decentralization. Decentralized programming offers regions the opportunity to formulate strategic goals that shall be realized through structural funding. Planning, implementation and all ensuing responsibilities remain close to the local level. This allows for flexibility and adaptation to local circumstances. It facilitates dialogue with the citizens and stakeholders and the dissemination of information, allowing for a greater involvement, building confidence.[786]

Regions are encouraged to exchange experiences, to promote best practices and assist one another in applying different development models. The Lisbon Regions Network organized thematic seminars to help share successful cases so that regions could benefit from other regions' experiences.

6.4 Community initiatives

Community initiatives were meant to develop common solutions to common problems of regional development. The Agenda 2000 reduced Community Initiatives from 13 to 4, covering the following themes:

a) transnational, cross-border and inter-regional cooperation designed to stimulate a balanced development across the European territory (INTERREG);

b) economic and social conversion of crisis-hit towns and cities (URBAN);

c) rural development (LEADER);

d) transnational cooperation to identify new means of fighting all forms of discrimination and inequality preventing men and women getting jobs (EQUAL).

Community initiatives received approximately 5% of total Structural Funds during the 2000–2006 period.

786 Decentralization remains a key element of regional policy: 'several Member States have received "territory-relevant" country-specific recommendations in 2014 and 2015. Some of these comments and recommendations were addressed to local and regional authorities, and rightly so, as they are the actors closest to the European people, they know their territories best, they have key competences in most of the relevant policy fields and they can help strengthen ownership of National Reform Programmes. The report also shows that local and regional authorities are increasingly involved in implementing – although they are still less involved in preparing – National Reform Programmes.' 6th Monitoring Report on Europe 2020 and the European Semester, p. 17.

7 The NUTS system

The Nomenclature of Statistical Territorial Units was set up in the 1970-s by Eurostat for in order to produce statistical data on the productivity of Member State regions. The NUTS system has only been afforded legal status in 2000, until then it was governed by gentleman's agreements.

	Minimum population	Maximum population
NUTS 1	3 million	7 million
NUTS 2	800 000	3 million
NUTS 3	150 000	800 000

Example: Hungary (NUTS 0)

NUTS 1: 3 regions: Nyugat-, Kelet-, Közép-Magyarország

NUTS 2: 7 statistical regions:

Nyugat-Dunántúl:
Közép-Dunántúl
Dél-Dunántúl
Közép-Magyarország
Észak-Magyarország
Észak-Alföld
Dél-Alföld

NUTS 3: 20 municipalities/capital city

8 The financial framework for the period 2000–2006

8.1 Interinstitutional agreement

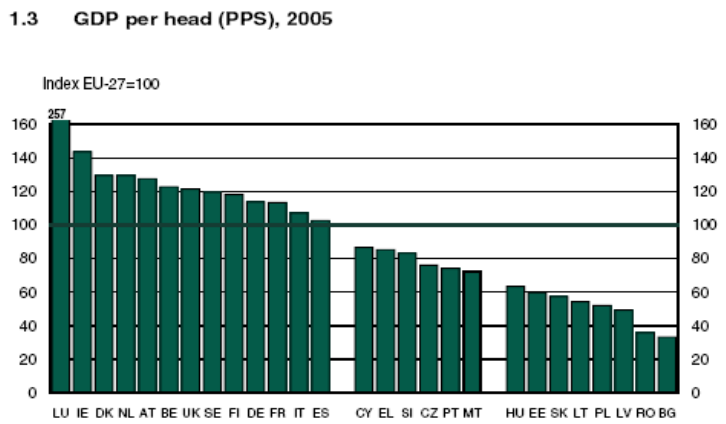
Carrying out enlargement and reforms with a tight budget, among others the new inter-institutional agreement determined that the overall EU spending was to be disciplined. The ambitious goal to carry out enlargement without raising EU revenues cap was set, at the same time, in the vein of financial solidarity it was determined, that Member State payments to the EU budget should reflect their financial abilities. A major setback included an 8% reduction of funds available for regional development.

8.2 The 3rd Cohesion Report – 'A new partnership for Cohesion'

The period encompassed by the 3rd Cohesion Report[787] saw economic recession, and, as a consequence, a growth in unemployment in several regions. A fundamental problem underlying these trends was the low productivity in the EU due to decreasing innovation and a slower shift towards information and communication technologies. In an integrated economy the interdependency of regions and economic performance means that losses are not confined to poorer regions, but affect the entire Union. Thus, the Report proposed achieving a balanced economic activity throughout the EU to mitigate inflationary pressure as well as the social and financial burden of the ageing society. The Report proposed investing in physical and human capital and innovation to boost productivity and employment, through fostering access to education and training.

Although disparities in the EU15 had been reduced, the Report pointed out that there were still considerable differences between the GDP and employment rates of the Mediterranean Member States and the rest of the EU. These differences were presumed to become much more dramatic with enlargement: the average GDP of the 10 candidate countries was half the EU15 average, coupled with higher unemployment levels.

Chart 2: GDP per capita (PPS), 2005[788]



787 A new partnership for cohesion convergence competitiveness cooperation. Third report on economic and social cohesion. COM (2004) 107 final, 18 February 2004. http://aei.pitt.edu/42151/1/Third_social_cohesion_report.pdf.

788 Commission Communication COM (2007) 273 final. 4th Cohesion Report – Growing Regions, Growing Europe, http://ec.europa.eu/regional_policy/sources/docoffic/official/reports/cohesion4/pdf/4cr_en.pdf. p.4.

With enlargement, the average GDP of the EU decreased, leaving Member States formerly eligible for support before the new wave of accession as no longer be eligible. However, these countries were still be dealing with the same structural weaknesses as before, therefore, their continued support had to be secured.

Chart 3. Regions with GDP per head <75% below EU average, 1995 and 2004[789]

1.1 Regions with GDP per head <75% below of EU average, 1995 and 2004

	EU-15		NMS12		EU-27	
	1995	2004	1995	2004	1995	2004
Number of regions	213		55		268	
Total population (million)	372	386	106	104	479	490
GDP per head <75% of EU average						
Regions						
Number	27	21	51	49	78	70
%	13	10	93	89	29	26
Population						
Number (million)	32	32	103	91	136	123
%	9	8	97	88	28	25

Source: Eurostat

The Report pointed out that poverty and unemployment are closely connected and old, retired people as well as single parents are greatly at risk. The Report stressed that in view of the ageing society, the population of working age in the EU will continue to decrease. Although a decreasing work force could mean less unemployment, to support those in retirement productivity must grow.

8.3 The connection between Lisbon Agenda and Cohesion

Social, economic and territorial cohesion are core objectives of the Lisbon and Gothenburg agendas. The aim of the Lisbon Strategy, launched in March 2000 by the EU heads of state and government, was to make Europe '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'.

789 Ibid., p. 9.

The Lisbon strategy developed a new tool: the Open Method of Coordination (OMC). It was established because although certain competences were not present on the EU level, action in these areas proved necessary for achieving the Lisbon aims. With the help of the OMC, member State competences and actions were coordinated in a common framework. Meanwhile, NRP-s (National Reform Programs) were to be elaborated on the Member State level as blueprints for implementing the Strategy.

A 10 year period (2000–2010) was set to reach the main target, with yearly monitoring. In 2004 the mid-term evaluation of the Lisbon Strategy revealed several problems, and a revised Lisbon Strategy was launched in 2005. The renewed Lisbon strategy focused on growth and jobs. The 2006 Spring European Council agreed on the following priority areas for action:

- investing in knowledge and innovation (European Institute of Innovation and Technology - Budapest);
- unlocking business potential for small and medium-sized enterprise;
- increasing employment;
- developing an energy policy for Europe.

A special contribution to the Lisbon objectives was requested for the 2007-2013 period: this was the so-called 'earmarking' procedure or *'Lisbon earmarking'*. Accordingly, Member States had to more than double the funds devoted to competitiveness and employment.

8.4 The 4th Cohesion Report – Growing Regions, Growing Europe

The Report[790] kicked off by stating that disparities in income and employment have decreased in the EU, with important cohesion policy achievements only the old MS-s, but also in the new accession states: GDP rates have grown, and almost half a million new jobs were created. However, the Report points out that wealth and innovation centers around specific regions in Scandinavia, the UK, Germany and the Netherlands. The problems of ageing society and the quandary of economic reform at the time of recession has been hard on all Member States.

8.5 Lisbon Strategy and the Cohesion Policy

8.5.1 The final Lisbon cycle: 2008–2010

In 2007 the Commission released a Communication on the final Lisbon cycle, the period 2008-2010. The Commission put forward a series of proposals to be

790 COM (2007) 273 final. 4th Cohesion Report.

implemented at the Community and national level. These are centered around investing in human capital and the modernization of labor markets; encouraging enterprise; investment in education and innovation; focusing on energy and climate change and the dialogue with third countries on globalization. It is obvious that the first 3 priorities are linked to Cohesion policy.

8.5.2 Critique of the Lisbon Strategy

Although cohesion policy can only be successful, if it dedicates substantial financial resources to the achievement of the Lisbon goals, only around 8% of the total EU budget was designated to turn Europe into the most competitive and dynamic knowledge based economy of the world. Without proper financial resources, these goals could not be realized. Furthermore, there was a contradiction between the original purpose of cohesion policy and the goal of the Lisbon Strategy. Cohesion policy was primarily designed to assist declining or deprived regions in catching up, based on the notion of solidarity. Meanwhile, Lisbon Strategy was geared towards making Europe the most competitive economy in the world. Funding regions that are lagging behind cannot contribute to this aim. By contrast, funding highly performing regions could contribute to this goal, but 80% of the funds – rightly – go to poor regions most in need. Finally, it was during the period of the Lisbon Strategy that the world financial crisis hit, resulting in economic recession, growth of unemployment rates and the adoption of austerity packages.

9 Beyond 2014 – renationalisation?

Since the so-called Sapir report (2003)[791] voices calling for the re-nationalisation of regional policy have become stronger: the efficiency of European cohesion policy has been vehemently criticized. According to some observers the added-value of EU funding is only apparent in the cases of structural policy interventions, while others say that EU intervention should focus on achieving convergence *within* the Member States, and should not deal with convergence *between* the Member States. An interesting finding is that regional policy interventions seem to further strengthen the concentration of economic activity in a handful of affluent regions, with inequalities growing massively (agglomeration concern). Finally, net contributor states are not necessarily satisfied that their financial efforts have paid off: it is the very same regions that seem to be lagging behind for the last few decades.

791 An Agenda for a Growing Europe http://www.euractiv.com/ndbtext/innovation/sapirreport.pdf, in particular: p. 55–67.

DEVELOPMENT POLICY OF THE EUROPEAN UNION

Kinga Debisso

1 Introduction

Cooperation with developing countries is traditionally a key area in the foreign relations of the European integration. With its population of five hundred million, the European Union is the third most populous political entity in the world, in addition to which it qualifies as a trade and economic partner of significant weight, with one fourth of the world economy concentrated here. Being aware of its economic and commercial weight and based on global solidarity and enlightened self-interest, the EU strives to facilitate stability, growing welfare and the conditions for sustainable development all over the world. In its external activities, the EU lays great emphasis on supporting the preservation of peace and the respect for good governance, human rights and democratic values. Thereby, in the increasingly globalised world characterised by interdependence, the EU indirectly contributes to the welfare and security of its own citizens as well.[792] The EU is the biggest aid donor in the world; the financial aid provided to developing countries by the European Union and its Member States make up 55% of the total Official Development Assistance (ODA). The main directions of development cooperation for the period spanning from 2016 to 2030 are shaped by the new UN framework for sustainable development, 'Transforming our world: the 2030 Agenda for Sustainable Development' (Agenda 2030). The new sustainable development programme, building on the basis set by the Millennium Development Goals in the year 2000, aims to provide a global framework for eradicating poverty and enabling sustainable growth.

2. Establishing the European Development Policy

2.1 The historic reasons for developing a European development policy

After the dissolution of the colonial system, former colonizing countries continued to wish to ensure the supply of raw materials essential for their industries, while at the same time trying to counterbalance the consequences of the sudden

792 European Commission, Directorate-General for Communication, *Europe on the Move – The story of the European Union*, 2007, pp. 1, 4.

dissolution of colonial ties for the former colonies. The idea of developing the African continent appeared in the Declaration of the French foreign minister Robert Schuman issued on 9 May 1950 already: '*[w]ith increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent.'*[793] Out of the founding members of the integration only France had extensive enough relations with its former colonies and trust territories to make it both economically and politically interested in shaping the development policy of the integration.[794] Germany, which lost its colonial territories after World War I, was against regional development based on the colonial heritage and, together with the Netherlands, urged a more open development policy concept extending to the whole developing world.[795] France, however, supported by Belgium, similarly a former colonizer in Africa, succeeded at the negotiations preceding the Treaty of Rome in its initiative targeting an association with overseas areas. Thus, in the initial decades, development efforts primarily targeted states of the African, Caribbean and Pacific regions referred to as the ACP countries. In parallel with the enlargement and deepening of the integration, the external relations, too, became increasingly extensive. All this fundamentally shaped the focus and priorities of the development policy. Participants of the Paris summit in 1972 succeeded in finding a compromise solution for the divergent stances of Member States: the Paris Declaration[796] emphasised the fundamental importance of association agreements and, at the same time, by urging global development cooperation it created an opportunity for supporting earlier neglected developing countries as well. Through the northward enlargement of the integration in 1973, the accession of the United Kingdom gave a further impetus to the advancement of the development cooperation. From the 1970s, the financial and technical assistance gradually extended to Central-East and Southeast Europe, the Mediterranean, Asia and South-America. From the 1990's, the EU made increasingly decisive steps towards certain regional integration blocks like ASEAN or Mercosur. The commitments made at the UN world conferences in the 2000's, the eastward enlargements and the global economic crisis led to the reconsideration and reform of the development policy.

793 Available at: http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index.

794 Anne-Sophie Claeys, 'Sense and Sensibility: the role of France and French interests in European development policy since 1957', in: Karin Arts & Anna K. Dickson (eds.), *EU Development Cooperation: From Model to Symbol*, Manchester University Press, Manchester 2004, pp. 113–131.

795 Dieter Frisch, The European Union's development policy. A personal view of 50 years of Development Policy, Policy Management Report 15, ECDPM, Maastricht 2008, p. 2. Available at: www.ecdpm.org/pmr15.

796 Declaration of Summit Conference in Paris 1972 (1973) 10 CMLR p. 108.

Considering the economic backwardness and special foreign relations priorities of the newly joined EU states, as well as their lack of development cooperation tradition, there arose several concerns regarding their participation in the EU's development policy. Fortunately, these critiques proved groundless, however:[797] the EU-12 committed themselves to full-scale participation in the EU's development policy and, while enjoying certain preferential arrangements, have gradually increased the ratio of their expenditure on development aid. Central-East European countries have, furthermore, significant comparative advantages in certain political sectors and geographical fields and may transfer useful experience to would-be accession countries in relation to economic and political transformation as well as the transposition of the EU's development acquis.

The year 2015 is a watershed in the history of the EU's development policy. It marks the final deadline of the Millennium Development Goals set in 2000, and the agreement on the new development framework for the period between 2016 and 2030. The EU declared 2015 to be the European Year for Development. This was the first of the so called 'European years' to be focused on the EU's external activities and global presence. During this year, under the motto 'Our World, Our Dignity, Our Future' the EU's institutions and the Member States, with the involvement of civil society, strove to familiarize EU citizens with the activities of development cooperation and to encourage them to participate in them.[798]

2.2. The role of strategic and moral factors in the shaping of the European development policy

In addition to faith in international solidarity and social justice, and the joint responsibility for the solution of global problems, the assistance provided by the EU is also underpinned by factors like the moral responsibility of the developed world arising from colonization[799] or the implementation of EU interests. Considering its economic strength and colonisation past, the EU has responsibility for developing and emerging states. At the same time, in many cases the development activity serves the implementation of economic and strategic interests. Development cooperation includes economic cooperation, too, in which respect developing countries are important trade partners both in view of their raw material resources and as markets for EU products. From the strategic aspect, the EU

797 V. Michaux, 'EU Enlargement: a brake on development cooperation?' *The Courier ACP-EU*, Vol. 193, 2002, p. 19.

798 European Commission, Directorate-General for Communication, *The European Union explained: International cooperation and development*, Publications Office of the European Union, Luxembourg 2014, p. 15.

799 Gábor Kardos, *Emberi jogok egy új korszak határán*, T-Twins, Budapest 1995, pp. 61–71.

often uses development policy for strengthening its identity and reinforcing its international position.[800]

The development policy levers include security policy and immigration policy reasons as well. The impacts of globally emerging new type of security challenges such as terrorism, the proliferation of arms of mass destructions, organised crime and international migration are evident all over the world. Creating peace is a prerequisite of sustainable development in all countries and similarly, permanent peace and security are impossible to attain without development or the eradication of poverty. Supporting the populations and economies of developing countries is an important means of retaining the population, through which development may mean a long-term solution for the management of migration waves and for combating human trafficking. The EU may help developing states both in the fight against terrorism and in uprooting the causes of violent conflicts. Almost half of the development aid is channelled to the most vulnerable, instable states, with the aim of peacekeeping and state building. Through its participation in the consolidation of international peace and security, the EU indirectly contributes to the protection of its own citizens as well.

3 The EU's development policy in the system of international development cooperation

3.1 The system of international development cooperation

The international development cooperation denotes the aiding activity provided by developed countries which, beyond economic and political issues, covers the areas of education, culture and environment protection as well. The basic principles and goals of the international development cooperation were worked out under the auspices of the United Nations and the Organisation for Economic Cooperation and Development (OECD). The participating states committed themselves to the integrated and coordinated implementation of the fundamental principles of the Development Assistance Committee (DAC) of OECD as well as of the Millennium Development Goals (MDGs) and the Sustainable Development Goals (SDGs or Global Goals) of the United Nations.[801] Furthermore, the programmes of the UN world conferences organised around the topic development

800 John Degnbol-Martinussen & Poul Engberg-Pedersen, *Aid: Understanding International Development Cooperation*, Zed Books, London 2005, pp. 125, 128.

801 Cf. United Nations Development Programme, *Human Development Report 2003*, Oxford University Press, New York 2003; United Nations, *Implementation of the United Nations Millennium Declaration*, Report of the Secretary General, General Assembly A/59/282, United Nations, Washington D.C. 2004.

– including, among others, the Doha, the Monterrey and the Johannesburg Declarations[802] – were also gradually incorporated into the national development strategies. These norms became parts of the EU's development policy, determining the implementation, monitoring and evaluation of the specific development programmes. The EU works closely together with international organisations, primarily with the UN, the OECD, the World Bank and the G8 and G20 states in establishing and executing its development policies and in supervising aid activities.[803]

The international development cooperation is not governed by a uniform, central organ; the donors' activities are coordinated primarily by the above mentioned forums, the UN and the OECD. The coordination of donors is not efficient enough, however; in the development activities, donor countries typically keep their own interests in view. In this respect, it is the internationally accepted norms that do have some regulatory force.[804] The EU also holds regular talks with other important, traditional donors, such as the United States, Japan and Korea, and, in an ever growing degree, with the emerging markets.

3.2 From the Millennium Development Goals to the Sustainable Development Goals

In the Millennium Declaration, adopted by the UN General Assembly in September 2000, world leaders acknowledged their joint responsibility with regards to global economic and social growth and handling security challenges. The Declaration outlined eight general goals, the so-called Millennium Development Goals, which, in the period leading up to 2015 defined actions aimed at reducing the different economic, political and socio-cultural aspects of poverty and encouraging international development cooperation:

1. eradicate extreme poverty and hunger;
2. achieve universal primary education;
3. promote gender equality and empower women;
4. reduce child mortality;
5. improve maternal health;
6. combat HIV/AIDS, malaria and other diseases;
7. ensure environmental sustainability;
8. develop a global partnership for development.

802 For this topic cf. Kofi Annan, 'From Doha to Johannesburg by Way of Monterrey: How to Achieve and Sustain Development in the 21st Century', *World Energy*, Vol. 5, No. 1, 2002, pp. 86–90.

803 *The European Union explained: International cooperation and development* 2007, p. 8.

804 Beáta Paragi, Balázs Szent-Iványi & Sára Vári, *Nemzetközi fejlesztési segélyezés*, TeTT Consult Kft., Budapest 2007, pp. 57–58.

The Millennium Development Goals Report issued by the UN established that several important targets were met by 2015.[805] Amongst others, the number of individuals living in extreme poverty has decreased with more than 50% since 1990; the number of people who do not have access to proper drinking water sources has halved; gender disparity in primary education has been addressed in most countries; infant mortality rates have been more than halved since 1990; the value of aid provided by developed countries has grown by 66% from 2000 to 2014.

However, the results did not meet expectations in several other areas: there are about 1.2 billion people worldwide still living below the poverty line and there are considerable differences among regions and countries and within countries as well. The process of establishing the Millennium Development Goals has also been criticised, as its beneficiaries had a minimal role in decision making. Furthermore, the resolve of developed countries to work towards the goals has also been questioned, as no system was put in place to measure partial results which could have given an overview of each country's overall performance.

The new development goal programme replacing the Millennium Development Goals is more thorough than its predecessor, and offers an integrated general perspective applicable to all its stakeholders. The most important innovation of the Sustainable Development Goals is that they do not focus on resolving isolated issues, but aim at tackling fundamental systemic problems, such as inequality, poor institutional performance, environmental degradation and unsustainable consumption and production trends, which were not addressed by the Millennium Development Goals.

The UN member states committed to fulfilling the following general global goals by 2030:

1. end poverty in all its forms everywhere;
2. end hunger, achieve food security and improved nutrition and promote sustainable agriculture;
3. ensure healthy lives and promote well-being for all at all ages;
4. ensure inclusive and equitable quality education and promote lifelong learning opportunities for all;
5. achieve gender equality and empower all women and girls;
6. ensure availability and sustainable management of water and sanitation for all;
7. ensure access to affordable, reliable, sustainable and modern energy for all;
8. promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all;

805 United Nations, *The Millennium Development Goals Report 2015*, United Nations, New York 2015.

9. build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation;

10. reduce inequality within and among countries;

11. make cities and human settlements inclusive, safe, resilient and sustainable;

12. ensure sustainable consumption and production patterns;

13. take urgent action to combat climate change and its impacts;

14. conserve and sustainably use the oceans, seas and marine resources for sustainable development;

15. protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss;

16. promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels;

17. strengthen the means of implementation and revitalize the global partnership for sustainable development.[806]

Kőrösi Csaba, Hungary's former permanent representative to the UN, was the joint president of the UN Working Group which formulated the 17 general goals and their respective 169 partial goals.

3.3 Official Development Assistance (ODA)

The UN organized the International Conference on Financing for Development in Monterrey in 2002, where the participating heads of state and government committed to mobilizing all resources for financing development and considerably increasing the amount of development aid.

As a result of the Monterrey Conference, a decision was made at the Barcelona summit of the EU in 2002 to increase the rate of the Official Development Assistance for developing countries.[807] In 1970, the United Nations had called upon developed states to spend at least 0.7% of their gross national income (GNI) on international assistance by 2015 in order to help the economic catch-up of the poorest countries. In order to achieve this, the EU wished to gradually increase the ratio of Official Development Assistance to 0.56% of the GNI by 2010, and to 0.7% by 2015, and called upon its partners to follow this objective. In 2010, the European Union spent EUR 53.8 billion on Official De-

806 Available at http://www.un.org/sustainabledevelopment/sustainable-development-goals/.

807 The Barcelona summit of 2002 took place before the Conference on Financing for Development in Monterrey, thus, the commitments made in Barcelona significantly contributed to the decisions adopted at the UN conference. In accordance with the Barcelona commitments, Member States were to raise the ODA/GNI ratio to 0.39% on the average by 2006.

velopment Assistance, which still falls very much short of the original commitment. In the case of the new Member States, the EU's expectation was raising the ODA/GNI ratio to 0.17% by 2010 and to 0.33% by 2015.[808] Some half of the increased assistance served the development of Africa's Sub-Saharan region.

The global economic crisis put the development cooperation of the EU and its Member States under considerable strain. As a result of the crisis, the majority of Member States was forced to implement restrictions on development funds as well. In 2011, the amount of collective aid decreased for the first time since the 2002 Barcelona summit. These processes endangered the development results of previous years and jeopardized the fulfilling of common goals. In 2014, the EU allocated approximately 59 billion euros, 0.43% of its GNI, to funding development, still a considerably lower amount than its original commitment. The Union and its Member States are still the most important aid providers at a global level, but in this critical period it is of paramount importance whether the EU can hold on to its ambitious goals in the area of development policy.

The financing of development will be one of the key factors in accomplishing the goals of the 2030 Agenda for Sustainable Development. The third UN conference on financing for development was organized in Addis Ababa in July 2015, where the results of the 2002 Monterrey Consensus and its 2008 Doha follow up were analysed, furthermore, decisions were taken on the means with which the new development framework can be implemented, amongst them the question of financing. The Addis Ababa Action Agenda[809] enforced the 1970 decision of the UN member states to raise development funds to 0.7% of their GNI and the effort to fight tax evasion and increase tax income. Nevertheless, civil groups found the agenda lacking when it comes to the reform of the international financial system and the involvement of new sources in financing.

4 The legal basis and the objectives of the EU's development policy

4.1 The legal personality of the European Union

One of the novelties of milestone significance of the Treaty of Lisbon was assigning a legal personality to the European Union, which brought about important changes also in the field of the EU's development policy. Article 47 of the

808 One of the criteria for participation in the OECD Development Assistance Committee was attaining the 0.2% ODA/GNI ratio.

809 Resolution adopted by the General Assembly on 27 July 2015: Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda) (A/RES/69/313).

Treaty on the European Union stipulates: 'The Union shall have legal personality'. Before 1 December 2009, independent legal personality was attached to the European Community: the Community could act autonomously in external relations and sign legally binding agreements.[810] The Union is now able to participate in international negotiations as a legal personality; in this capacity, in its areas of competence, it is authorised to act individually, independently of Member States.

It is Article 216 of the Treaty on the Functioning of the European Union (TFEU) that governs the capacity of the EU to sign agreements:

> 'The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act (…). Agreements concluded by the Union are binding upon the institutions of the Union and in its Member States.'

By virtue of Article 1 of the Treaty on the European Union the legal personality of the Union replaces the legal personality of the European Community and the Union becomes the legal successor of the European Community, taking over its rights and obligations.[811] Thus, since the Treaty of Lisbon the rights the European Community was entitled to by virtue of earlier international agreements have been enjoyed by, and the commitments undertaken by the Community have been obligatory for the Union. It is, however, not only the earlier rights and obligations that have been passed on to the Union but, in future, it may independently join international agreements and international organisations, too. The single legal personality has significance from the point of view of the Union's external activities primarily: the Union's single legal personality puts an end to the earlier dividedness characterising foreign policy.

4.2 The legal basis of the European development policy

Since its establishment, the European Community (and the European Union) has participated in supporting developing countries and combating poverty. The Treaty of Rome included development policy provisions under the title: 'Association of Overseas Countries and Territories', although there was no mention of a common development policy as yet. Only the Maastricht Treaty pro-

810 In accordance with Art. 281 of the Treaty Establishing the European Community: 'The Community shall have legal personality.'

811 By virtue of Art. 1 of the Treaty on European Union: 'The Union shall replace and succeed the European Community'.

vided an explicit legal basis for the development cooperation ongoing for several decades already. Articles 177–181 of the Treaty establishing the European Community regulated on the general framework of the cooperation with developing countries. The Constitutional Treaty would have assigned a separate chapter for the rules on development cooperation and humanitarian aid already. At the moment it is Articles 208–211 of the Treaty on the Functioning of the European Union that rule on development cooperation. Title III in Part Five on the Union's External Action is: Cooperation with Third Countries and Humanitarian Aid. The Treaty of Lisbon did not make any fundamental changes in the rules on development policy but at the same time adopted the achievements of the European consensus on development policy, which was the first to provide a coherent framework for the European development policy.[812]

Development cooperation policy and humanitarian aid were listed in the Treaty of Lisbon under shared competences. Accordingly, Member States exercise their competence in this area only to the extent the Union has not exercised its competence.[813] The Union has the competence to conclude international agreements but Member States continue to be able to participate in international agreements and adopt binding acts individually as well. The development policies of the EU and of Member States are complementary: they mutually complement and reinforce each other.[814]

In addition, the Treaty explicitly refers to the Union's commitments in the field of international development cooperation. Article 208 (2) of TFEU[815] says that the Union and Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.

4.3 The objectives and principles of the EU's development policy

Article 177 of the EC Treaty was the first to formulate the objectives and principles of the development policy:

> '1. Community policy in the sphere of development cooperation, which shall be complementary to the policies pursued by the Member States, shall foster:
> – the sustainable economic and social development of developing countries, and more particularly the most disadvantaged among them;
> – the smooth and gradual integration of the developing countries into the world economy;

812 Joint declaration by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on the development policy of the European Union entitled 'The European Consensus' [Official Journal C 46 of 24.2.2006].
813 Art. 2 (2) of TFEU.
814 Art. 208 (1) and Art. 214 (1) of TFEU.
815 This provision was included in Art. 177 (3) of the EC Treaty already.

– the campaign against poverty in the developing countries.
2. Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.'

One of the main priorities of the Treaty of Lisbon was to reinforce the EU's international weight and ensure more consistent external action. The common principles and objectives on the Union's external action are specified in Article 21 of the Treaty on the EU. The most important new goals and fundamental principles stipulated here are the following:

- consolidating global security, democracy and the rule of law;
- fostering respect for solidarity, human rights and international law;
- protecting the citizens of the Union;
- implementing the EU's strategic interests and fundamental values.

In comparison with the provisions of the EC Treaty, the part of the Treaty of Lisbon on the global role of the European Union presupposes more active international action compared to previous goals, which is underpinned by the Union's legal personality as well.

The principles of the European development policy referred to as the principles of three *C*s are outlined in the Treaty of Maastricht: according to this, the better *coordination* of programmes, the *complementarity* of measures and the *coherence*[816] of EU policies are of fundamental importance. The Treaty of Amsterdam added a fourth element to the principles of development policy emphasising the importance of *consistency* in the external activities of the Union. Efficient development is served furthermore by what is referred to as the principle of *geographical weighting*, according to which, in the development strategies and programmes, priority must be given to the least developed and to low-income countries. The EU is committed to the principle that the *primary responsibility* for the development of partner states lies with the partner states themselves. In the area of programming according to countries and regions, the *principle of concentrated support* is decisive, by virtue of which only a limited number of fields of action are supported instead of fragmented efforts in a high number of sectors.

816 Cf. the Commission's Communication 'Policy coherence for Development: establishing a policy framework for a whole-of-the Union approach' [COM (2009) 0458].

5 The institutional framework and the set of tools of the Development Cooperation Policy

5.1 Institutional frameworks and scopes of authority

By virtue of the Lisbon Treaty, the measures on the implementation of the development policy[817] are adopted by the European Parliament and the Council within the framework of ordinary legislative procedures.[818] European development policy is the only field of foreign policy where the Parliament had a role as a co-legislator before the adoption of the Reform Treaty already. In addition to its legislative tasks, the European Parliament participates in the development cooperation through its competent committee as well. The committee's scope of authority covers, among others, the development, implementation and control of the development cooperation policy, the continuation of political dialogue with developing countries within bilateral and multilateral frameworks and the facilitation of democratic values, responsible governance and human rights. Related to this latter, the committee participates in election monitoring missions.

Within the Council of the European Union, there was a Development Council operating until 2001, which was later integrated into the Council of General Affairs and Foreign Relations. Currently development policy issues are within the authority of the Council of Foreign Relations which, by virtue of the Treaty of Lisbon, has been chaired, since 2010, not by the foreign minister of the country holding the EU presidency but by the High Representative of the Union for foreign affairs and security policy (currently Federica Mogherini).

The European Commission has important competences in the field of development policy. As a political player it takes part in the legislative procedure and beyond that it is responsible for the management of donors and the coordination of development policy activities with the other policies. Through the EuropeAid Development and Cooperation Directorate-General, the Commission is involved in the designing of the Union's development policy and the practical implementation and evaluation of development programmes and projects. DEVCO was set up by the merger of the earlier EuropeAid Cooperation Office and the Directorate-General for Development on 1 January 2011. The Directorate-General for International Cooperation and Development (DG DEVCO) was reformed into its current form on the 1st of January 2015 as a response to the evolution of the

817 The measures adoptable in the area of development policy may be programmes in a certain scope of issues or multi-annual cooperation programmes with developing countries. In addition, the EU and the Member States may sign agreements with third countries and international organisations in authority for the implementation of development policy goals.

818 Art. 209 (1) of the TFEU.

global development framework. In its activities it cooperates with Member States, the delegations of the EU, the European Foreign Affairs Service, international organisations and representatives of the civil society. Since November 2014, the member of the European Commission responsible for development policy has been Croatian Commissioner Neven Mimica.

The European Investment Bank (EIB) also plays an important role in the implementation of the European development policy through preferential loans and investments into local private and state enterprises. The loans provided by EIB primarily target infrastructure, environmental and energy supply developments.

5.2 Development policy tools

Development cooperation policy has an extremely varied set of tools, the most important ones being financial tools (aid) and various trade policy tools. Development aid can be granted among others in the form of sector or budget support, preferential loans, debt remission, project financing or technical assistance. In the field of development cooperation the EU may sign association and trade agreements and cooperate with local or non-governmental organisations (NGOs).[819] An association agreement is an international agreement between the European Union and third countries that establishes closer cooperation between the contracting parties. The agreement may target, among others, the provision of trade preferences, the establishment of a customs union or financial aiding. A trade agreement is a two- or multilateral international contract for enhancing trade turnover, which typically refers to customs preferences. The general trade policy tool of the common development policy is the Generalised System of Preferences (GSP) applied since 1971. GSP is a system of customs preferences unilaterally provided by the EU, which includes general tariff preferences beyond the principle of the most favoured nation treatment.[820] Within the Everything But Arms (EBA) initiative, the EU provide tariff and quota free market access for all products, except armaments, exported by the 49 least-developed countries (LLDCs).

The special institutional-legal relations with ACP countries are also reflected in the different way of financing of the development activity. The European Development Fund (EDF) was set up by the Treaty of Rome for the financing of the ACP region and overseas countries and areas. It is operating independently of the common budget, with a budget of Euro 30.5 billion during the 2014–2020 period. Payments to the European Development Fund for five-year periods ad-

819 Paragi, Szent-Iványi & Vári 2007, p. 131.

820 The Generalised System of Preferences is an exception to the clause in the General Agreement on Tariffs and Trade (GATT) on the most favoured nation treatment.

justed to the cycles of the respective ACP partnership agreements are made by Member States in an ad-hoc way.

The development funding mechanisms of the Union have geographical or thematic scope. Most of the development funding is handled by geographical instruments: the Development Cooperation Instrument (DCI), the European Neighbourhood Instrument (ENI), the Instrument for Pre-Accession Assistance (IPA), the Partnership Instrument (IP), the Instrument for Greenland. The geographical instruments are complemented by the thematic instruments which are open to all partner states: The European Instrument for Democracy and Human Rights (EIDHR), The Instrument contributing to Stability and Peace (IfSP), the Instrument for Nuclear Safety Cooperation (INSC).

The largest development funding source within the EU budget is the Development Cooperation Instrument, which extends to cooperation with Latin American, Middle-, East- and South- Asian countries, South Africa and certain Middle Eastern states. Further to this, the DCI also encompasses two thematic programmes: the 'Global Public Goods and Challenges (GPGC)' programme and the 'Civil Society Organisations and Local Authorities (CSO-LA)' programme, which extend to all developing countries. One of the most important reforms of the DCI for 2014-2020 period is the introduction of the 'differentiation' principle. According to this, 16 middle-income countries (MICs) are no longer eligible for grant-based bilateral EU funding, but can still participate in regional and thematic cooperation. As a result of negotiations between the Commission and the Parliament, five countries with medium income – South Africa, Ecuador, Columbia, Cuba and Peru – remain eligible for full cooperation.

The below chart summarizes the EU's external action financing instruments.

Chart 1: Overview of the European Union's external action financing instruments (MFF 2014–2020)[821]

Instrument	Focus	Format	Budget
Development Cooperation Instrument (DCI)	Latin America, Asia, Central Asia, Gulf region, South Africa + global thematic support	Geographic + Thematic	EUR 19.7 billion
European Neighbourhood Instrument (ENI)	Sixteen European Neighbourhood countries, Russia (regional and cross-border cooperation)	Geographic	EUR 15.4 billion

821 Available at http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_6.3.1.htm.

Instrument for Pre-Accession (IPA)	Balkans and Turkey	Geographic	EUR 11.7 billion
Partnership Instrument (PI)	Industrialised countries	Geographic	EUR 955 million
Instrument for Greenland	Greenland	Geographic	EUR 184 million
European Instrument for Democracy and Human Rights (EIDHR)	Democracy and human rights promotion	Thematic	EUR 1.3 billion
Instrument contributing to Stability and Peace (IfSP)	Political stability and peace-building	Thematic	EUR 2.3 billion
Instrument for Nuclear Safety Cooperation (INSC)	Nuclear safety	Thematic	EUR 225 million
Off-budget			
European Development Fund (EDF)	ACP and Overseas Countries and Territories (OCTs)	Geographic	EUR 30.5 billion

6 The major characteristics of the development cooperation policy

The development cooperation policy of the European Union is one of the common policies. In addition to the common foreign and security policy and the common trade policy, the development cooperation policy is one of the most important fields of the EU's external activity. For a long time it was considered to be a part of the common foreign and security policy, but the Treaty of Lisbon made the independence of the development policy clear. The primary goal of the development policy of the EU is reducing and, with time, eradicating poverty within the framework of sustainable development. This objective must be respected also in the implementation of the EU policies which may affect developing countries.[822] Thus Article 208 of the TFEU defines the EU's development

822 TFEU Art. 208 (1) subparagraph 2.

policy as a separate, *sui generis* policy, which is not exclusively a special dimension of the foreign and security policy. At the same time, in practice, development policy is sometimes subordinated to the foreign policy, both at the level of Member States and at the EU level.[823] Member States shape their foreign policies along different values and goals; national interests often overrule the needs of the beneficiary countries even within the framework of the development cooperation.[824]

EU development policy has strong links to the common trade policy, but its objectives reach far beyond the economic development effects of the trade policy tools. As a member of the World Trade Organisation, the EU may only sign trade agreements that are compatible with the fundamental principles and goals of the WTO. The primary goal of WTO is the liberalisation of international trade, which it wishes to attain by removing customs duties and other trade barriers and eradicating discriminative treatment. Within the framework of this, the EU grants various trade facilitations and preferential market access to developing countries. At the same time, the partnership agreements signed by the EU extend, beyond economic reforms, to health care and education, infrastructure programmes and in many cases also to the research and development and environmental policies. This comprehensive cooperation framework also enables the EU to facilitate its foreign policy goals as well, including the dissemination of democracy and human rights and the preservation of peace.

Although Official Development Assistance is one of the most important means of development for the poorest countries, it is important to underline that aid in itself is not enough for mitigating poverty.[825] There are several data and studies[826] proving that development cooperation and the economic growth granted within the framework of that do not automatically result in a permanent improvement in the quality of life or a better implementation of global justice. A successful and efficient development policy presupposes coherence[827] with other policies[828]; the use of all the foreign policy set of tools in the implementation of

823 Paul Hoebink & Olav Stokke (eds.), *Perspectives on European Development Cooperation: Policy and Performance of individual donor countries and the EU*, Routledge, London 2005, pp. 18–21.

824 See: Paul Bowles, 'Recipient Needs and Donor Interests in the Allocation of EEC Aid to Developing Countries', *Canadian Journal of Development Studies*, Vol. 10, No. 1, 1989, pp. 7–19.

825 On this topic cf. Amartya Sen, *Development as a freedom*, Alfred A. Knopf, New York 1999.

826 Cf. e.g. the human development reports of the United Nations, the General Comments No. 2 of the Committee of Economic, Social and Cultural Rights or the participatory poverty survey of the World Bank 'Voices of the Poor'.

827 Art. 7 of TFEU confirms that the Union shall ensure consistency between its various policies and activities, taking all of its objectives into account.

828 Thus, creating coherence with the policies on trade, environmental protection, security, immigration, agriculture, the social dimension of globalisation, employment and fair work and international scientific cooperation also including health research may to a great extent contribute to the attainment of the development policy goals. Cf. Communication from the Commission to the Council and the Eu-

the development policy goals. It is of paramount importance that the EU takes into account the goals of development cooperation when making decisions regarding policies which impact developing countries as well.

In its first annual report on the global situation of human rights in 1983, the European Parliament asked the Commission to work out proposals on how human rights considerations could be included in the Community's foreign relations. It was in the 1990's that clauses on human rights conditionality were included in the EU's cooperation agreements. If partner countries fail to observe the fundamental values stipulated in the clauses, the relevant provisions provide for suspending financing.[829] At the same time, the sanctions implemented for human rights violations often take toll on the population, especially on the poorest and most vulnerable. As a result, the efficient implementation of human rights may become even more illusionary. A further problem may be posed by the fact that the application of conditionality is influenced by economic and strategic reasons even within the EU framework; so far the Union's measures have, similar to IMF sanctions, often affected the least influential and most backward partner countries. Unless the EU demands of all unlawful regimes to comply with the set of conditions stipulated in the agreements, the issue of using double standards may arise.[830] Within the development cooperation framework the advancement of human rights may be successful only to the extent that the states provided the financing are willing to facilitate, by their conduct, the protection of human rights and the implementation of democratic values. The best means for the EU to foster this is through the application of what is referred to as positive conditionality, by which it stimulates developing countries to the implementation of higher-level human rights norms by offering advantages in return.[831]

In the 2000s, the common development policy underwent a continuous transformation. The most important result of the process was the European consensus issued by the main organs of the EU setting the future development directions of the development policy. In addition to increasing financial resources the Union gives special attention to reinforcing the quality and efficiency of support. The action plan entitled 'EU aid: Delivering more, better, faster'[832] adopted in April

ropean Parliament – Annual report 2007 on the European Community's development policy and the implementation of external assistance [COM (2007) 349].

829 Such provisions can be found e.g. in Art. 37 of Regulation 1905/2006/EC creating a financing instrument for development cooperation or in Article 96 of the Cotonou Agreement.

830 Interparliamentary Committee Meeting, *European Parliament – National Parliaments: Human Rights Conditionality in Development Policy*, Brussels, 11 October, 2011, pp. 5–6, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/deve/dv/877/877516/877516en.pdf.

831 Elena Fierro, *The EU's approach to human rights conditionality in practice*, Kluwer Law International, The Hague 2003, p. 100.

832 The Commission's Communication: 'EU aid: Delivering more, better and faster' [COM (2006) 0087].

2006 emphasises the significance of increased coordination with both the beneficiary countries and the other donors. In order to facilitate this, the EU strives to set up a joint multi-annual programming built on the partner countries' strategies and budget processes, the application of co-financing agreements and common implementation mechanisms. In addition to the coordination of aid there is a need to establish a better division of responsibilities between both the EU and Member States and among Member States. Aid must be focused to fields and regions of the development cooperation where the Union or its Member States have comparative advantages. The EU is represented in over 140 countries in the world. Due to its global presence the EU is able to take more efficient action in the fields of e.g. trade and regional integration, environment protection, regional development, conflict prevention or the implementation of democracy and human rights. The EU provides assistance via several forums. On the one hand, it directly cooperates with governments, in addition to which it implements individual programmes and supports civil society. As a result of the decentralisation of the development policy it is EU representative offices operating in the partner countries that are responsible for the management of aid. Individual programmes are often implemented through non-governmental organisations. Civil society organisations have a growing role in the fight against the negative effects of globalisation, often providing more flexible and novel solutions than governments.

The global economic crisis brought about a new turn in the history of the Union's development policy. The European Commission put forward its new development programme, the Agenda for Change[833] in October 2011, which the Council accepted in May 2012. The aim of the Agenda is to bring a strategic and goal oriented approach to development policy, adjusting the efforts to decrease poverty to contemporary global challenges. It defines the support and promotion of democracy, human rights, the rule of law and good governance and the promotion of inclusive and sustainable growth as the two main priorities of development policy. With the help of the new methods and priorities formulated in the Agenda for Change, the Union strives to respond faster and more flexibly to unexpected situations and to use funds differentially, channeling them to regions where they are most needed and where they can have the greatest impact. The rewriting of goals and priorities, such as the focus placed on agriculture, social security, health and education, the limitation of the Union's intervention to three sectors per partner countries, the promotion of good government, the wide ranging use of innovative financing mechanisms and the improvement of policy co-

833 European Commission: An agenda for change: Increasing the impact of EU development policy. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. COM(2011) 637 final, Brussels, 13 October, 2011.

herence could bring about significant changes in the area of development cooperation.

7 Humanitarian aid

Since the European consensus on humanitarian aid [834] was adopted, humanitarian aid has become a separate field of policy of the European Union. At the same time, considering its close correlations with development policy – which is also indicated by the fact that the Treaty of Lisbon provides for the two policies under the same title – any discussion on the development policy must, at the same time, include a brief discussion on humanitarian aid.

Despite the numerous meeting points, there are considerable differences between the two activities.[835] While the primary goal of the development policy is reducing and eradicating poverty, humanitarian aid aims at the mitigation of human suffering and hardship and the helping of victims in the shortest possible time. The development programmes require long planning and coordination, while the utilisation of humanitarian aid is preceded by immediate decisions. Humanitarian assistance is required in situations of emergency and catastrophes, in contrast to which development policy targets facilitating the long-term sustainable development of all developing countries. Thus it is not the individual but the community, the whole society that is in the focus of development policy. The difference is also reflected in the motivations: while in the background of humanitarian aid there are moral and humanitarian principles, development cooperation serves, to a significant extent, the interests of donor states. Bridging the relief-development gap and creating harmony between the two fields pose difficulties primarily due to the separation of humanitarian and development aid.[836]

The European Commission has provided humanitarian aid to alleviate the consequences of conflicts or natural or human disasters since 1960. By today, the EU has become the greatest humanitarian donor in the world; the contribution of the Union makes up 45–50% of the total assistance. Albeit the EU's fund for humanitarian aid does not reach one billion euros at a yearly level, the sum

834 Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission: The European consensus on humanitarian aid [OJ C 25, 30.1.2008, pp 1-12]. The Commission set up an action plan for the implementation of the consensus signed on 18 December 2007: the Working paper of 29 May 2008 [SEC (2008) 1991]. The regulatory framework for humanitarian aid is set, in addition to the consensus, by Regulation 1257/96/EC of 20 June 1996.

835 For more details cf. Amelia Branczik, 'Humanitarian Aid and Development Assistance' *Beyond Intractability*, February 2004. http://www.beyondintractability.org/node/2701.

836 Paragi, Szent-Iványi & Vári 2007, pp. 166–168.

still enables the Union to help approximately 120 million people in need each year. Article 214 of the TFEU explicitly provides for humanitarian assistance, thereby creating a primary legal basis for the EU to provide emergency financial and technical aid as well as protection to third countries. The novelties introduced by the Treaty of Lisbon in the area of humanitarian aid primarily aim at accelerating financial and technical assistance in future. The Humanitarian Aid and Civil Protection Department (ECHO) puts great emphasis on making sure that the help required for survival reach the victims of catastrophes as soon as possible. The Treaty provides for setting up the European Voluntary Humanitarian Aid Corps, which is to perform the coordination of volunteers in the implementation of the Union's humanitarian programmes. The aid provided by the EU is not tied to conditions, i.e. is independent of the victims' racial or religious belonging or their government's political affiliation. The Treaty of Lisbon underlines that in the field of humanitarian aid the principles of international law, especially the requirements of impartiality and neutrality as well as the ban on discrimination must be respected.

The European Union sends the emergency aid to the crisis locations via the Humanitarian Aid and Civil Protection Department. The ECHO provides food aid, medical teams, mine clearing experts, logistic support and infrastructure development[837] in the first place. The EU has an active role in all distressed areas, amongst others Syria, Sudan, the Ukraine, the Western African countries affected by the Ebola virus and the Central African Republic. The Union's humanitarian aid primarily aims to help persons affected by conflict-related crises (complex emergencies). The European Union continues to support the victims of so-called 'forgotten crises' neglected by the media and international donors, such as the populations of the Myanmar-Thai border zone, Nepal or Chechnya.[838] The Cypriot Christos Stylianides is the European commissioner for humanitarian aid and crisis management since November 2014.

8 The Main Areas of Cooperation with Third Countries

8.1 The ACP-EU relations

The set of relations maintained with the 79 states of the African, Caribbean and Pacific regions is the EU's oldest cooperation framework. Initially it was the two

837 European Commission, *Europe on the move – The story of the European Union*, p. 15.

838 A forgotten crisis is a type of what is referred to as structural crisis. In addition to natural disasters and human-caused crises, structural crises constitute the third reason triggering a humanitarian crisis, developing in the course of a long time, emerging in a cumulative way and demanding high toll in the poorest countries, e.g. the black African region.

Yaoundé Agreements (of 1963 and 1969) and later on, between 1975 and 2000, four consecutive Lomé Conventions that regulated on the trade and development cooperation relations of the European Community and the ACP region. In the Lomé Conventions the European Community granted preferential market access to former colonies without demanding reciprocity, in addition to which it wished to facilitate the world market integration of ACP countries by providing financial aid. However, there took place no structural change in the economies of the beneficiary countries, because of which the association agreements needed to be revised. At the moment, the relations between the EU and ACP countries are governed by the Cotonou Agreement signed for a twenty-year period in June 2000. An important novelty in this agreement is that, through the introduction of political dialogue, it aims to strengthen the political dimension of the cooperation. By virtue of the Cotonou Agreement the economic relations between the Community and ACP countries are governed by Economic Partnership Agreements (EPA) compatible with the norms of WTO, which may considerably improve developing countries' chances for integration into the world economy. Within the framework of the Economic Partnership Agreements, instead of unilateral preferences the EU and African countries grant market access to each other's products based on reciprocality. The EU-Africa Joint Strategy adopted in Lisbon in December 2007[839] provides a long-term framework for strengthening EU-Africa relations. The primary goal of the strategy is to enable EU and African states to deepen their political relations and strive to find answers to global challenges together. Most of the financing of the development aid for the ACP region comes from the European Development Fund, while certain goals and programmes are also funded from the common budget through the Development Cooperation Instrument and the European Neighbourhood Instrument. The Development Cooperation Instrument allocates, for the period between 2014 to 2020, 845 million euros to the newly created Pan African programme (PANAF), which will be spent on building the EU-Africa Joint Strategy and financing transcontinental presence. Until the 1990's, the ACP region had a special position among recipient countries, while later on other regions like Mediterranean countries or the Central-East European region, too, became increasingly important for the EU.

839 Communication from the Commission to the European Parliament and the Council – from Cairo to Lisbon – the EU-Africa strategic partnership (27 June 2007) [COM (2007) 357]. The first Action Plan (2008-2010) on the implementation of the Africa–EU Strategic Partnership was adopted by the heads of states and governments of the EU and African countries at their meeting in Lisbon on 8 and 9 December 2007.

8.2 Europe and the Mediterranean

The EU-Mediterranean relations were launched in 1969, by signing the first preferential trade agreements. In the 1970s the Community signed comprehensive association agreements with Mediterranean countries. Although the development policy tools were very similar to those included in the Lomé Conventions, considering the political situation in the region, the Mediterranean agreements had to be signed with each respective country on a bilateral basis. The bases of regional cooperation between the Mediterranean and the European Union were laid down in the Euro-Mediterranean Partnership formulated at the conference held in Barcelona in November 1995. The Union for the Mediterranean initiative adopted at the Paris summit in July 2008 confirmed the political weight of the Barcelona Process.

The PHARE programme (Poland-Hungary: Assistance for the Reconstruction of the Economy) established in 1989 ensured development aid for two potential future members, Hungary and Poland with the aim to support the economic and societal reform process.[840] From 1990, the payment of the assistance was extended by the European Community to other countries as well, to help economic transformation, the process of democratisation and the preparation for EU accession. There were two other pre-accession programmes at the disposal of countries wishing to join the EU: ISPA for supporting environment protection and transport projects and SAPARD providing assistance for establishing sustainable agriculture and rural development. For the period between 2007-2013 the EU introduced a new integrated pre-accession tool replacing the earlier pre-accession funds: the Instrument for Pre-accession Assistance (IPA).[841] As an effect of the enlargement process, the security challenges and energy interests, in 2004 the Union launched its neighbourhood policy (European Neighbourhood Policy, ENP) covering the Mediterranean and Central-East European countries as well as, with the exception of Russia, the Caucasus.[842] The ENP aims to establish privileged economic, political and social relations based on neighbourhood and common history between the Union and all neighbouring countries. The implementation of the specific programmes is enabled by the European Neighbourhood and Partnership Instrument (ENPI), which receives funds amounting to 15.4 billion euros for the period between 2014 and 2020.

840 Council Regulation (EEC) 3906/89 on economic aid to the Republic of Hungary and the Polish People's Republic, OJ L 375, 23.12.1989.

841 Regulation 1085/2006/EC establishing an Instrument for Pre-Accession Assistance (IPA), OJ L 210, 31.7.2006.

842 Since April 2004 Cyprus and Malta have participated in the partnership as EU Member States.

8.3 Asia and Latin-America

Considering the lack of classic colonial ties and the relatively better economic situation compared to African states, countries in Asia and Latin-America received very limited development aid from the EU for a long time. The first aid programme for these two regions (ALA) was adopted in 1976. Latin-America and the Caribbean (LAC) got into the focus of development policy in 1985, when Spain and Portugal joined the EU.[843] From the second half of the 1980's, in addition to multilateral and bilateral relations with the respective states the EU pursued relations also with the regional integration blocs like the Central-American Integration System (SICA), the Andes Community or Mercosur. A partnership between the European Union and the countries of the LAC-region was established in Rio de Janeiro in 1999.[844] Priorities of the partnership include stimulating regional integration, promoting economic cooperation and good governance, mitigating poverty and social inequality and improving the standard of education. The European Union is currently Latin America's main source of aid, its second largest foreign investor and commercial partner. Between 2014 and 2020, 2.5 billion euros will be provided to the region through the Development Cooperation Instrument.

Asia became an important player in the development cooperation from the 2000s. In 2005, it was Afghanistan to receive the most development aid from the European Union and the assistance provided to the whole region, too, considerably increased. With reference to Asia, the EU primarily strives for establishing enhanced trade relations and a strategic framework for the development cooperation. A special role in the EU's Asia strategy is assigned to the cooperation with the Association of Southeast Asian Nations (ASEAN). In 1980, the EU and ASEAN signed a cooperation agreement in order to deepen trade, economic and political relations. As Southeast Asian countries experienced significant economic growth, the relations gradually made room for political dialogue, balanced trade and investment development. Since 1996, institutionalised dialogue has continued within the framework of Asia-Europe Meetings (ASEM). ASEM is a loose consultation forum which, beyond economic, political and security issues, extends cooperation between the two regions to the fields of social policy and culture as well.

843 Paragi, Szent-Iványi & Vári 2007, pp. 134–135.

844 Communication from the Commission to the Parliament and the Council – The European Union and Latin America: Global Players in Partnership [SEC (2009) 1227].