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Law – Regions – Development

Tímea Drinóczi,
Mirela Župan (eds.)

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Law – Regions – Development

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Foreword by the President of the Republic of Croatia

It is also a privilege to write forewords to books (conference proceeding) published sequentially that represent coherent and consistent research work as well as a firm and well established co-operation between the two neighboring universities. University of Pécs and University in Osijek started their IPA co-operation within the EUNICOP programme. Croatia was not a member state of the European Union, but as a candidate it could boast at that time that her legal system had been harmonized with the *acquis* of the EU to the maximum extent. It was not enough; we had to prove the ability to implement *acquis* in the practice as well. Universal legal analysis, both scientific and professional, comparison of standards and of the practice with those countries that had already gained experience in the implementation of the *acquis*, was certainly necessary for adopting the *acquis* in such a way that would allow the realization of its *ratio legis*. These were the topics of the two previous proceedings which provided an excellent basis for narrowing as well as widening the research topic at the same time.

This book, a collection of papers titled 'Law – Regions – Development' is dedicated to the issues of regional development and environmental protection; and at the same time, it applies not only a legal approach, in *strictu sensu*, but some economic perspectives as well.

Croatia has recently become EU member state. Due to historical circumstances Hungary joined the EU before Croatia. Hungary was more than heartily supporting Croatia in her efforts to satisfy all the conditions for EU membership, and has been advocating for and encouraging Croatia. As one of the priorities of her EU presidency in the first half of 2011, Hungary set out the completion of Croatian accession negotiations with the EU. Furthermore, Osijek and Pécs are regionally connected and they are constantly emphasizing the importance of universal and quality cross-border relations, not only through the cooperation of their universities, but also through every other form of cooperation. Today, in Europe without borders, cross-border cooperation of Osijek and Pécs will become even more important. Finally, this book has been co-financed by the European Union through the IPA cross-border program Hungary-Croatia, which shows that the EU itself has recognized Osijek and Pécs as centers of jurisprudence that are able to universally analyze particular aspects of regional development and environmental protection.

The publishers and authors certainly deserve praise for the choice of topic, the quality of papers, and the message they are sending to the

Croatian and Hungarian professional and general public. This message is very simple: Croatia and Hungary are part of the common European legal space, countries that are directed toward each other, countries whose resemblances are much greater and much more important than possible differences resulting from the different historical circumstances in which they have followed their European way.

Zagreb, 10 October 2013

Prof.dr.sc. Ivo Josipović

Foreword by Former President of Hungary László Sólyom to the Conference Proceedings of the DUNICOP Project Co-Managed by the University of Pécs and J.J. Strossmayer University of Osijek

1. I gladly joined President Josipović in his gesture of writing a foreword to the volumes reporting on the joint research undertaken by the law faculties of Pécs and Osijek. He did so for each book separately; while today I can see all three research reports at the same time. The earlier forewords by the Croatian head of state were written in the spirit of Croatia's accession to the European Union. The Pécs-Osijek project itself leans on a European Union tender. Cooperation between the two universities has demonstrated both Croatia's preparation and maturity for membership as well as cooperation between the two countries – one might say, cooperation not at an official inter-governmental, but rather a civil level, also providing an example for inter-regional relations. Although we shared only a short period together as presidents of our respective states, the symbolism of these volumes is perhaps enhanced by the fact that it was on the very site of the one-time university in Pécs that in April 2010 the Hungarian, Croatian and Serbian heads of state conducted talks, amongst others, on topics that the University of Osijek and the present University of Pécs had been working on together. Apart from the European Union and environmental protection, such issues were, for example, the collective rights of national minorities or dual citizenship. At their meeting in Pécs the presidents also declared that they recognized and would promote the concept of cultural nation (irrespective of citizenship) within the Union.

2. The three volumes of essays reflect the almost self-organizing thematic development of the research. The first year dealt with rather general, 'cross-border' (common?) legal issues. The second one also deals with 'legal challenges of our era'. These may indeed include almost anything. As a matter of course, each year at least half of the work is taken up by the EU; on the other hand, other topics come up repeatedly, such as local governments, environmental protection and regions. Thus a part of the papers already anticipate the focus of the third year on regional governance. It may be interesting to note the predominance of private law topics in the second volume – which seems to be a single burst of enthusiasm in the light of the theme of the third year. It is apparent that the around thirty essays born every year have mobilized the entire two faculties. This is revealed not only in the rich diversity of topics, but also in the fact that all writings, almost without exception, have been co-

authored between Croatian and Hungarian participants. Consequently, there has been a real dialogue, mutual learning about each other's way of thinking, preparedness, methodology and preferences.

3. And now we have arrived at the key and underlying essence of the whole joint work supported by the Union: can the European Union create a common culture? This question is particularly interesting with regard to the Pécs-Osijek relationship as well as Croatian-Hungarian relations. This is so because the earlier common culture has not yet become totally extinct here – and the legal part of this culture enables us to draw peculiar lessons for the very reason that Croatia always held an autonomous constitutional legal status within the Kingdom of Hungary. As a matter of course, by common culture I do not mean one-time Hungary or the Austro-Hungarian Empire, but rather the Central-European culture which might be referred to as Central-Eastern-European today, but the borders of which from time to time emerge from below the North-South and East-West fault lines of the European Union. This heritage has its effect even if we are unconscious of it or we do not want to be aware of it. However, the question is whether it is powerful enough to renew itself and contribute its own special colour to a new (legal) culture within the EU. Nevertheless, apart from voting quotas on the one hand and the unpredictable effect of specific cultural achievements on the other hand, there are special intermediate possibilities for having a voice especially in the field of law. For the achievements of legal culture may become institutionalized.

We speak of the common constitutional tradition of Europe – she is also referred to by the European Court of Justice. Today's intensive communication provides an unprecedented opportunity, for example, for decisions of a Constitutional Court to become the object of constitutional borrowing; but good practices of governance may similarly exert their influence just like bad practices set as negative examples to be avoided. These practices may become well-established in the soft law of various bodies or may become habitual through adoption. The Pécs-Osijek cooperation experiments with the common culture in the laboratory of a small border region. Still, international queries received from unexpected locations may be monitored on the website of the project: this work is not confined to the region. The reader, to whom I recommend the work of the authors for further contemplation, will himself become a shaper of legal culture.

Budapest, November 2013

László Sólyom

Content

Environmental protection: legal protections

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Preface

The international conference entitled ‘Law – Regions – Development. Legal implications of local and regional development’ was one of the events of the DUNICOP project (**D**eepening **UNI**versity **C**ooperation **O**sijek – **P**écs project; HUHR/1101/2.2.1/005) managed by the two partner law faculties in Pécs and Osijek. DUNICOP is a one-year long common research and curriculum development project between the Universities in Osijek and Pécs in the field of law. The project is co-financed and supported by the European Union through the Hungary-Croatia IPA Cross-border Co-operation Program and by the two participating law faculties. The DUNICOP project is operated in various interrelated areas and through various activities and is regarded as a successful continuation of the previous EUNICOP and SUNICOP projects. The conference, similarly to the previous ones, gave opportunity to Hungarian and Croatian researchers to conduct common research activity and encouraged them to write and present papers together at the conference that was held in Pécs on the 14-15 June 2013. The project made it also possible for researchers to finalize their papers either before or after the conference and adjust them to other papers as well as to the final conclusions of the conference.

Attracting the widest audience possible who can benefit from the research results is also one of the objectives of the project. Therefore, the conference papers have been collected and published in three books in Croatian, Hungarian and English. An electronic version of these books can be found on our websites and printed versions of proceedings in English and Croatian are also available. The Faculty of Law, University of Pécs feels much privileged to have been given the opportunity to host the conference and hopes that cooperation will not cease, but will be continued either at the institutional or personal level.

Pécs – Osijek, 17 October, 2013

the editors

Pluralistic approach on development: regions and environment

Tomasz Milej[*]
Samir Felich[**]

European Cohesion Policy: objectives, instruments and reality

I. Legal origin of cohesion policy in the European Union

Economic and social cohesion is an expression of solidarity between the Member States and regions of the European Union.[1] This is, at first glance, a simple explanation of the economic, social and territorial cohesion policy. It points to the inherent goal of the European community, which is also, but not only, to be attained by means of the cohesion policy of the European Union. This goal is a unified and equal Europe based on equality and solidarity between Member States and regions.

According to Article 3(2) TEU, the Union is committed to a 'highly competitive social market economy, aiming at full employment and social progress'. The concept of social market economy stemming from Germany and attributed to Ludwig Erhard is interestingly not enshrined in the German constitution. Given the unambiguous articulation of this commitment, one could expect that there is some sort of social policy led by the European Union. This does not however seem to be the case. Social policy remains within the competence of the member states. It has been suggested, that that due to the missing European *demos*, it is not possible to make reasonable social policy choices on the supranational level.[2]

On this basis, one may ask whether the EU may discharge its commitment to the social market economy in a situation in which there is lack of activity of EU organs in the field of social policy. If the said commitment is to be taken seriously, the Union may not just rely on the member states. It must itself take some sort of action. One may thus ask whether cohesion policy may fill this gap. Is cohesion policy the social policy of the European Union? Another issue, which will be explored in

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[1] Glossary of the EU, available at *http://europa.eu/legislation_summaries/glossary/economic_social_cohesion_en.htm.*
[2] H.-J. Wagener and T. Eger, *Europäische Integration. Wirtschaft und Recht. Geschichte und Politik* (München, Vahlen 2009) p. 559.

this paper, is the regional dimension of cohesion policy. What is regional about cohesion policy?

1. The first nuance of cohesion policy in the Treaty of Rome

Not surprisingly, the earliest origin for all following instances of what can be summarized as cohesion policy of the European Union can be found in the preamble of the Treaty of Rome. Yet at this time, cohesion policy was mentioned only in an open and inconclusive manner which had a long way to go before it was complemented by more specific regulations. The treaty proclaimed an honorable goal in the preamble, that is *ensure the economic and social progress of their States by common action to eliminate the barriers which divide Europe* and through that *to strengthen the unity of their* [the member states] *economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favored regions.* However, the treaty itself lacked specific provisions on how the EC could contribute to the development of those 'less favored regions'. Neither did it provide for any common action to foster such development. Nevertheless, some Articles took up the issue of reducing the differences among various regions, even if between the lines. Some reference to regional disparities and possible measures can be found in the treaty provisions dealing with the Common Agricultural Policy (just to mention the European Agricultural Guidance and Guarantee Fund established in 1964),[3] the European Investment Bank, and the European Social Fund (ESF). The latter, even already established by the Treaty of Rome in Article 123, was at this time a quite modest instrument designed to help regulate the European capability of labor, to combat unemployment and social exclusion. Its rise to one of the three main structural funds in the field of the cohesion policy took a number of reforms. The European Agricultural Guidance and Guarantee Fund (EAGGF) was part of the structural funds until 2007 when it was replaced by the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD).[4] From this time on, they have been accounted

[3] Regulation (EEC) No. 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy.

[4] Council Regulation (EC) No. 1290/2005 of 21 June 2005 on the financing of the common agricultural policy.

for under the Common Agricultural Policy and no longer under the structural funds.

The fact that the issue of helping the poorer regions to catch up with the wealthier was dealt with so reluctantly could be explained by three factors occurring in the relevant time period.[5] First, the original six member states that created the European Community were a (economically) homogeneous association of countries with an understanding of regional policy as an internal issue.[6] Even about ten years later in 1969 it was still expressed that

> '[...] regional policy is clearly the concern of the public authorities in the member states. The measures it involves fall directly under the political, cultural, administrative, sociological and budgetary organisation of the States. Regional policy forms an integral part of the system of internal balances on what the State is based'.[7]

Second, it was believed that the integration itself and the promotion of inter-regional trade would remove regional disparities and start a process of harmonization between the regions on its own.[8] Third, it has to be considered that certain expectations were vested in the capacity of public investment banks to support growth in underdeveloped regions. In this context, it should be mentioned that the foundation of the World Bank took place precisely in that period of time and in addition, the European Investment Bank (EIB) was established as early as by the Treaty of Rome. However, as for the EIB, it should be noted that it was not the European Commission as a community autonomous organ, but the member states, as shareholders of the European Investment Bank, which had a final say on grants for projects and loans.[9]

The concurrence of these factors might explain the reluctance towards explicit provisions in the Treaty of Rome at that time, even if the states did realize that some form of support for the less favored regions was

[5] G. P. Manzella and C. Mendez, *The turning points of EU cohesion policy. Working Paper in the context of the Barca Report* (Brussels 2009) p. 5; see J. Lackenbauer, *Equity, Efficiency, and Perspectives for cohesion policy in the enlarged European Union* (Bamberg, BERG 2006) p. 19.

[6] Manzella and Mendez, op. cit. n. 5, at p. 5.

[7] Commission of the European Communities (1969) A Regional Policy for the Community, COM(69)950, 15 October 1969, Brussels, p. 13.

[8] J. Lackenbauer, op. cit. n. 5. at p. 19.

[9] Manzella and Mendez, op. cit. n. 5, at p. 6.

necessary. However, they preferred to take a very cautious approach in this regard.

2. From Rome to Lisbon

An explicit treaty provision, which declared the strengthening of economic, social and territorial cohesion as a policy objective of the European Community, was added to the treaty as late as 1987 by the Single European Act (SEA), the first major revision of the Treaty of Rome.

Yet, also in earlier stages of European integration, the European Commission was well aware of the need to take appropriate measures to strengthen the development of less favored or less developed regions. In its report from 1964, the Commission pointed out that for various reasons, there were many *régions défavorisées* within the European Community and that the member states had a different approach towards handling their regional problems and development.[10] On numerous occasions, the European Commission underscored that this disequilibrium might also detrimentally affect the better developed regions.[11] Nonetheless, the member states were quite unwilling to heed the suggestions of the European Commission. A real and substantive progress in the field of regional policy was reached by the reform of the ESF in 1971,[12] the launch of agricultural structures reform from 1972[13]and the expansion of the possibilities of the European Investment Bank to finance its own measures of regional development by

[10] European Commision, Rapport de groupes d'experts sur La politique régionale dans la Communauté économique européene (Brussels 1964) p. 17-27.

[11] European Commision, Rapport de groupes d'experts sur La politique régionale dans la Communauté économique européene, loc. cit. n. 10, at p. 24: *'Ces déséquilibres [...] portent préjudice directement ou indirectement non seulement aux régions défavorisées, mais aussi aux régions les plus avancées'*; see Resolutions of European Parliament of 9 February 1959 (Resolution Van Campen), of 2 June 1960 (Resolution Motte), of 22 January 1964 (Resolution Birckelbach), Commission of the European Communities (1965); First Communication of the European Commission on Regional Policy in the European Community, SEC(65)1170; Commission of the European Communities (1969), A Regional Policy for the Community, COM(69)950, 15 October 1969, Brussels; see also Manzella and Mendez, op. cit. n. 5, at p. 7.

[12] 71/66/EEC Council Decision of 1 February 1971 on the reform of the European Social Fund.

[13] Council Directives, 72/159, 72/160, 72/161.

empowering the European Commission to contract loans for the purpose of promoting investment within the community.[14]

At the Paris Summit in 1972 and 1974, as a result of the economic crises and the enlargement of the community in 1973 (Denmark, Ireland and the United Kingdom), the leaders of the member states decided to coordinate their regional policies establishing a committee on regional policy and a community-funded regional development fund in 1975.[15] The European Development Fund (ERDF) thus came into being and, since then, it constitutes the second of the three main structural funds in the field of cohesion policy. However, as aforementioned, the legal basis for cohesion policy and the establishment of the structural funds was missing from European primary law until the adoption of the SEA. For this reason, at that time, Articles 145 and 235 EEC were invoked as legal bases for the establishment of the committee on regional policy and the ERDF.[16] Moreover, the ERDF was not a true instrument for regional development of the Commission. It was more upon the member states and their governments to bargain regarding the quota of financial support from the community budget and project financing under their own regional policies.[17]

The following southern enlargement (Greece 1981, Spain & Portugal 1986) increased the number of less favored regions in the community and the regional disparities became an aggravated problem. In this situation, the claims of the economically weaker member states to extend the community's regional policy efforts were advanced more vigorously. However, at the same time, the different and not coordinated mechanisms of the existing financial development programs prevented the effective use and positive impact of the different funds. Therefore, a comprehensive redesign of the community structural policy appeared necessary.[18]

[14] 78/870/EEC Council Decision of 16 October 1978 empowering the Commission to contract loans for the purpose of promoting investment within the Community.

[15] 75/185/EEC Council Decision of 18 March 1975 setting up a Regional Policy Committee; Regulation (EEC) No 724/75 of the Council of 18 March 1975 establishing a European Regional Development Fund.

[16] See 75/185/EEC Council Decision, Regulation (EEC) No 724/75 of the Council.

[17] Lackenbauer, op. cit. n. 5, at p. 20.

[18] A. Putler, 'AEUV Art. 174 (ex-Art. 158 EGV), Ziele der Strukturpolitik; benachteiligte Gebiete', in C. Calliess and M. Ruffert, Hrsg., *EUV/AEUV, Das Verfassungsrecht der Europäischen Union mit Europäischer Grundretchtecharta, Kommentar* (München, C. H. Beck 2011).

The first steps on this route where made in the first half of the 1980s. The changes included a revision of the ERDF, an overall enhanced role for regional development programs, for example by widening the scope of eligible infrastructure expenditures, and a simplification of the administrative process.[19] Additionally, the Commission was tasked with periodically reporting on the social and economic situation, and the progress and impact of measures taken in the regions to which it also had the chance to 'submit proposals for community regional policy guidelines and priorities'.[20] One could notice a shift from a member state controlled model, where the Commission acted as a mere redistribution institution of the funds, towards a model controlled by community policies and the Commission.[21]

The real major step in this direction was the adoption of SEA in 1986. It not only set the objective for a single European market, but also established a primary statutory source for cohesion policy which was becoming increasingly important. Article 23 of the SEA added the Title V 'Economic and Social Cohesion' with Articles 130a to 130e as ancestors of Title XVIII, Articles 174 to 178 of the consolidated version of the Treaty on the Functioning of the European Union (TFEU) in its current version. The tenor of the treaty amendment by the SEA was not subjected to any major overhaul until the present day. Some minor amendments were introduced by the treaties of Maastricht, Amsterdam and Nice. Only the amendments made by the treaty of Lisbon were more significant.

With this legal basis in force, the Commission could start to reform its community policies towards a structural policy with a real economic impact that would build the desirable cohesion in the European Community. The proposal of the Commission,[22] which was later

[19] Manzella and Mendez, op. cit. n. 5, at p. 12.

[20] Council Regulation (EEC) No 1787/84 of 19th June 1984, on the European Regional Development Fund.

[21] Bulletin of the European Communities, Supplement 4/85. Programme of the Commission for 1985. Statement by Jacques Delors, President of the Commission, to the European Parliament and his reply to the ensuring debate, Strasbourg, 12 March 1985, p. 15, para. 15.

[22] EC Commission, Bulletin of the European Communities Supplement 1/87, The Single Act: A new frontier for Europe Communication from the Commission [COM(81)100] to the Council, 15 February 1987.

implemented through a council regulation, targeted five objectives and tasks of the structural funds.[23]

Objective 1 meant 'promoting the development and structural adjustment of the regions whose development is lagging behind'. *Objective 2* aimed at 'converting the regions, frontier regions or parts of regions (including employment areas and urban communities) seriously affected by industrial decline'. *Objective 3* referred to 'combating long-term unemployment'. *Objective 4* targeted 'facilitating the occupational integration of young people'. *Objective 5* was intended to reform the common agricultural policy by 'speeding up the adjustment of agricultural structures' [Objective 5 (a)] and 'promoting the development of rural areas' [Objective 5 (b)]. The Structural Funds EAGGF, ESF and ERDF were assigned to attain these goals, each according to the specific provisions governing its operations. All three structural funds were tasked to assist Objective 1 (ERDF, ESF, EAGGF), whereas the support for regions affected by industrial decline (Objective 2) attributed to the ERDF and the ESF. Both Objective 3 and 4 were limited to promotion by the ESF, while Objective 5(a) should be fostered by the EAGGF Guidance Section and Objective 5(b) could use the full power of all the structural funds (EAGGF, ESF, ERDF).[24]

By virtue of the same regulation, the Council laid down rules for funding eligibility concerning three out of five of these objectives. The eligibility for regions to fall under Objective 1 was based on an average GDP per person less the 75% of the community average in the last three years. The eligibility for regions within Objective 2 was based on three factors,

> '(a) the average rate of unemployment recorded over the last three years must have been above the Community average; (b) the percentage share of industrial employment in total employment must have equaled or exceeded the Community average in any reference year from 1975 onwards; (c) there must have been an observable fall in industrial employment

[23] Council Regulation (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.

[24] EC Commission, Bulletin of the European Communities Supplement 1/87.

> compared with the reference year chosen in accordance with point'.[25]

Eligibility for Objective 5(b) was based on

> '(a) high share of agricultural employment in total employment; (b) level of agricultural income, notably as expressed in terms of agricultural value added by agricultural work unit (AWU); (c) low level of socio-economic development assessed on the basis of gross domestic product per inhabitant. Assessment of the eligibility of areas according to the above three criteria shall take into account socio-economic parameters which indicate the seriousness of the general situation in the areas concerned, and how it is developing'.[26]

Coordination between the structural funds, the EIB, and other financial instruments to stimulate these objectives was later reinforced by Council Regulation (EEC) No 4253/88 of 19 December 1988.[27] The focus on these five objectives and the fact of having guidelines and regulations based on a statutory source marked a milestone in European cohesion policy. Later, these objectives were supplemented by *Objective 6* 'to promote the development and structural adjustment of regions with an extremely low population density'.[28]

The most recent structural fund was added after entry into force of the Treaty of Maastricht in 1992. The Cohesion Fund was established by a Council Regulation on the 16 May 1994 on the basis of Article 130d TEU.[29] The idea was to create an instrument for Ireland, Portugal, Spain, and Greece to help these Member States out of a dilemma created by the Maastricht fiscal convergence criteria. On one hand, they were required to meet the economic and monetary union criteria, but on the other hand they had to ensure development of infrastructure, trans-

[25] Ibid.

[26] Council Regulation (EEC) No 4253/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments.

[27] EC Commission, Bulletin of the European Communities Supplement 1/87.

[28] Treaty of Accession of Austria, Finland and Sweden (1994), OJ C 241, 29.8.1994.

[29] Council Regulation (EC) No 1164/94 of 16 May 1994 establishing a Cohesion Fund.

European transport networks, and environmental protection. The essential investments in these areas were hardly reconcilable with the budgetary austerity necessary to enter the monetary union. The appropriate level of public investment was to be attained via assistance by the Cohesion Fund. Accordingly, the objectives of the Cohesion Fund were focused on environmental protection and transport infrastructure. The main feature of the Cohesion Fund is the fact that only member states and not the regions are eligible for the funding. Criteria for this eligibility included, first, gross national product (GNP) below 90% of the European Union average and, second, a program leading to the fulfillment of the conditions of economic convergence as set out in Article 104c of the Treaty.[30] Today, a similar regulation is incorporated into Article 177 TFEU as the Fund *shall provide a financial contribution to projects in the fields of environment and trans-European networks in the area of transport infrastructure* with the purpose of strengthening the economic and social cohesion in the European Union.[31] The fund is financing inter-regional transport, infrastructure, and environmental protection in 13 countries [Czech Republic, Estonia, Greece, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Portugal, Slovenia, Slovakia, Spain (eligible on a transitional basis)][32] whose per capita GDP is less than 90% of the EU average. Although the member states and not regions are eligible for support under the Cohesion Fund, the development of infrastructure has a potential to positively affect both the state as a whole and its particular regions. Financial aids from the Cohesion Fund do help to accomplish major infrastructural projects in the beneficiary countries such as construction of bridges and ring roads, improvement of railway networks, expansion of ports and airports, supplying large towns with drinking water, processing waste water, evacuating solid waste, cleaning rivers, and many more.[33] Assistance to the cohesion member states in developing their infrastructure (the new member states from Eastern

[30] Council Regulation (EC) No 1164/94.
[31] Council Regulation (EC) No 1084/2006 of 11 July 2006 establishing a Cohesion Fund and repealing Regulation (EC) No 1164/94.
[32] 2006/596/EC Commission Decision of 4 August 2006 drawing up the list of Member States eligible for funding from the Cohesion Fund for the period 2007-2013.
[33] 'The Cohesion Fund, A boost for European solidarity', 14 *Inforegio panorama* (2004).

Europe in particular) is not a charity of the wealthier member states. It is necessary to maintain and build up economic, social, and territorial cohesion as goal of a functioning European Union which brings macroeconomic benefits for everybody.

Although the treaties of Amsterdam and Nice did not bring about any extraordinary changes to the EU primary law foundations of cohesion policy, the policy itself did undergo considerable reforms during the decades of the 1990s and 2000s. First, the objectives were redefined and renamed to adjust them to the respective programming periods. The reform for the 2000-2006 programming period included considerable changes. The first change aimed to improve the effectiveness of structural measures by reducing the number of objectives from seven during the previous period (1994-1999) to three objectives for the 2000-2006 period.[34] The new objectives focused on

> 'promoting the development and structural adjustment of regions whose development is lagging behind' (Objective 1), 'supporting the economic and social conversion of areas facing structural difficulties' (Objective 2) and finally, 'supporting the adaptation and modernization of policies and systems of education, training and employment. This objective shall provide financial assistance outside the regions covered by Objective 1 and provide a policy frame of reference for all measures to promote human resources in a national territory without prejudice to the specific features of each region' (Objective 3).[35]

Second, the implementation was decentralized, passing the main responsibility for management, monitoring, evaluation, and control down to competent member state authorities responsible for the respective program. Third, the requirements for the program content and its implementation were simplified. The decentralization and simplification involved new regulations, designed to reinforce the control and effectiveness of expenditures by reviewing evaluation, monitoring and reporting.[36] This can be seen as step back to the initial

[34] Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds.

[35] Loc. cit. n. 33.

[36] Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations; Council Regulation

member states based quotas bargaining model as opposed to the community based model.

II. Cohesion policy under the consolidated version of the Treaty on the Functioning of the European Union (TFEU)

The treaty of Lisbon eventually added the 'territorial' dimension, providing a basis for broadening the scope of the cohesion policy. Article 174(1) TFEU contains a general provision on the structural policy which addresses the EU cohesion objective articulated in Article 3(3) subpara. 3 TEU. Accordingly, the cohesion policy is aimed not just at strengthening the economic ties between the member states. By virtue of article 174 TFEU, the Union is obliged to promote the economic, social and territorial cohesion thus contribution to an overall harmonious development. In addition, by virtue of Article 175 TFEU, the member states are also obliged to coordinate their economic policies with each other and implement the Unions cohesion policies in a way to attain the objectives set out for the Union in Article 174 TFEU. Articles 175-178 TFEU concretize the general provision of article 174 TFEU and contain the necessary statutory source for appropriate and necessary actions by the Union institutions.

The last reform for the period 2007-2013 was marked by increasing the added value of community cohesion policy, by another concentration and simplification of the structural funds.[37] For that purpose, former Objectives 1-3 were changed to the new objectives: *convergence*,

(EC) No 1263/1999 of 21 June 1999 on the Financial Instrument for Fisheries Guidance; Regulation (EC) No 1783/1999 of the European Parliament and of the Council of 12 July 1999 on the European Regional Development Fund; Regulation (EC) No 1784/1999 of the European Parliament and of the Council of 12 July 1999 on the European Social Fund.

[37] Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999; Regulation (EC) No 1081/2006 of The European Parliament and of the Council of 5 July 2006 on the European Social Fund and repealing Regulation (EC) No 1784/1999; Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC); Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999; Council Regulation (EC) No 1084/2006 of 11 July 2006 establishing a Cohesion Fund and repealing Regulation (EC) No 1164/94.

regional competitiveness and employment, and *European territorial cooperation*.[38]

Convergence aims at reducing regional disparities in Europe by helping those regions whose GDP is less than 75% of the European Union to catch up with the average regions. A 'phasing out' support until 2013 is offered for the regions which, as a result of the eastern enlargement of the European Union, overstepped the 75% mark due to the fact that the average GDP of the European Union has fallen with the accession of the newest member countries. *Convergence* is financed by all three structural funds (ERDF, ESF and the Cohesion Fund). It is the focus of the cohesion policy, as the European Union is spending €283.3bn which is 81.5% of total structural fund budget. The resources for the ERDF and ESF funds are 75,5% or 189.604.890.409€ out of the *Convergence* objective funding and the Cohesion Fund receives 24,51% or 61.558.243.811€ out of the *Convergence* objective funding (both figures include resources for transitional 'phase out' support in the respective fund).[39]

Regional Competitiveness and Employment aims at creating jobs by promoting competitiveness and making the regions more attractive to businesses and investors. All regions in Europe that do not fall under the *Convergence* objective are eligible for funding under the objective *Regional Competitiveness and Employment*. By supporting the wealthier regions to come into terms with their last drawbacks, it is intended to create a kick-off effect for all parts of the European Union. These regions who 'phase out' of the *Convergence* objective receive extra funding for 'phasing in' this new objective. *Regional Competitiveness and Employment* is financed by the ERDF and the ESF with a budget of €55bn, which is 16% of the total structural fund budget.[40]

European territorial cooperation aims at uniting the European Union and promoting cross-border cooperation between regions and countries. The eligible regions are, as a general rule, regions within 150 km radius

[38] Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999.

[39] Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999.

[40] Council Regulation (EC) No 1083/2006.

from the border and they are listed by the Commission.[41] *European territorial cooperation* is supported solely by the ERDF and has a budget of €8.7bn which represents not more than 2.5% of the total structural fund budget.[42]

As the cohesion policies underwent considerable expansion, the budget share spent on the structural funds and cohesion policy grew accordingly. With nearly no remarkable financial means in the beginning (1950s), the budget grew to 10% of the Community budget in 1975. The steady rise reached about one third of the Community budget in 1990s and is currently stable around 36% of the EU budget.[43] For the period of 2007-2013 the structural funds had a total capacity of 308.041.000.000€.[44] On the other hand, the budget for the Common Agricultural Policy (CAP) has massively decreased from over 70% in 1975 to about 40% of the community budget in 2013.[45]

These developments must be looked at against the background of the relation between the total expenditure by the EU budget and the Union's GDP. As compared to budgets in national states, the percentage of the GDP spent via the EU-budget is dramatically low. According to the new multiannual financial framework (MFF) it should be 1% of the GDP which is a reduction as compared to the MFF of 2006-2013.[46] It is virtually the same level as in 1970, which was 0.96%.[47] Amongst the OECD-states, there is no state spending less than 30% of the GDP via central budget; in 2006 Hungary was spending 51.9%.[48]

III. Cohesion Policy in the new programming period

According to the new multiannual financial framework as adopted by the Council in February 2013, there should be only two aims pursued by

[41] 2006/769/EC Commission Decision of 31 October 2006 drawing up the list of regions and areas eligible for funding from the European Regional Development Fund under the cross-border and transnational strands of the European territorial cooperation objective for the period 2007 to 2013

[42] Council Regulation (EC) No 1083/2006.

[43] Lackenbauer, op. cit. n. 5, at pp. 24-25; for 2013 budget see *http://ec.europa.eu/budget/figures/2013/2013_en.cfm.*

[44] Council Regulation (EC) No 1083/2006.

[45] Council Regulation (EC) No 1083/2006.

[46] Conclusions of the European Council 7/8 February 2013 on Multiannual Financial Framework, EUCO 37/13, para. 9.

[47] Wagener and Eger, op. cit. n. 2, at p. 494.

[48] Wagener and Eger, op. cit. n. 2, at p. 495.

the cohesion policy: economic growth and the creation of jobs.[49] It is intended to match the Europe 2020 strategic agenda, assuming a smart, sustainable and inclusive growth. According to the aforementioned agenda paper, the inclusive growth means that the benefits of this growth 'spread to all parts of the Union, including the outermost regions, thus strengthening territorial cohesion'.[50] It is further declared that the economic, social and territorial cohesion shall remain at the heart of the Europe 2020 strategy, with cohesion and structural funds being the key mechanisms to achieve these priorities.[51] The goal of territorial cooperation has been upheld, but the financial resources allocated to it are of marginal significance.

The most controversial issue is the total amount of expenditure on economic, social and territorial cohesion which the Council intends to reduce by 30bn (8,4%), even if the share for the cohesion states shall increase.[52]

Another important aspect which is mentioned in the Council conclusions regarding the MFF is that of macro-economic conditionality. It is laid down that the allocation of funds should be made conditional on 'sound economic policies'.[53] This is contested within the EP.[54]

IV. The assessment of cohesion policy

The cohesion policy was not introduced as a tool of wealth redistribution, not even an instrument to promote growth in backward regions but as a shock absorber.[55] It responds to the fact that the benefits of the common market are aggregated within the core regions. This is

[49] Conclusions of the European Council on Multiannual Financial Framework, para. 20.

[50] Communication from the Commission Europe 2020. A strategy for smart, sustainable and inclusive growth COM(2010)2020, final, Brussels, 3.3.2010 (hereinafter Europe 2020) p. 17.

[51] Europe 2020, at p. 21.

[52] Conclusions of the European Council on Multiannual Financial Framework, para. 6.

[53] Conclusions of the European Council on Multiannual Financial Framework, para. 77.

[54] See Opinion of the EP Committee on Regional Development, 27.9.2012, 2011/0177(APP), para. H.

[55] R. Riedel, 'European Union's Cohesion after the Enlargement: a View from Central Europe', 12 *Yearbook of Polish European Studies* (2009) p. 83; Wagener and Eger, op. cit. n. 2, at p. 579.

partly at the expense of peripheral regions.[56] Based on this assumption, the cohesion and regional policy were initially conceived as a compensation for the peripheral regions for their participation in the common market. This shock absorber function is particularly important in a situation, in which the Member States located in the periphery must meet the convergence criteria and keep budget spending low. As the participation in the common market requires enhanced investment in the peripheral regions, the budgetary austerity in everything but not affluent societies is likely to contribute to the gap increase between core and periphery.

As European integration was deepened, the scope of the cohesion policy was broadened, just to mention its social and territorial dimension. The strategy Europe 2020 also contains very far-reaching objectives, such as the aforementioned objective of 'spreading wealth'. The cohesion guidelines for the programming period 2006-2013 refer broadly to welfare state standards, including declarations, which can be regarded as a credo of expansive social policy.[57] Yet, the progressive broadening of the cohesion policy's scope did not go along with a proportionately substantial increase of financial resources. Even if the share of the expenditure for the cohesion policy within the EU budget increased, the share of the EC/EU expenditure in relation to the Union's GDP remained stable and low. In Central and Eastern Europe, this situation may have contributed to a certain degree of misperception with regard to the role of the structural funds. For the new member states, the access to the funds was one of the main incentives to join the EU,[58] perhaps even more important than the access to the common market. There seems to be not much awareness that the common market is the key element of

[56] Wagener and Eger, op. cit. n. 2, p. 578 and p. 579.

[57] See Council Decision (EC) No 2006/702 on Community strategic guidelines on cohesion which set out the goal of ensuring 'inclusive labour markets, enhance work attractiveness, and make work pay for job-seekers, including disadvantaged people, and the inactive'. Further, it was stated that '[an] important priority should be to strengthen active and preventive labour market measures to overcome obstacles to entering, or remaining in, the labour market and to promote mobility for job seekers, the unemployed and inactive, older workers as well as those at risk of becoming unemployed, with particular attention to low-skilled workers. Action should focus on the provision of personalised services, including job search assistance, job placement and training to adjust the skills of job-seekers and employees to the needs of local labour markets.'

[58] See Riedel, loc. cit. n. 55, at p. 84.

European integration whereas the structural funds only have an auxiliary function. On the other hand, in the region concerned, prior to the accession to the EU, infrastructural investment spending was relatively low in comparison to the 'old' Union. Therefore the cohesion policy is still perceived as a very important factor contributing to the modernization of the new member states.

Economical stock-taking generally suggests that the cohesion and regional policy may help to reduce disparities between the core and the periphery within the European common market taken as a whole, but not within the peripheral member states.[59] On the contrary, there is some evidence that peripheral regional subsidizing may even increase the economic distance to major urban areas in the given member state.[60] It is also suggested that regional subsidies can likewise have detrimental effects if they do not form a part of a coherent national regional policy.[61] For the use of funds to succeed, good governance and well-targeted investment based on clear strategy are also essential.[62]

V. Implementation of the cohesion policy

There are five principles guiding the cohesion policy spending:[63] the additionality principle (according to which EU funds should be additional to national funds, rather than replacing them), the principle of concentration on regional and structural needs, the principle of partnership between governments, regions and various social groups, the programming principle and the environmental protection principle.

The implementation of the cohesion policy, as it stands today, in particular with regard to the cohesion states, responds to some extent to the aforementioned diagnosis of its risks. The crucial step was made in 1988, when the idea of granting subsidies from the structural funds to support single projects was abandoned and switched to funding based on

[59] J. Bachtler and G. Gorzelak, 'Reforming EU cohesion policy. A reappraisal of the performace of the Structural Funds', 28 *Policy Studies* (2007) p. 311 and p. 319.
[60] Ibid.
[61] Bachtler and Gorzelak, loc. cit. n. 59, at p. 316; see also Wagener and Eger, op. cit. n. 2, at p. 588.
[62] Bachtler and Gorzelak, loc. cit. n. 59, at p. 317.
[63] For a summary overview see C. Archer, *The European Union* (London, Routledge 2008) p. 89; see also C. Eggers, 'EU-Arbeitsweisevertrag Art. 177, Ziele und Organisation der Strukturfonds; Neuordnung; Kohäsionsfonds', in E. Grabnitz and M. Hilf, eds., *Das Recht der Europäischen Union* (München, C. H. Beck 2011) para. 35 et seq.

planning and operational projects.[64] The allocation of funds is decided on the basis of a national strategic reference framework which for its part must be in conformity with the community strategic guidelines for cohesion.[65] A comparative view on the operational projects run in the cohesion states within the programming period 2006-2013 reveals a holistic, centralized approach. Accordingly, in Poland, around 75% of the total amount allocated to this country is spent on centrally steered operational programs and only 25% is distributed among 16 regional programs (every region runs one regional program). This allocation has been decided on the basis of a study of needs conducted in the national strategic reference framework. A quite similar situation occurs in Hungary, where some 23% of the available funds are spent by the regions. In Romania, which is a highly centralized country anyway, 100% of the structural funds are administered from Bucharest. On the other hand, in Germany, there is only one operational program run by the federal authorities (Transport infrastructure in the Federal Republic of Germany) amounting to 5.8% of the total funds, the remaining part being allocated to the *Länder*. The strongly decentralized allocation of funds is also a case of France, notwithstanding the fact that France, as opposed to Germany, is not a federal state. A high level of decentralization is accordingly not an essential condition for a decentralized administration of funds.

In regard to the real impact of the regional policy in the core EU regions, it should not be overestimated, to say the least. For example, the total of EU structural funds invested in North Rhine-Westphalia within the regional operational program in the programming period 2007-2013 amounted to €1,28bn,[66] whereas the total budgetary expenditure of the budget of this *Bundesland* was €59.9bn just in one year (2013).[67] EU financed investment is not even half of the budget deficit which is to be €3.4bn. Comparing these figures with the budget expenditures in the cohesion states is quite difficult, as they are mostly not decentralized to such a wide extent. Accordingly, in 2013, budget expenditure of the

[64] Eggers, loc. cit. n. 63, at para. 39; Wagener and Eger, op. cit. n. 2, at p. 583.
[65] Eggers, loc. cit. n. 63, at para. 53-55.
[66] All figures available at INFOREGIO web portal of the European Commission: *http://ec.europa.eu/regional_policy/indexes/in_your_country_en.cfm*.
[67] Information of the Ministry of Finance, 20 March 2013, available at http://www.fm.nrw.de/.

Polish region Lower Silesia amounts to some €450mn only,[68] whereas the region's largest city (Wrocław) is projected to spend twice as much this year.[69] Under these circumstances, the sum of €1,24bn allocated for the regional operational program for Lower Silesia is of enormous significance, although it is virtually the same amount of money as in the case of North Rhine-Westphalia.

VI. Conclusions

The existence of the EU regional policy depends on what operational programs are adopted, and the adoption of operational programs depends on the level of decentralization. As a rule, the most ample realization of the regional policy takes place in wealthier, decentralized states. However, paradoxically, the significance of EU funded projects is low there. In the cohesion states, even an allocation of a modest share of EU funds may trigger an empowerment of regions which, in the long term, can even shift a balance of power within a member state. There cannot be any doubt, though, that the cohesion policy aimed at narrowing the gap between rich and poor states within the EU is a policy led by the central government.

As for now, the structural funds do not work as a tool for the redistribution of wealth. Accordingly, there is no social policy within the European Union. And if there is no social policy at the European level, can the Union still claim that the commitment to social market economy and social progress is not taken seriously? The scarce resources which the states make available for the Union do not predestinate it as a social policy actor.

A difficulty to agree on common social policy choices resulting from the lack of a European *demos* was mentioned as a reason for the lack of the EU-run social policy. However, there seems to be a more serious problem, which can be characterized as a deficit of trust. This could be demonstrated by the conditionality requirement, mentioned in the Council conclusions and opposed by the EP. Apparently, the main contributor states do not have confidence that the funds will be spent efficiently by the cohesion states, or, to put it simply, will not be wasted. There is no confidence that the control mechanisms within the cohesion

[68] Information of the regional Marshall Office, 22 November 2012, available at *http://www.umwd.dolnyslask.pl/.*

[69] Information of the city council, 28 December 2012, available at *http://bip.um.wroc.pl/.*

states, for example the parliamentary control of government spending, work properly. It is quite a different question, whether these objections are substantiated. Is some cases they are, in other cases, and perhaps even in the most cases, they are not. The mere fact that the adequate level of confidence is missing, constitutes an obstacle for any form of EU-run social policy. The lacking confidence can only be counterbalanced by the parliamentary scrutiny on the European level, which is hampered by the broadly discussed democratic deficit and which may be thus perceived as not trustworthy either.

Cohesion policy can best be described as public investment policy.[70] As such, it is beneficial not only for the backward regions, but also for the capital from wealthier member states, given the fact that many infrastructure projects are implemented by the companies from the 'old' union. Further, it should be remembered that symmetrical regional development may also adversely affect the wealthier regions, which was repeatedly reported by the European Commission, for the first time as early as 1964.[71]

Finally, the present account suggests that the European Union is far from being a federation. The conditionality principle fits better into regulations on humanitarian aid or financial loans than to a redistribution system within federally organized polity. Only significant progress regards mutual confidence and democratic legitimacy of the EU institutions may put the EU in the position to effectively maintain a social policy on its own. Until this progress is achieved, expectations towards the structural funds should not be set too high.

[70] It has been suggested that this is precisely what the social policy of the EU is about, see Wagener and Eger, op. cit. n. 2, at p. 565, with further references. Labeling measures which do not aim at redistribution of wealth and which traditionally have not been conceived as social policy as 'social policy' is not very convincing.

[71] This aspect has been recently reaffirmed by Opinion of EP Committee on Regional Development, at para. J ('both beneficiaries and net contributors benefit from the Cohesion Policy').

Zoltán Gál*

The role of universities in regional development and governance
Towards the model of regionally engaged service-universities

I. Introduction

The focus of this paper is on the role of mid-range universities in the development of peripheral regions in the context of the university engagement literature. In many regions, modern universities are viewed as the core of the knowledge base, acting as key elements of innovation systems, supporting science and innovation-based regional growth.[1] The so-called regional engagement of universities has developed through an evolutionary process during the last 50 years. Traditionally, universities primarily focused on teaching and, to some extent, research, while university education was elite education. In many European countries, due to the gradual expansion of the higher education sector, the appearance of mass education and lifelong learning as well as the declining share of grants provided by the state in the 1970s and 1980s, competition between universities has become stronger, and they have been forced to perform their research activities on a profit-oriented basis. Universities have had to seek alternative sources of funding from business, industry, civil society and non-national state actors.[2] Also, public funding has increasingly become competitive funding, and research activities often require public-private partnership. This is called the 'entrepreneurial turn', or the servicing mission of universities.[3]
Later, in addition to teaching and research, universities started to adopt a third mission or developmental role, which is mainly described as 'community service' by the US literature, and 'regional engagement' in

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[1] R. Huggins and F. Kitagawa, *Devolution and Knowledge Transfer from Universities: Perspectives from Scotland and Wales*, Discussion Paper: Impact of Higher Education Institutions on Regional Economies Initiative (2009).

[2] M. Harloe and B. Perry, 'Universities, localities and regional development: The emergence of the 'Mode 2 University'? *International Journal of Urban and Regional Research* Vol. 28 No. 1 (2004) pp. 212-223.

[3] P. Inman and H.G. Schuetze, *The community engagement and service mission of universities* (NIACE Publications, Leicester 2010); A. Tjeldvoll, 'A Service University in Scandinavia?' 9 *Studies in Comparative and International Education* (1997).

Europe,[4] or 'regional innovation organization' or 'academic entrepreneurialism'.[5]

The university engagement literature, while accepting that universities may well undertake knowledge generative activities, proposes that they adopt a broader, developmental focus on adapting their core functions of teaching and research, as well as community service, to addressing regional needs.[6] With regard to human capital formation, the university engagement literature focuses on the importance of regionally-focused teaching[7], which is manifested in a stronger focus on regional student recruitment and graduate retention; the development of programmes that address skills required by regional industries, particularly, small and medium-sized enterprises; and the localization of learning processes, for example, through workplace-based learning and regional projects.

This third (developmental and engagement) mission is a somewhat indefinite concept which refers to the economic development role motivated by the social responsibility of the institutions. According to Harloe and Perry,[8] the third role of universities in relation to sub-national (EU regions) economies and societies has been widely justified in terms of the development of the knowledge economy and the significance of the regions in economic development. This 'regionalization of the economy' strengthens the links between universities and clusters of firms and regionally-based supply chains of small and medium sized firms.[9] Knowledge and innovation have become increasingly important sources of economic development, and there is a pressure from government, businesses and communities for universities to align their core functions with regional needs.[10]

[4] B.A. Holland, 'Toward a definition and characterization of the engaged university', 3 *Metropolitan Universities* (2001) pp. 20-29.

[5] OECD, *The Response of Higher Education Institutions to Regional Needs*, (CERI/IMHE/DG(96)10/REVI) (Centre for Educational Research and Innovation, OECD, Paris 1999).

[6] P. Chatterton and J. Goddard, 'The response of higher education institutions to regional needs' 35 *European Journal of Education* (2000) pp. 475-496.

[7] Harloe and Perry, loc. cit. n. 2.

[8] Chrys Gunasekara, 'The Third Role of Australian Universities in Human Capital Formation', 26(3) *Journal* of *Higher Education Policy* and *Management* (2004) pp. 329-343.

[9] Ibid.; Huggins and Kitagawa, op. cit. n. 1, at p. 22.

[10] Chatterton and Goddard, loc. cit. n. 6, at p. 482.

Huggins and Kitagawa[11] argue that, although universities emphasize their international orientation, they are embedded in their region and add to the area's economic and social strength through e.g. preserving local jobs, diversifying the local economy and attracting inward investors. Among many others, these authors state that economic development and the welfare of regions can be enhanced through universities' various forms of engagement with the local economy, including research, infrastructure development, education, effective industry-university partnerships, technological innovation and community development.

This paper tries to adapt the models of universities' regional engagement to the case of a peripheral border region in Central and Eastern Europe, the South Transdanubia Region in Hungary. Although the study applies the concept of 'mid-range university' to Central and Eastern Europe, the term of mid-ranged universities was borrowed from the study by Wright et al.[12], which is focused on mid-range universities and their links with industry in British, Belgian, German and Swedish regions. In the UK, for example, mid-range universities are defined as all universities excepting top universities and new (post-1992) universities. For example, the sample of Wright and co-authors[13] included universities teaching between 8 thousand and 33 thousand students and employing between 700 and 2500 full-time researchers. However, in the UK and other European countries there are many first-ranked universities located in non-metropolitan regions, which is not the case in Central and Eastern Europe. As a consequence of the spatial concentration of top universities in Central and Eastern European countries almost exclusively in metropolitan areas, mid-range universities are most often located in non-metropolitan regions.[14]

The article examines to what extent regional mid-range universities may enhance economic development in a lagging area and to what extent European models of the third role of universities may be relevant in the particular region. The hypothesis is that universities' developmental role is much weaker in peripheral regions where mostly mid-range

[11] Huggins and Kitagawa, op. cit. n. 1, at p. 22.

[12] M. Wright, et al., 'Mid-range universities' linkages with industry: Knowledge types and the role of intermediaries', 37 *Research Policy* (2008) pp. 1205-1223.

[13] Wright et al., ibid at p. 1215.

[14] Z. Gál and P. Ptáček, 'The role of mid-range universities in knowledge transfer: the case of non-metropolitan regions in Central Eastern Europe', 19.9. *European Planning Studies* (2011) pp. 1669-1690.

universities are present, and the traditional models designed for first-ranked universities located in prosperous economic environment are not directly applicable due to e.g. the different sectoral structure of the economy and the different nature of the knowledge supply and demand.[15]

The paper is structured as follows. After summarizing the literature on the contribution of universities to regional development, the paper reviews the most important theoretical considerations including the developmental role (the third mission) of universities and the positions of higher education institutions (HEI) in territorial governance. It presents the main features in which mid-range universities in peripheral regions are different from top universities located mainly in metropolitan areas. Using case studies from Central and Eastern Europe the paper concludes that it is not only the position of universities in their collaboration with the business sector that is different but also their role in the innovation system, and there is a need for much more comprehensive and complex economic policies initiating the support of the university sector and starting the development of high tech industries, small-scale enterprises and constructing regional advantage by strengthening the community involvement of universities. The following section focuses on the specificities of mid-range universities in the South Transdanubian region. Following this, case studies are presented from the region which may reveal the position of the universities in the system of regional and cross-border development. Finally, some concluding considerations are included in the last section.

II. University engagement: the role of universities in regional development and governance

The literature on the engaged university also focuses on the third role of universities in regional development, but it differs from the triple helix model in its emphasis on the responses of universities that adopted a stronger regional focus in their teaching and research missions.[16] The evolution of engaged universities ran parallel to the regionalization of the economy or 'the rise of the regions', which means that the salience of the regional scale is increasing and the regulatory capacity of the

[15] Gál and Ptáček, loc. cit. n. 14, at p. 1687.
[16] Holland, loc. cit. n. 4; Chatterton and Goddard, loc. cit. n. 6.

nation-state declines.[17] Essentially, universities' regional engagement means meeting the various needs of the modern client population, such as flexible structures for lifelong learning created by changing skill demands, more locally based education as public maintenance support for students declines, greater links between research and teaching, and more engagement with the end users of research. Also, regional institutions including universities have gained more and more importance in the governance of the regional economy; therefore, universities as important parts of the regional networks have become more embedded in their regional environment.

The engaged university approach encompasses a range of mechanisms by which universities engage with their regions. The literature on the responsive university places less emphasis on academic entrepreneurialism, compared with the triple helix model, and more on community service. Here, community service means that the university is a community-based institution serving the needs of the society in a local area or region.[18] Unlike in the US, European higher education institutions are highly dependent on state support. However, from the point of view of their regions, they function as autonomous institutions and have control over the nature of teaching and research, since they are under national regulations and raise the majority of their funding from national sources. Therefore, regional engagement is not inherent to these institutions. There is an external pressure from government, businesses and communities for universities to align their core functions with regional needs. Universities also need to diversify sources of funding due to the rising relative costs of education, the intensifying competition for students and research contracts in conjunction with fiscal and demographic pressures, in order to maintain their academic standing and in some cases, to even survive. Taking a specific approach, Srinivas and Viljamaa[19] analyzed the process and motives of becoming an engaged university in the context of institutional change and institutional interactions.

[17] P. Arbo and P. Benneworth, *Understanding the Regional Contribution of Higher Education Institutions: A Literature Review*, OECD Education Working Papers, No. 9. (OECD Publishing 2007).

[18] Chatterton and Goddard, loc. cit. n. 6, at p. 482.

[19] S. Srinivas and K. Viljamaa, 'Emergence of Economic Institutions: Analysing the Third Role of Universities in Turku, Finland', 42.3 *Regional Studies* (2008) pp. 323-341.

University engagement can incorporate several activities. Together with the shift in the higher education sector from elite education to mass education and the prevalence of life-long learning, there is a requirement for universities to educate graduates in compliance with the needs of the regional labor market. This means that universities provide an interface between graduates and the labor market in their region. According to Chatterton and Goddard,[20] engaged universities provide flexible structures for lifelong learning created by changing skill demands as well as more locally based education as public maintenance support for students declines.

In the field of research, universities' engagement means greater links between research and teaching; and more engagement with the end users of research, e.g. in the form of regional research networks and joint research with participants from the academia and the industry. Since university researchers are conducted mainly in international academic networks, universities are able to channel international knowledge to regional users. A considerable part of the literature, e.g. Varga[21] builds on the notion that knowledge generation becomes localized and agglomeration effects are crucial for the spillover effects to work. Evidence proves the importance of proximity in supporting university-industry joint research efforts and other collaborations.[22]

Universities engage with their regions not only in the fields of education and research but also in regional institutions and governance systems. This is the consequence of the previously mentioned phenomenon that state activity is becoming increasingly regionalized in Europe, and administrative and political decisions are increasingly made at the regional level. For this reason, institutional capacities have to be built and extended at the sub-national level and sub-national policy networks have to be created. As important regional actors, universities are part of these governance networks.[23]

Individuals in the academic sphere take an active role in civil society:

[20] Chatterton and Goddard, loc. cit. n. 6, at p. 483.

[21] A. Varga, ed., *Universities, Knowledge Transfer and Regional Development: Geography, Entrepreneurship and Policy* (London-New York, Edward Elgar Publishers 2009).

[22] J. Drucker and H. Goldstein, 'Assessing the Regional Economic Development Impacts of Universities: A Review of Current Approaches', 1 *International Regional Science Review* (2007) pp. 26-46.

[23] See Arbo and Benneworth, op. cit. n. 17.

> 'Academic staff, either in formal or informal capacities, can act as regional animators through representation on outside bodies ranging from school governing boards and local authorities to local cultural organizations and development agencies. Higher education institutions also act as intermediaries in the regional economy by providing, for example, commentary and analysis for the media. As such, they make an indirect contribution to the social and cultural basis of effective democratic governance, and ultimately, economic success through the activities of autonomous academics.'[24]

In addition, the community service of universities often takes the form of developing the social and cultural infrastructure of the region in accordance with the specific needs of university students and academics. Arbo and Benneworth[25] review the numerous aspects through which higher education institutions are embedded in their regions. These are primarily non-economic aspects including regional policy, national and regional innovation systems, human capital development and governance systems. They concentrate on the numerous interfaces through which the university and its region may be linked.

The impact of local universities is not restricted to the technical sphere, but may spread into wider social and economic effects on their region. Commitment to social and organizational innovation is gaining more and more importance as main barriers emerge from the social sides even if universities and regions try to introduce adopted technologies. Social and organizational innovation in a wider context means the generation and implementation of new ideas and creativity in order to overcome the social barriers of innovation and it requires ongoing social interactions.[26] Innovators face many social and managerial barriers which inhibit innovations. Among others, inadequate funding, risk avoidance, incorrect measures and forecasts, lack of partnerships and deficiencies in collaboration are the most important social and managerial constraints. Social innovations facilitate the formation of new institutions, networks

[24] Chatterton and Goddard, loc. cit. n. 6, at p. 481

[25] See Arbo and Benneworth, op. cit. n. 17.

[26] M.D. Mumford and P. Moertl, 'Cases of social innovation*:* Lessons from two innovations in the 20th century', 15 *Creativity Research Journal* (*2003*) pp. 261-266.

and the building up of social capital through collective learning processes.[27]

III. Universities in peripheral regions

Many of the empirical studies on universities' regional developmental role and economic impact derive their findings from investigating large, world-class research universities located in a highly developed economic environment. Nevertheless, Wright and the co-authors[28] argue that those findings are not necessarily relevant for all universities, especially for mid-range universities. The main features of mid-range regional universities are that they are located in secondary cities where the regional demand for innovation is moderate, the density of contacts is much lower and possible spillover effects emerge more sparsely; they may not possess a base of world-class research; academics work in a smaller local scientific community in which they interact with the industry; and the creation of spin-off companies is different in its nature.[29]

According to Gál and Ptáček,[30] the model of university engagement can be adopted by those mid-range universities in the less developed East European regions which do not have the critical mass to engage in world-class scientific research, but instead *these universities* can focus on other than high-technology innovation. In the less developed, reindustrializing Central and Eastern European regions with substantial human capital resources, benefiting from the relocation of European industry, but with not yet fully developed knowledge creation and transfer capacities, this special situation forces mid-range universities to take on new roles in contrast with other countries/regions where university-state-industry-citizen relations have perhaps had longer time frames to evolve. This new role means a stronger regional engagement in medium-tech innovations and in social and organizational innovation.

[27] K. Kitagawa, 'Universities and Regional Advantage: Higher Education and Innovation Policies in English Regions', 6 *European Planning Studies* (2004) pp. 835-852.
[28] Wright, et al., loc. cit. n. 12, at p. 1217.
[29] Wright, et al., loc. cit. n. 12, at p. 1219.
[30] Gál and Ptáček, loc. cit. n. 14, at p. 1677.

In their paper, Huggins and Johnston[31] compare the economic impact of universities of different types, and they conclude that there are significant differences in the wealth generated by universities according to their regional location and the type of institution. According to their results, universities in more competitive regions are generally more productive than those located in less competitive regions, and more traditional universities are also generally more productive than newer ones in the UK. Furthermore, the overall economic and innovation performance of regions in the UK is generally inversely related to their dependence on the universities located within their boundaries. This means that weaker regions tend to be more dependent on their universities for income and innovation, but often these universities underperform in comparison with similar institutions in more competitive regions. Although knowledge commercialization activity might be a source of productivity advantage for universities, markets for knowledge in less competitive regions appear to be weak on the demand side. Huggins and Johnston[32] emphasize that the regional environment may also influence the actions of institutions, since a relatively strong knowledge-generating university in a relatively weak region may have a greater propensity to engage with firms in other regions. In weak regions the private economy's strength may be insufficient and small and medium-sized enterprises may be unable to exploit the benefits of engagement with the universities. In the long term this may result in a leakage of knowledge from the home region, which further deepens the disparities in regional competitiveness.

Benneworth and Hospers[33] focus on how peripheral regions which are functionally distant from core economic activities can reposition themselves in the knowledge economy. They argue that such regions are internally fragmented, which reduces their capacity to attract and embed external investment to reduce this distance, and upgrade their status among other regions within a technical division of labor. In regions with sub-optimal innovation systems, it is very hard to lay down the

[31] R. Huggins and A. Johnston, 'The economic and innovation contribution of universities: a regional perspective', 27 *Environment and Planning C: Government and Policy* (2009) pp. 1088-1106.

[32] Huggins and Johnston, loc. cit. n. 31, at p. 1095.

[33] P. Benneworth and G-J. Hospers, 'Urban competitiveness in the knowledge economy: Universities as new planning animateurs', 67 *Progress in Planning* (2007) pp. 105-127.

foundations of a sustainable local economic growth. According to Benneworth and Hospers,[34] a governance failure is in the root of this problem, namely networking deficiencies. They list a range of internal and external barriers that less-favored regions face when building local networks which exploit the knowledge spillovers of external investments. Internal barriers include a lack of local institutional capacity, a lack of critical mass or substantive outcome, the lack of entrepreneurial resources, and a mismatch between the science base and knowledge users. External barriers to building and integrating local networks are the unfavorable economic specialization (to low-tech industries), externally imposed barriers to local governance integration, antipathy by external firm owners to local innovation, and a poor external image discouraging potential investors.

IV. Role of mid-range universities in Central and Eastern Europe

1. Limits of the economic impact of universities in Central and Eastern Europe

There is a substantial spatial concentration of top universities almost exclusively in metropolitan areas in Central and Eastern European countries. Mid-range universities are most often located in non-metropolitan regions or, to put it another way, most of the universities outside the capital cities can be classified as mid-range, where the R&D potential and the 'density of contacts' are much lower and possible spillover effects emerge more sparsely. For this very reason, mid-range universities represent the keystones of regional innovation systems and are often crucial parts of regional innovation strategies.[35] During the transition in the 1990s universities were mostly facing pressure from the state to increase their educational role. The system of financing in this decade did not motivate universities to search for new contacts and collaboration with industry and it was much easier to survive through the rising numbers of students.

The gradual 'marketization' of the higher education sector started after 2000 as a result of several factors. In general, it was the recognition of knowledge as a source of economic growth. In the process of marketization, universities started to use standard tools borrowed from Western Europe, but the result could not be the same because of the

[34] Benneworth and Hospers, loc. cit. n. 33, at p. 115.
[35] Gál and Ptáček, loc. cit. n. 14, at p. 1675.

differences in history and the different position of universities in the regional or national innovation systems. EU accession and the possibility to use EU development funds (such as cohesion funds) for building knowledge infrastructure induced an active approach from the side of universities. The establishment of the supporting innovation infrastructure (scientific parks, scientific incubators) was further developed at the universities thanks to the role of intermediaries (mostly technology transfer offices or R&D services) which focused, on the one hand, on the building of ties with industry and, on the other hand, on gaining EU funds for building infrastructure. In that period, the trend of incoming foreign direct investments shifted from low-paid routine labor towards investments requiring a skilled and university educated labor force. In this sense multinational companies have a pioneering role in the knowledge spillover from universities to industry.[36] The regional impact of these processes is leading to the ongoing polarization of the R&D potential between metropolitan and non-metropolitan areas; that is, R&D resources and research capacities are more and more unevenly distributed among the regions.[37] This has resulted in that mid-range universities remain the keystones of regional innovation infrastructure outside the metropolitan regions, furthermore, their role even increases. Sectoral research institutes set up in the socialist era and sponsored by the industry and relevant ministries were mostly closed down after the regime shift, and so their role was taken over by local universities.

In sum, the role of mid-range universities in CEE countries is weaker than in more developed countries of the EU and the process of adaptation to the new social and economic conditions started substantially later than in Western Europe. At the same time mid-range universities located mostly outside the metropolitan areas have to face similar problems and disadvantages as their western counterparts, such

[36] P. Ptáček, 'The Role of Foreign Direct Investment (FDI) in Establishing of Knowledge Economy in the Czech Republic: The Case of Knowledge Intensive Business Services', in Z. Ziolo and T. Rachwal, eds., *Problems in the Formation of Industrial Spatial Structures and their Surrounding* (Warszawa-Krakow, Prace Komisji Geografii Przemyslu Polskiego Towarzystwa Geograficznego 2009) pp. 22-30.

[37] Z. Gál, 'The New Tool for Economic Growth: Role of Innovation in the Transformation and Regional Development of Hungary', 2 *Geographia Polonica* (2005) pp. 31-52

as less intensive university-industry contacts, weak local R&D networks etc. (see Table 1).

It is often argued that universities are able to generate economic effects based on knowledge spillovers and innovation transfers to businesses.[38] The differences between the advanced regions of metropolitan agglomerations and the most backward regions are emphasized in the relationship between universities and their regions.[39] This means that in most of the non-metropolitan Central and Eastern European regions, where the regional innovation systems and the university-industry linkages are still weak, the role of universities in local development has to be revised and, consequently, the economic impact of universities cannot be unambiguously extended to transition economies. For example, a Hungarian study concluded that the knowledge-producing ability of the academic sector did not increase the knowledge-exploitation ability of the local business sector; moreover, both universities and the less developed local economy may be responsible for several hindering factors of intraregional knowledge transfer between universities and industries.[40] Similarly, Bajmóczy and Lukovics[41] showed that university researches for local economic development may be an outstanding instrument in case of advanced regions but not necessarily for the less developed regions where the lack of an appropriate industrial base is one of the main constraints. They measured the contribution of Hungarian universities to regional economic and innovation performance between 1998 and 2004. The results showed that the presence of universities does not affect the growth rate of the gross value added per capita or the gross tax base per tax payer. Therefore, general economic effects of universities and

[38] H. Etzkowitz, et al., 'The Future of the University, the University of the Future: Evolution of Ivory Tower to Entrepreneurial Paradigm', 2 *Research Policy* (2000) pp. 313-330.

[39] A. Varga, et al., 'Research notes and comments: Geographic and sectoral characteristics of academic knowledge externalities', 4 *Papers in Regional Science* (2000) pp. 435-443.

[40] Z. Gál and L. Csonka, *Specific analysis on the regional dimension of investment in research – case study report and database on the South Transdanubian region (Hungary)* (Brussels, ERAWATCH 2007) p. 59.

[41] Z. Bajmóczy and M. Lukovics, 'Subregional Economic and Innovation Contribution of Hungarian Universities', in Z. Bajmóczy and I. Lengyel, eds., *Regional Competitiveness, Innovation and Environment* (Szeged, JATE 2009) pp. 142-161.

related R&D investments are hardly visible in transition economies, such as many Central and Eastern European regions.

Our case study area, South Transdanubia, is a less developed reindustrializing region with lower knowledge absorption capacity and with an underdeveloped research and technology development sector relative to the national average (Figure 1). Basic conditions for change in the technology sphere are rather unfavorable. Its regional GERD was 23M € in 2007, which is only 2.5% of Hungary's total GERD. The region has one of the poorest R&D capacities in Hungary (in 2007 with only 4.1 per cent of the Hungarian R&D employees). The region has large public RTD infrastructure mainly based on the two universities[42] absorbing more than four fifths of the regional GERD, therefore the HEI[43] sector plays a dominant role in R&D performance (Table 1). Unlike the public RTD sector, the visibility and performance of the business sector is very low, even in comparison with the national average. The RTD creation of the business sector in Southern Transdanubia is limited (3.4 M € BERD in 2004). Universities are the major employers of RTD personnel. The orientation of the knowledge creation activity of the region is based, to a great extent, on the profile of its universities, which have the strongest potential in life science (biotech) research and they also have a good reputation with measurable RTD outputs in laser physics, environmental and animal cytology research.[44] However, the strongest barrier in South Transdanubia is the clear mismatch between the knowledge-production specialization of the universities and the economic structure of the region.

The main findings of this section are based on an empirical survey which listed 92 time-series indicators covering 20 different EU regions, including South Transdanubia, commissioned by ERAWATCH S.A. in Brussels.[45] This research was focused on the constraints of knowledge transfers in the case of mid-range universities in the less developed transition regions with traditional, non-research universities. The survey

[42] University of Pécs (est. 1367) and University of Kaposvár (est. 2000).

[43] Higher Education Institute.

[44] The relative strength of biotech research base is demonstrated by its large share of total input-output indicators and also by the increase of RTD spending in this field (64.8m in 2004). In addition, the 11 university spin-offs in the biotech sector are tightly connected to the Medical School (MS), which has 48 employees and produces a turnover of €3 million (2004).

[45] Gál and Csonka, op. cit. n. 40, at p. 59.

on South Transdanubia identified the main reasons for the poorer performance in RTD transfers. On the one hand, there is a mismatch between the economic and research specializations, which is combined with the low share of the business sector in RTD investment, the high share of the traditional lower tech sectors, the small size of local SMEs and the consequent lack of resources to invest into RTD and absorb its results. On the other hand, there is a lack of demand for research results from larger (mainly foreign-owned) companies and, to some extent, the necessary knowledge supply for certain sectors and in certain disciplines is also lacking in the region.[46] It should be also accepted that these regions are specialized in activities that are not highly research intensive, therefore increased R&D expenditures cannot be easily exploited by local businesses or utilized by HEIs. In these situations, setting up a new research base that is not linked to the needs of the regional economy could be like building '*cathedrals in the desert*' as they are unlikely to be able to develop knowledge transfer and spillovers with local economic actors, particularly for high-tech industries.[47]

2. Engaged universities – the South Transdanubian case

Universities can act as regional actors, developing stronger partnerships between universities and the regional development agencies, emphasizing the key role of higher education in regional development. The policy approaches and activities in CEE regions almost exclusively concentrated only on the first two missions of universities, and the notion of regional engagement did not constitute the part of university strategies up until very recently. Two compelling endogenous and exogenous factors have contributed to the recognition of the importance of a stronger regional engagement of universities recently. Firstly, the accumulated knowledge and the experiences of staff at the higher education institutions provide expertise in various fields, and this can be a very effective way of accelerating progress of collaboration through

[46] A few large enterprises in high tech electronics have been engaged in high-tech activities, but their influence on the local RTD sector is considered to be marginal, as they usually rely on the in-house RTD activities of their parent companies importing the technology from outside the region.

[47] Z. Gál, 'The role of research universities in regional innovation: The case of Southern Transdanubia, Hungary', in N. Longworth and M. Osborne, eds., *Perspectives on Learning Cities and Regions: Policy Practice and Participation* (Leicester 2010) pp. 84-106., T. Dory, *RTD policy approaches in different types of European regions* (JRC and ERAWATCH Report 2008).

the exploitation of economic and social interactions transmitted by spin-offs and other university based consultants within the newly formed regional networks.[48] Secondly, exogenous pressures are extorted by new market demands and policy goals which envisage a real regional and social prosperity that integrates knowledge, social and human development. This exogenous factor facilitates connectivity among different institutions including universities and other stakeholders and will provide not only better funding opportunities but also a collective learning platform for social interactions.

In the following sub-sections we present two case studies the authors participated in, from South Transdanubia, which show the new types of developmental roles and community engagement that local universites can undertake in a peripheral, border region in order to revitalize the economy of a lagging, de-industrialized area. The first one presents an example of an urban development project based on campus (property) development in conjunction with the European Capital of Culture 2010 project, and a city development strategy relating to the health and environmental sectors; the second one provides insights into the building of a common cross-border knowledge region in the framework of university partnership. It is characteristic of both case studies that the strategies are strongly reliant on the contribution of the local academic sector.

2.1. University engagement in the South Transdanubia Region: The European Capital of Culture 2010 Project and the so-called 'growth pole' development programmes

In the case study presented in this section we focus on the biggest city of the South Transdanubia Region and its university. The city of Pécs has adopted two strategies with strong collaboration of the University of Pécs to mobilise endogenous resources and enhance its competitiveness (the University of Pécs is the oldest university in Hungary, which was established in 1367). Higher education has been a strong driver of economic restructuring; in fact, it was probably the university which saved the city of Pécs from the depression experienced by other Central

[48] A. Schmidt, 'Towards the common Education Area in the Visegrad region – in the University of Pécs', in N. Styczynska, ed., *Towards a common education area in the Visegrad region. New modalities of co-operation within international relations and European studies programmes* (Kraków, Wydawnictwo Promo 2012) pp. 65-74.

and Eastern European industrial regions after the change of the political regime – even if it could not fully prevent the disadvantageous processes. In the 1990s and the 2000s, Pécs, the city with 2000 years of history dating back to the Roman and medieval times, has lost most of its economic potential which was built on coal and uranium mining and several industrial plants. Due to its peripheral situation and the adverse effects of the war in the former Yugoslavia, there are insufficient foreign direct investments in the region and there is a lack of local economic strength. In an economic environment characterized by a decreasing industrial sector, the city's cultural, educational and market services give a chance for the economy to rise again. Cultural issues first appeared markedly in local development policy in the city development strategy of 1995, which envisaged a growth path built on knowledge-based economy, services and innovation where innovative tourism and 'cultural industry' get priority.[49] After the integration of several local universities and a number of smaller higher education facilities in 2000, the University of Pécs, being the oldest university of Hungary (est. 1367), has become one of the largest employers in the city and even the region. Although R&D outputs in engineering and natural sciences and the university-industry links are limited, the presence of students and employees has had a multiplier effect on the economy of Pécs, mainly in the field of rented flats, consumer products and services and culture. Of course, the university has contributed to the urban ambience and real estate site development of Pécs as well. One of the strategies is a comprehensive initiative which aims to reconfigure the economy of the city to utilize the heritage and cultural basis in the framework of a singular large project of the European Capital of Culture 2010 to generate growth. The European Capital of Culture 2010 project tries to capitalize on the idea of culture-led urban regeneration and has helped Pécs to reinvent itself through culture. The University of Pécs played a major role in organizing the European Capital of Culture project, which became the largest ever exercise of community service of the local university, being heavily involved not only in the cultural events but also in the development of the new cultural, community and educational functions of the city's newly built cultural quarter. The project is the

[49] G. Lux, 'From Industrial Periphery to Cultural Capital? Restructuring and Institution-Building in Pécs', in J. Suchacek and J. Petersen, eds., *Developments in Minor Cities: Institutions Matter* (Ostrava, Technical University Press 2010) pp. 103-119.

Zsolnay Cultural Quarter: built on the site of the eponymous ceramics factory, which was originally established as a mixture of production facility, artist's colony and living environment for the owner and his family, it intends to endow a disused area with new cultural, community and educational functions serving as the new training site for the university's Faculty of Music and Visual Arts. Benneworths[50] describe the university's urban development role and the major factors conditioning the success of co-operation for both the city and the university in detail.

The strong university engagement in the city's development was also reflected in the development pole programme[51] called 'Pécs – Pole of Quality of Life' which has three pillars: health industry, environmental industry and cultural industry. The main features of this programme are introduced by – among others – Lux[52] as follows:

- Similarly to the European Capital of Culture 2010 project, the 'growth pole' programme has also strongly involved the contribution of the University of Pécs during the planning period as well as in the governance and the implementation, especially within the health industry pillar and the environmental industry pillar (Figure 2).
- 'Health industry' covers health services relying on the university's Faculty of Medicine and its clinics, which have achieved outstanding results in treating movement-related disorders. Several industrial functions are connected to these

[50] P. Benneworth, et al., 'Building Localized Interactions Between Universities and Cities Through University Spatial Development', 10 *European Planning Studies* (2010) pp. 1611-1629.

[51] The development pole based type of development appeared in France and its main characteristic is that the central motivator of the development process is the university. The overall aim of the pole programme is to promote the formation of internationally competitive clusters; specialization on high value-added, innovative activities; strong cooperation primarily between businesses and additionally between universities and local governments; to strengthen the regions through the increasing competitiveness and better business environment of the pole cities. The expected results (for the period between 2007 and 2013) include that the businesses – through clustering and the cooperation with the academic and university sector – reach the critical size which is necessary for being competitive in Europe and pole cities emerge as centers which are able to strengthen and sustain competitiveness for both themselves and their surrounding regions on an international scale.

[52] Lux, loc. cit. n. 49, at p. 108.

services including the manufacturing of medical and prosthetic equipment; and other services in the field of human recreation.
- The 'Cultural industry' pillar of the programme is expected to benefit from the European Capital of Culture 2010 programme, and this returns to the idea of promoting the urban culture of Pécs as a complex, innovative product.
- The 'Environmental industry' pillar is both narrower and wider than the 'quality of life' concept: it might be helpful in fostering a cleaner, more attractive environment, but the actual elements of the development project have a prioritized focus on alternative energy sources.

2.2. University engagement through the Hungarian–Croatian cross-border programmes: lessons from the 'South Pannonia' knowledge region

Another initiative under the umbrella of universities' engagement is the Hungarian-Croatian IPA cross-border project titled '*Regional Universities as Generators of a Transnational Knowledge Region: UNIREG IMPULSE*' started in the 'South Pannonia' region with the aim of developing a knowledge region based on the universities' active regional engagement – their third mission – mediating organizational and social innovation by strengthening networked relations between universities and regional actors (Figure 3). The project initiates networking relations in three different fields: rural development; strategic and regional planning; environment and sustainable local energy systems. It provides a vast scope for enhancing the role of universities in regional, economic development and knowledge dissemination in the region. Besides the mainly bilateral educational and research relations between the region's universities there is a need for building channels of local knowledge flows towards their lagging, underprivileged hinterlands also in those fields where not primarily high-tech oriented R&D activities are demanded. Instead, the specific regional development impacts of the universities and their social and organizational innovations, as well as the knowledge generation and transfer through the contacts with local actors contribute most to the local development.[53]

[53] In the project the social-organizational innovation mediated by the academic sector was serving for strengthening the social and organizational foundations of the local economic development and focused on the development of human resources in

The central problem of regional development in cross-border areas is that these regions are not only peripheral but also below the average in terms of economic development in both countries. The neighboring border regions have a common interest in sustaining open borders in order to reveal and exploit the potential advantages of cooperation in the fields of education and economic and social activities which should be customized to the region's geographical specificities.

Effectively it was after the millennium that the local governments along the two sides of the border started to make contacts with each other thereby linking almost the entire border region and they have undertaken activities which influence progress in their environment. The various interregional, organizational, sectoral etc. applications and their implementation resulted in the formation of mutual ideas and ambitions, as well as the creation of institutions on both sides of the border that are able to engage in mutual tasks on the basis of value-creating co-operations.

The general aim of the project was to motivate a more active regional engagement of the universities – in terms of their third mission – and to create a South Pannonian knowledge region which is based on the knowledge networks transmitting organizational and social innovation through the strengthening of network relations between the universities and the regional actors. The regional academic sector possesses those intellectual capacities through which the cross-border region's inherent specificities, problems and mutual development perspectives can be envisaged. The project activities included the establishment of a knowledge transfer office as the organizational framework for the implementation of the third role of the local universities, the development of the co-operative knowledge networks and the creation of a knowledge map to serve as a basis for stronger cross-border co-operations between the universities.

In this case structural changes and cross-border social dialogues should all be regarded as priorities. Due to the region's economic, geographic

which the different forms of knowledge have a key role. The adult education and professional training courses organized by the universities, the exchange of practical knowledge bound to certain sectoral policies, development priorities, the elaboration of development strategies and practical development programmes (in rural development and in environmental sector) customized to the demands of local society and the universities' narrow and broad environment are important components in the increased regional engagement of universities.

and environmental specificities, the new cross-border knowledge region which extends the innovative capacities of the area should be built on the foundations of regional development instruments and rural economic development opportunities.

Our approach assumes that the expansion of the universities' functions can be interpreted as a social and organizational innovation, while as a result of the project activities; a new co-operation interface emerges between the knowledge sector and the industry which is in accordance with the aims of the project. Dissemination, knowledge maps, joint knowledge transfer office, webpage development and workshops, publications and reports addressing the specific problems of the region help achieve the overall goals of the project while they provide frameworks for analyzing, planning and implementing new communication and co-operation forms in the field of social and organizational innovation.

In summary, the main implications of the case studies are as follows:

- Higher education has been a strong driver of economic restructuring, and urban development/regeneration of slum districts within the city and contributes to the urban ambience and real estate site development of cities. The University of Pécs has not only played a key role in supporting urban development and regeneration through campus development (Regional Library and Information Centre, Cultural Quarter etc.), but also contributed to the quality of urban governance and to the place branding (external image creation) of the city. These new development sites take part in the development of the new cultural, community and educational functions of the city generated by the university.
- The presented Unireg Impulse project called for an active cross-border engagement of the regional universities in order to create a transnational knowledge region through organizational and social innovation and strengthening networked relations between the universities and regional actors. The project was useful, on the one hand, for the regional universities, since it included elements for defining the universities' growth strategy (third role, social visibility, strategic involvement) and with the active involvement of the relevant regional stakeholders the universities increased their partnership as a potential for future collaborations. On the other hand, the project was useful for

regional and local government bodies, because it provided a synthesis of Hungarian experiences on EU accession and expert guidelines for the transition on a regional level based on the expressed needs. It can be concluded that universities have to be relevant players in the development and evaluation of regional policy that fosters 'new combinations' of partnership-based, innovation-centered approaches, which maximize the development of human capacities, such as skills and mobility, and the formation of social capital through networking, collective learning and building up trust.

V. Conclusions

This paper has applied the regional and community engagement literature to the mid-range universities of Central and Eastern Europe and explored the peculiarities and specificities of these mid-range universities facing a number of extra constraints in the less developed CEE regions. After summing up the ways in which universities may contribute to the economic development of their regions and presenting the measurement methodologies and the theoretical considerations, the paper focused on the problem of adapting the literature on peripheral regions with mid-range universities. From the presented theories, the literature on universities' regional engagement is the most relevant in the context of our article. There are several facilitating and hindering factors concerning the process of becoming a regionally engaged university, and our main lesson is that the whole regional innovation system should be developed in an integrated manner in order to reach this goal.

The mentioned constraints impede peripheral, mid-range universities from building linkages to the local economy and developing internationally recognized areas of research excellence, with the associated critical mass, and exploiting the advantages of global knowledge networks. The research has found that not only the position of universities in their collaboration with the business sector but also their role in the innovation system is quite different, which is mainly due to the different development path of the innovation systems and development trajectories in post-communist countries described in the paper. Because of historical path-dependence, mid-range universities, unlike top-universities, are very often located in non-metropolitan regions in CEE countries where the RTD potential and 'density of

contacts' are much lower and possible spillovers emerge more sparsely than in capital city regions.

We argued that in these regions, setting up new university based research directions that are not linked to the needs of the regional economy are unlikely to be able to develop knowledge transfer and spillovers to local economic actors. In a peripheral situation the lack of research capacity in science and engineering RTD can also be a serious obstacle to the modernization of the industrial structure. Universities are looking for contacts out of the regions and their contribution to the regional innovation infrastructure cannot fulfill the possible expectations. Rather, these universities need to take careful strategic decisions to build up those areas and the related intermediaries where they have the scope to make an international impact and also to differentiate investment in those areas where they can make a regional contribution.

Economic policy practices suggest that the support of university researches for stimulating local economic development may be an outstanding instrument in case of advanced regions but not necessarily for the less developed CEE regions where the lack of an appropriate industrial base is one of the main constraints. It can also be argued that business-led networks connecting different actors have much higher importance in economically advanced regions while in the less advanced ones universities and public agencies play a more significant role in network building and in catalyzing activities of the key actors. If universities are embedded in a region it has a clear impact upon the intensity and nature of the relationships and, hence, their ability to effect tacit and codified knowledge transfers. Regionally-focused teaching and research are manifest in a stronger focus on regional student recruitment and graduate retention (in order to combat brain drains in R&D), the innovation oriented regional development programs addressing skills required by regional industries and the localization of learning processes.

The paper also argues that mid-range universities in the reindustrializing CEE regions have to take on new roles, which means a stronger regional engagement also in medium-tech innovations and in social and organizational innovations. Universities have to be practically relevant in the development and evaluation of regional policy that fosters 'new combinations' of partnership-based, innovation-centered approaches, which maximize the development of human capacities such as skills and

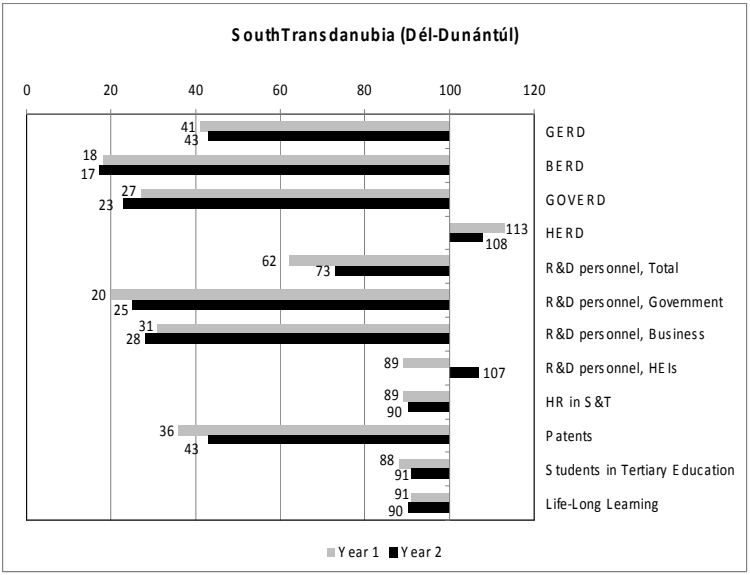
mobility, and the formation of social capital through networking, collective learning and building up trust. In the less developed CEE regions there is a need for much more comprehensive and complex economic policies initiating not only the support of the university sector but also the starting of developing high-tech industries, small-scale enterprises and constructing regional advantage with a stronger developmental role and community involvement of universities. This contributes towards the third mission of universities through meeting learning needs of the region. This might be achieved by exchanging knowledge between higher education and the business community or through outreach to local communities to combat social exclusion and to improve cultural understanding.

Table 1 Main indicators of mid-range universities in Western Europe and their CEE counterparts[54]

	University of Pécs (Hu)	**UP Olomouc (Cz)**	**Notthingham University**	**University of Karlsruhe**	**University of Ghent**	**University of Antwerp**
N students	28,000	22,000	33,000	15,686	21,160	8,029
N FTE researchers	1051	1158		2500	1401	846
N FTE technology transfer	6	7	4	1	3	4
HERD Mill. Eur	14	19.4	150	83	122	45
N spin-offs	11	7	27	unknown	12	2
Total RSBO	n.a		n.a.		23	4
Regional GDP (Bn Eur)	6.7	11.2	103.8	316.9	157.3	157.3
GRP per capita (Eur)	6,900	9,600	24,145	29,694	26,194	26,194

[54] Source: by the author and Wright, et al., loc. cit. n. 12.

Figure 1 Key indicators on Southern Transdanubia's knowledge base development in comparison to the national average, in percentage[55]



GERD

[55] Source: calculated by the Author based on EUROSTAT and KSH (Hungarian Statistical Office) data. BERD: Business expenditure on Research and Development, GERD: Gross expenditure on Research and Development, HERD: Higher Education expenditure on Research and Development, GOVERD: Government expenditure on Research and Development. The following years were used for BERD, GERD, HERD GOVERD1999, 2003; R&D personnel 1999, 2004; HR 1997, 2004; Patents 1999, 2003 and Lifelong learning 1999, 2004.

Figure 2 The system of cluster initiatives and projects in Pécs[56]

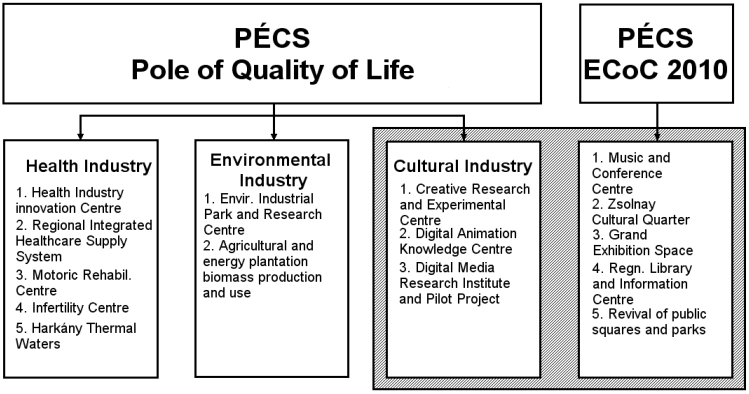


Figure 3 Cross-border areas of Hungary and Croatia covered by the UNIREG IMPULSE project[57]

[56] Lux, loc. cit. n. 49, at p. 115
[57] Source: *http://www.hu-hr-ipa.com/.*

Martina Mikrut*
Nihada Mujić**

Ecotourism market segmentation as a basis for ecotourism strategy development

I. Ecotourism as a global tourism trend

A large number of definitions of ecotourism have been offered in the literature and all of them have in common 'nature-based' tourism point of view, but in recent years, those definitions are narrowing toward nature-based but also educative and culturally and environmentally 'sustainable'. Despite a variety of definitions of ecotourism since its emergence in the 1980s, it is now generally agreed by academics, government and the tourism industry that ecotourism can be identified by three core criteria: nature, learning and sustainability where the sustainability criterion incorporates environmental, social and economic elements and therefore includes criteria referred to specifically in some definitions, such as conservation and community benefits.[1] Although ecotourism is seen as a global tourism trend and the economic market recognized the potential of usage words such as 'eco' and 'green' which will help them in selling almost anything, little is known about the profile of individuals who are either interested in such experiences, or currently driving this apparently lucrative market.

II. Segmentation as a basis for strategy development

A key component of all marketing programmes is knowing the current or potential target group in order to create customer efficient marketing strategy and operational marketing mix and reach full product, service and communication potential. Attempts to define tourist types have also been called segmentation, classification, and clustering. Identifying distinct tourist types is crucial for the planning, management, and

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[1] N. Beaumont, 'The third criterion of ecotourism: are Eco tourists more concerned about sustainability than other tourists?', 10:2, *Journal of Ecotourism* (2011) pp. 135-136.

marketing of tourism.[2] Strategy development of ecotourism promotion might be fostered by identifying the motivational and psychological roots of ecotourism and elaborating appropriate communication strategies for ecotourism advertisement. Such a marketing approach may prove a valuable strategy for ecotourism promotion. This approach would require examining the targets' needs, motivations, and expectations to gain a better understanding of the elements that can affect tourism-related behaviour.[3] Tourist's characteristics are the key elements of the marketing strategy. These represent the starting point for the identification of service/product qualities that better respond to tourist's preferences. Communication strategies for promoting ecotourism could be developed on the basis of the target population's needs, motivations, interests, and expectations, which are the driving forces behind attitudes and behaviours.[4] That is why it is very important to apply a segmentation strategy that would identify homogeneous subsets that could be targeted by specifically tailored communication strategies. Segmentation can result with tourist typologies where some of these tourist typologies used today are theoretical in nature, and some have been empirically tested. In countries and regions where ecotourism strategy is not firmly developed yet it is necessary to understand the potential of interest and level of awareness of ecotourism current and potential tourist, which means that for first step it is interesting to measure openness toward ecotourism within general population.

III. Tourism segmentation of Croatian citizens

This paper investigates understanding and perception of ecotourism of Croatian citizens with the goal of providing market segmentation as the strategic tool to account for heterogeneity among tourists by grouping them into market segments which include members similar to each other and dissimilar to members of other segments based on vacation preferences, identifying ecotourism potential among Croatian as current or potential tourists. Measurement of previous touristic behaviour or future vacations plans was not included on attitude level, only statement about traveling in general, within the country and/or abroad. In order to

[2] G. T. Hvenegaard, 'Using Tourist Typologies for Ecotourism Research', 1:1 *Journal of Ecotourism* (2002) p. 7-8.
[3] Cini, L. Leone, P. Passafaro, 'Promoting Ecotourism among Young People: A Segmentation Strategy', 44 *Environment and Behaviour* (2012) pp. 87-88.
[4] Leone, Passafaro, loc. cit. n. 3, at p. 90.

measure potential ecotourism segment development, analysis was done using backdate of six research waves through 3 years, 2 waves per year for 2010, 2011 and 2012 on total sample of 12.000 respondents, with core focus on 2012 sample (n=4077) using 2010 and 2011 data only as trend detections regarding traveling habits. Data collection was done using self-completion method, and data set related to vacation preferences was a part of wider research project. Sample was representative for Croatian population aged from 15 to 65 years. Controlled variables were gender, age, and region and settlement type.

1. Methodology overview

Selected segment of measurement instrument was consisted of 26 statements plus questions related to socio-demography. Statements were evaluated using predefined answers of ordinal Likert scale (1 to 5). Detailed list of statements is presented in Table 1.

Table 1 Statements

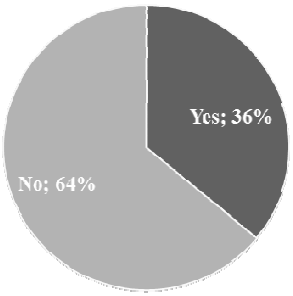
1.	Companies and people responsible for the pollution of nature should be strictly penalized.
2.	For me, the ideal vacation is in well-equipped spa.
3.	For vacation I choose destinations that offer special health programs.
4.	Going on a vacation is the best time for socializing with family members.
5.	Good night life is for me the best way to spend my holidays.
6.	I am interested in the news about what is good and what is harmful to health.
7.	I am trying to spend the time of my vacation on wild parties and fun.
8.	I expect that the vacation place offers various entertainments for the whole family.
9.	I like to try new food products that appear in stores.
10.	I really enjoy going out to bars, pubs and clubs.
11.	I try to protect my health with my lifestyle.
12.	I want to spend my vacation in a completely quiet environment.
13.	I would give an advantage to the environmental protection even if it causes slower economic growth.
14.	If we don't protect the nature human species will soon be found on the edge of survival.
15.	It is important for me to learn more about the history of the place I visited.
16.	It is important to spend the vacation on a place where the nature is beautiful.
17.	On vacation I enjoy the most in beautiful natural landscapes.

18.	The behaviour of our society to the nature that we damaged with excessive development must urgently change.
19.	The best part of vacation for me is using the wellness treatments.
20.	The most important is that I get enough sleep while on vacation.
21.	Vacation is the only time when I manage to be with my family.
22.	Vacation without getting in touch with genuine nature is not a vacation to me.
23.	When I go on vacation all I want is to rest.
24.	When on vacation I like to visit night bars and disco clubs.
25.	When on vacation I visit cultural heritage places with interest.
26.	When on vacation I will try to visit good cultural manifestation or show.

2. Research results

Since the study was based on perception and attitudes rather than real behaviour of Croatian inhabitants regarding their leisure time, representative sample was used for *state of mind* measurement. With the aim of understanding possibilities of transferring opinions into real future behaviour, it was verified how many Croatian residents travel in general, within the country and abroad. When observing traveling in 2012 there were 36% of Croatian inhabitants who said they were traveling within Croatia during their summer or winter vacations (graph 1). This number is rather stable through three years trend, still somewhat lower than previous years (which probably can be explained by recession and lower standard of living).

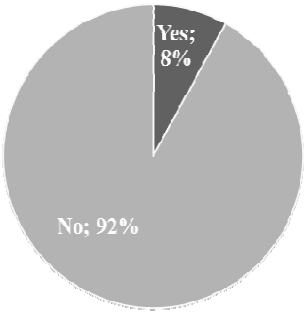
Graph 1 Traveling within Croatia



Significantly lower number of Croatian population is going abroad for holidays (graph 2). It can be expected that large number of collective

discounts offering several days abroad for large discounts will help retain that number (or even increase) despite hard economic situation.

Graph 2 Traveling abroad



As earlier mentioned, further analysis is based on perception and attitudes and not real vacation behaviour so representative sample of Croatian inhabitants was used for detailed statements analysis. Descriptive statistics shows that there is general understanding of nature importance since the highest average grade of agreement was related to statement about penalising nature pollution followed by agreement with statement related to urgent need of changing behaviour toward nature (table 2). Mean result were confirmed by median value. Value that appears most often in a dataset was even higher e. g. highest possible grade. Consistency of responses was reflected in the fact that all statements related to ecology and sustainable development in general were best ranked statements among all, including more individually oriented statements. Nature as important part of ecotourism segment was recognised dimension within Croatian population, but not followed by heritage, history or culture as interesting dimensions of sustainable tourism development.

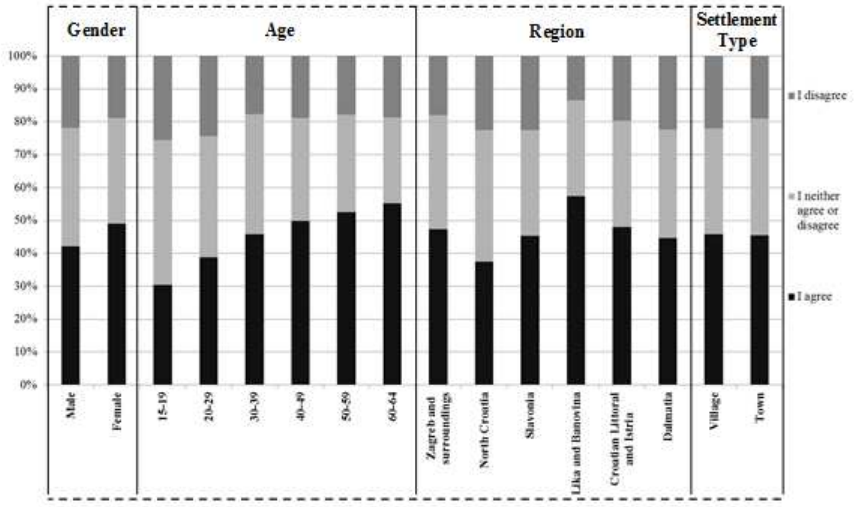
Table 2 Statements descriptive statistics

	Mean	Median	Mode	Std. Deviation
Companies and people responsible for the pollution of nature should be strictly penalized.	4,12	4	5	1,025
The behaviour of our society to the nature that we damaged with excessive development must urgently change.	4,08	4	5	1,004
If we do not protect the nature human species will soon be found on the edge of survival.	3,93	4	5	1,066
I would give an advantage to the environmental protection even if it causes slower economic growth.	3,86	4	5	1,063
I expect that the vacation place offers various entertainments for the whole family.	3,86	4	5	1,167
Going on a vacation is the best time for socializing with family members.	3,76	4	5	1,204
It is important to spend the vacation on a place where the nature is beautiful.	3,74	4	5	1,139
On vacation I enjoy the most in beautiful natural landscapes.	3,74	4	5	1,112
I try to protect my health with my lifestyle.	3,47	4	3	1,124
I want to spend my vacation in a completely quiet environment.	3,44	3	3	1,282
I am interested in the news about what is good and what is harmful to health.	3,42	3	3	1,173
Vacation without getting in touch with genuine nature is not a vacation to me.	3,38	3	3	1,221
I try to keep my body in the best possible shape	3,32	3	3	1,143
The most important is that I get enough sleep while on vacation.	3,10	3	3	1,296
I am interested in alternative methods of improving health	2,92	3	3	1,219

It is important for me to learn more about the history of the place I visited.	2,91	3	3	1,267
When on vacation I visit cultural heritage places with interest.	2,87	3	3	1,289
When I go on vacation all I want is to rest.	2,85	3	3	1,376
When on vacation I will try to visit good cultural manifestation or show.	2,71	3	3	1,275
Good night life is for me the best way to spend my holidays.	2,43	2	1	1,341
For me, the ideal vacation is in well-equipped spa.	2,42	2	1	1,349
For vacation I choose destinations that offer special health programs.	2,35	2	1	1,284
The best part of vacation for me is using the wellness treatments.	2,32	2	1	1,294
When on vacation I like to visit night bars and disco clubs.	2,25	2	1	1,346
I am trying to spend the time of my vacation on wild parties and fun.	2,24	2	1	1,306

On the other hand, lowest average grades were given to activities related to parties, fun, disco etc., but it is partially due to the wide range of age difference with rather small proportion of young people (as in population). Prior to conducting cluster analysis, average grades were tested in relation to demographic value on statements related to ecotourism perception, and rather stable profile was shown, as presented in graph 3.

Graph 3 Vacation without getting in touch with genuine nature is not a vacation to me



Croatian citizens who agreed with statements regarding positive ecotourism perception were somewhat more female, older than 30 years from different Croatia regions, equally from small and large settlements. But, this is overall profile which is not enabling marketing strategy creation for promoting and communicating with interested population. That is why cluster analysis, statistical techniques that can be applied to create 'natural' grouping, was conducted. The analysis resulted in three mayor segments (table 3). Segments are approximately the same sizes, where 379 respondents did not match to any of given segments.

Table 3 Final clusters numbers

Cluster	**1 Segment**	**1220**
	2 Segment	**1184**
	3 Segment	**1294**
Valid		3698
Missing		379

Analysis of variance (ANOVA) was used to confirm that there is significant difference between clusters (P-value<0.01) in order to be able to start the description of the segments. Segments were described

twofold: primarily by understanding agreement with measured statements followed by demographic profile.
With the aim of understanding crucial difference between given segments, indexes based on average grades per statements were calculated and presented in table 4.

Table 4 Statements – final clusters

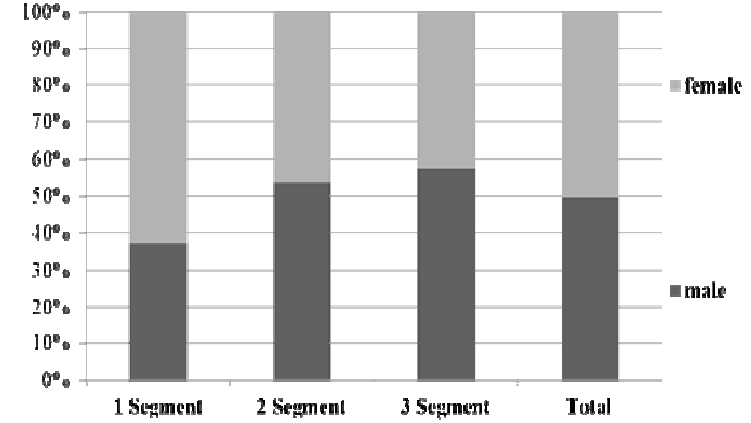
	segment1	**segment2**	**segment3**
When on vacation I visit cultural heritage places with interest.	130	70	99
It is important for me to learn more about the history of the place I visited.	129	71	99
When on vacation I will try to visit good cultural manifestation or show.	129	69	102
For me, the ideal vacation is in well-equipped spa.	126	72	101
Vacation without getting in touch with genuine nature is not a vacation to me.	126	86	89
The best part of vacation for me is using the wellness treatments.	124	65	109
For vacation I choose destinations that offer special health programs.	123	74	102
On vacation I enjoy the most in beautiful natural landscapes.	122	90	89
I am interested in the news about what is good and what is harmful to health.	120	87	92
Going on a vacation is the best time for socializing with family members.	119	95	86
It is important to spend the vacation on a place where the nature is beautiful.	119	89	92
I am interested in alternative methods of improving health	119	81	99
I expect that the vacation place offers various entertainments for the whole family.	118	95	88
I try to protect my health with my lifestyle.	117	89	94
I want to spend my vacation in a completely quiet environment.	117	94	90
I try to keep my body in the best possible shape	114	86	100
I would give an advantage to the environmental protection even if it causes slower economic growth.	111	96	93
If we don't protect the nature human species will soon be found on the edge of survival.	111	98	92

The behaviour of our society to the nature that we damaged with excessive development must urgently change.	111	98	92
Companies and people responsible for the pollution of nature should be strictly penalized.	110	99	92
The most important is that I get enough sleep while on vacation.	110	91	99
When I go on vacation all I want is to rest.	103	88	108
Good night life is for me the best way to spend my holidays.	80	66	150
I am trying to spend the time of my vacation on wild parties and fun.	76	63	157
When on vacation I like to visit night bars and disco clubs.	74	63	158
Total sum	**2836**	**2074**	**2573**

When analysing responses per naturally created segments, it can be concluded that 1 segment can be seen as *eco-open segment*, where respondents are aware of all tested segments of ecotourism, not only nature-based, but heritage, culture and history as well, also above average interested in their own health. Only dimension distant to this segment was related to vacation wild night life. Second segment can be seen as *uninterested segment* in general since their indexes are lowest on all given statement. It is segment that actually is not open or not even interested in going on vacation, e.g. ecotourism as well. Third segment is segment *self-oriented tourist* since their affinity index shows high affinity for taking care of their own health and wellbeing, but also interest in wild night parties and nightlife in general.

Demographic profile of segments also varies, since there was confirmed statistical difference between segments on all observed demographic variables. As having focused on *eco-open segment* it can be seen that there are more female than in general sample or other segments (graph 4).

Graph 4 Segments by gender

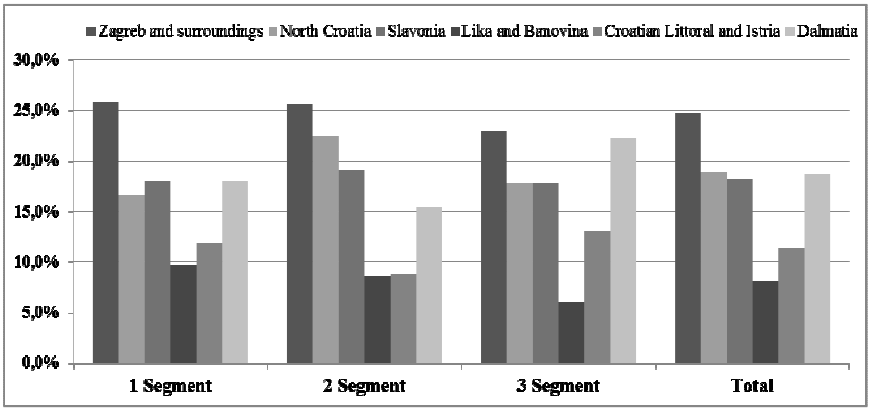


Regarding region, on first glance distribution is rather similar especially of *eco-open segment* and total, but there are some regions which differ significantly (graph 5).

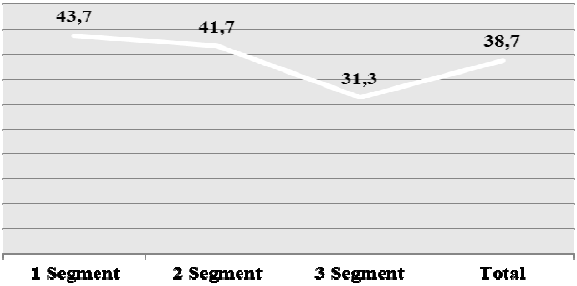
As expected, *eco-open segment* is 'oldest' in average, and third, self-oriented segment the youngest of all observed segments (graph 6).

When it comes to settlement type, only second uninterested segment are respondent coming from urban settlements rather than urban (graph 7).

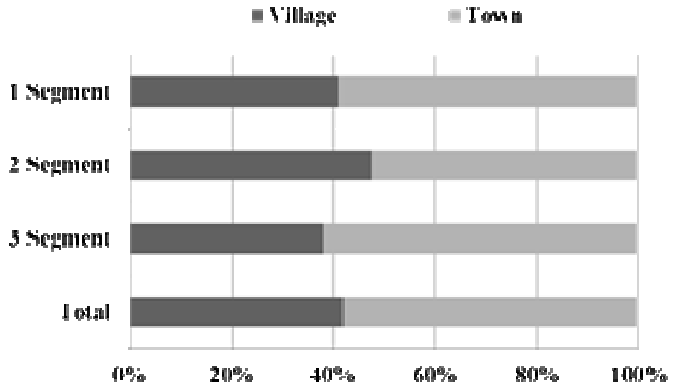
Graph 5 Segments by region



Graph Graph 6 Segments by average age



Graph 7 Segments by settlement type



IV. Conclusion

Ecotourism has proven itself to be an important tool for region development, but it only works when it yields economic benefits to local people, supports conservation and reduces the human impact of travel. In order to become a successful sustainable region development tool, ecotourism requires deep understanding of situation and ecotourism perception as a starting point of building regional strategies and developing actions relevant to the development of the region. Although ecotourism is seen as a global tourism trend, little is known about the profile of individuals who are either interested in such experiences, or currently driving this apparently lucrative market. Since a key

component of all marketing programmes is knowing the current or potential target group and tourist's characteristics are the key elements of the marketing strategy it is very important to apply a segmentation strategy that would identify homogeneous subsets that could be targeted by specifically tailored communication strategies.

Croatian citizen's segmentation based on perception and attitudes resulted in ecotourism segment detection and description, providing a basis for ecotourism strategy development. Although rather small proportion of Croatian citizens is travelling abroad (8%), there are 36% travelling within the country. This number correlates to eco-open segment of current and potential tourist where one third of all citizens are consistently open to ecotourism and all activities related to it. This is segment which should be the base for further ecotourism strategy development within the Croatia, but within the region as well, since their open attitudes and ecotourism values could be basis for new ecotourism experiences.

Limitations of this research are that ecotourism openness was measured on the basis of an attitude scale. Although there is evidence from the psychological literature that attitudes influence behaviour, the relationship is not always consistent so it would be preferable for future research to focus on actual behaviour regarding sustainability in eco-tourists' holiday decision-making.

Regional governance: regional development

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Representation and possibilities of regions in the European Union

I. Introduction

This paper aims to look at the possibilities that regions have in the framework of the European Union. Regions are represented in the Union in an institutionalized way within the Committee of the Regions. Although its powers are relatively limited, the Committee of the Regions can provide input in the EU legislative process and present its views in various non-legislative opinions in order to influence European decision-making. We will assess the importance of the right of the Committee of the Regions to initiate an action for annulment and its role in safeguarding subsidiarity since the entry into force of the Lisbon Treaty. The second part of the paper will deal with the direct representation and other possibilities of regions in the EU framework. The representation of Osijek-Baranja County in Brussels was founded in 2007, by the City of Osijek and Osijek-Baranja County. The main objectives of the office in Brussels are to assure strong representation of the regional interests, to provide information about the on-going processes in Brussels and to establish horizontal connections with other regions and European institutions. Since the office of Osijek-Baranja County was founded prior to the Lisbon changes, this paper will try to answer the question whether the Lisbon changes improved the process of direct representation.

II. The Committee of the Regions in the institutional framework of the European Union

The first real milestone regarding the representation of regional and local actors in European integration was the establishment of the Committee of the Regions (hereinafter: CoR). The CoR was set up by

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the Maastricht Treaty (1993), and began operating in an advisory capacity in the EU institutional system in 1994. Although multiple treaty reforms have taken place since then, Treaty rules regarding the CoR have not undergone drastic modifications – the Lisbon Treaty, however, did bring about changes and new possibilities for this consultative body. Essentially, the CoR is a political assembly of holders of a regional or local electoral mandate '*that aims to provide institutional representation for all the territorial areas, regions, cities and municipalities of the European Union through its political legitimacy*'.[1]

1. Composition and organization of the Committee of the Regions

The CoR is currently regulated by Articles 300 and 305-308 of the Treaty on the Functioning of the European Union (TFEU). Its composition is defined by Article 300 as consisting of representatives of regional and local bodies who 'either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly.' The number of members of the Committee may not exceed 350. The corresponding decision is adopted by the Council, acting unanimously on a proposal from the Commission.[2] Currently, the Committee of the Regions is made up of 344 members and an equal number of alternate members appointed for a term of five years. The members are not to be bound by any mandatory instructions and shall act completely independent in the performance of their duties, in the general interest of the EU. Regarding its internal structure, the CoR has a president and a first vice-president (both elected by the CoR from among its members for two-and-a-half years); a Bureau (which draws up the political programme at the start of each new term, oversees its implementation and coordinates the work of the plenary sessions and the commissions in general) and six so-called commissions which specialize in various policy areas and are responsible to support the preparation of draft opinions and resolutions which are subsequently submitted to the Plenary Assembly for adoption.[3] The CoR members sit in political

[1] Committee of the Regions – Mission Statement (2009), available at *http://cor.europa.eu/en/about/Documents/Mission%20statement/EN.pdf* (15.05.2013).

[2] Before the Lisbon Treaty, the division of seats allocated to individual Member States was contained in the EC Treaty. The new regime allows for greater flexibility.

[3] Currently, the commissions are the following: Citizenship, Governance, Institutional Affairs and External Affairs (CIVEX); Territorial Cohesion Policy

groups[4], but also meet in national delegations to discuss issues on the agenda of the CoR plenary sessions from a national point of view. The CoR is supported by a Secretariat-General, situated – like the Committee itself – in Brussels.

2. Powers of the Committee of the Regions

Article 13 TEU gives a general description regarding the role of the CoR by stating that it shall assist the European Parliament[5], the Council and the Commission in an advisory capacity (alongside the Economic and Social Committee). In order to realize its advisory functions, the CoR adopts its own rules of procedure[6] and elects its president and officials from among its members.

As mentioned, the Treaties define the CoR as an advisory body, and its powers reflect this designation, as its main function is to provide non-binding opinions in the legislative process. Firstly, it is mandatory to consult the CoR if this is prescribed by the TFEU – thus the CoR has a possibility to express its opinion on matters concerning education, vocational training and youth (Article 165), culture (Article 167), public health (Article 168), trans-European transport, telecommunications and energy networks (Article 172), and economic and social cohesion (Articles 175, 177, 178). It must be noted in this regard however that there are quite a number of EU policy areas which do have (or can have) a significant regional dimension and regarding which consultation of the CoR is not required, such as the internal market or industrial policy.[7] Secondly, the Commission, the EP or the Council may also consult the

(COTER); Economic and Social Policy (ECOS); Education, Youth, Culture and Research (EDUC); Environment, Climate Change and Energy (ENVE); Natural Resources (NAT); Temporary ad hoc Commission on EU budget; Financial and Administrative Affairs (CFAA).

[4] Currently there are five political groups (European People's Party; Party of European Socialists; Alliance of Liberals and Democrats for Europe; European Alliance, European Conservatives and Reformists).

[5] The addition of the European Parliament to the institutions supported by the CoR was facilitated by the Lisbon Treaty, corresponding to the increased legislative powers of the European Parliament. Horváth Zoltán and Ódor Bálint, *Az Európai Unió szerződéses reformja* [The Treaty Reform of the European Union] (Budapest, HVG-Orac 2008) p. 165.

[6] For the current version see OJ 2010 L 6/14.

[7] D. Chalmers, et al, *European Union Law* (Oxford, Oxford University Press 2010) p. 90

CoR of their own accord regarding any other matter. The consultation of the CoR – whether mandatory or voluntary – must take place within the (at least one month long) time limit set by the consulting institution. If the CoR does not issue an opinion before the deadline, the consulting institution(s) may continue with the decision-making procedure regardless.[8] Thirdly, the CoR may also issue an opinion on its own initiative when it deems necessary.[9] Since the Lisbon Treaty entered into force, the CoR may initiate annulment proceedings before the Court of Justice of the European Union (hereinafter CJEU) – a question we will come back to in more detail below.

Admittedly, the CoR is not one of the strongest bodies in the European Union: its 'modest' powers could be seen as an external challenge to its effectively fulfilling the tasking role of representing regional and local interests at the EU level. The CoR also faces an internal challenge insofar as it has to bring together and consolidate quite diverse interests represented by members coming from very diverse backgrounds themselves. Furthermore, the fact that the members of the CoR are not directly elected (and not necessarily elected at all) mitigates its democratic legitimacy. Nevertheless, its opinions carry political significance, and the decision-making institutions of the EU also need to have regard to the CoR as one of the actors in the political and legislative arena of the EU. The European Commission has traditionally been quite supportive of regional representation in the European policy process, and ever since the CoR was created, both bodies have expressed the wish for active communication and cooperation with each

[8] As opposed to the consultation of the European Parliament in the consultation procedure, where no time limit can be set for the EP, thus giving it the possibility to draw out legislation by delaying the delivery of its own opinion. The EP's power to the delay is also not limitless: as the Court of Justice pointed out, the institutions are bound by the same duty of sincere cooperation as that which governs relations between Member States and the EU institutions. See Case C-65/93 *Parliament v Council* [1995] *ECR I-00643*, para. 23.

[9] For an example, see the Committee's White Paper on Multilevel Governance from 2009 (CdR 89/2009 fin), which was released by the CoR laying down two main strategic objectives: to encourage public participation in the European process and to reinforce the efficiency of Community action. The CoR was prompted to act by the fact that 'public interest in European elections is decreasing, whilst the European Union itself is largely seen as an asset in facing the challenges of globalization', aiming to encourage political action to be refocused on the principles and mechanisms of multi-level governance.

other: the interest and support of the Commission stems from its aspiration to achieve better implementation of EU policies at national and sub-national level and also from the willingness of the Commission to incorporate proposals and initiatives coming from the CoR, even encouraging it to be more active in this regard.[10] The two institutions cooperate along the rules of a protocol detailing their relationship.[11]
In recent years, a new area of activity has come to the foreground: the role of the CoR in ensuring that the principle of subsidiarity is respected. We will now analyze the CoR's approach towards subsidiarity in general, and then take a closer look at the right of the CoR to initiate annulment proceedings before the CJEU.

3. The Committee of Regions and the principle of subsidiarity

The principle of subsidiarity is meant to guarantee that decisions are taken at the level closest to the citizens – since the Maastricht Treaty, it is one of the principles that have to be taken into account by the European Union when it exercises its legislative powers. According to Article 5 of the Treaty on European Union (hereinafter TEU), in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
In the institutional structure of the EU, it is the Committee of the Regions that is composed of members who are representatives or officials at the level closest to the citizens in their respective Member States, thus it is only logical that the CoR would play a role in safeguarding the principle of subsidiarity. The CoR itself has recognized this immediately following its establishment, and has declared itself to

[10] T. Christiansen and P. Lintner, 'The Committee of the Regions after 10 Years: Lessons from the Past and Challenges for the Future' *EIPASCOPE* 2005/1 p. 8. See in particular the Commission White Paper on European Governance, COM(2001)428 final p. 14.
[11] Protocol on cooperation between the European Commission and the Committee of the Regions, OJ 2012 C 102/02. The document represents a type of agreement between the Commission and the CoR, and is not a 'protocol' in the public international law sense.

be the 'custodian' of the principle of subsidiarity,[12] elaborating upon the importance of the principle as early as 1995.[13]

However, it was only the Lisbon Treaty that endeavored to turn the CoR into one of the 'watchdogs' of subsidiarity. The Lisbon Treaty has placed great focus on further democratization of the European Union, on enhancing the role of national parliaments and – in connection with these aims – the safeguarding of the principle of subsidiarity, fundamentally rewriting the protocol regarding the application of the principles of subsidiarity and proportionality attached to the Treaties.[14] Importantly for our subject, it has also added the mention of the regional and local dimension of subsidiarity in the definition of the principle (whereas pre-Lisbon, the definition of subsidiarity only referred to the nation state level).

Article 2 of the protocol states that before proposing legislative acts, the Commission is to engage in wide consultation, and that such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged.[15] The European Commission is obliged to submit each year to the European Council, the European Parliament, the Council, and national Parliaments a report on the application of Article 5 TEU – this annual report is also forwarded to the Economic and Social Committee and the Committee of the Regions (according to Article 9 of the Protocol).

As a reaction to the newly bestowed powers, the CoR modified its Rules of Procedure in 2010 to ensure that all its opinions contain an explicit reference to subsidiarity.[16] The CoR has also established a Subsidiarity Monitoring Network (hereinafter: SMN) even predating the entry into force of the Lisbon amendments, which aims to facilitate the exchange of information between local and regional authorities in the EU and EU

[12] Opinion of the Committee of the Regions on the Principle of subsidiarity: Developing a genuine culture of subsidiarity (CdR 302/98 fin), OJ 1999 C 198/73.

[13] Opinion of the Committee of the Regions on the revision of the Treaty on European Union and of the Treaty establishing the European Community (CdR 136/95), OJ 1996 C 100/1.

[14] Protocol (No 2) on the application of the principles of subsidiarity and proportionality, OJ 2012 C 306/206.

[15] In cases of exceptional urgency, the Commission may disregard conducting such wide consultations; however, it is obliged to give reasons for its decision in its proposal.

[16] See Rule 51(2) of the Rules of Procedure: Committee opinions shall contain an explicit reference to the application of the subsidiarity and proportionality principles.

institutions on Commission documents and legislative proposals which have a direct impact on regional and local authorities.[17] The SMN is made up of different types of partners, bringing together 143 stakeholders including:

- parliaments or assemblies representing regions with legislative powers,
- governments or executives representing regions with legislative powers,
- local or regional authorities without legislative powers,
- associations of local/regional authorities,
- others (national parliaments or chambers thereof).[18]

Via the SMN, local and regional authorities are able to express their views on draft European legislative proposals in various stages of the (pre-)legislative process, aiming to contribute to avoiding conflicts regarding compliance with the subsidiarity principle and giving the European Commission direct access to the views of local and regional authorities.[19] According to the new subsidiarity strategy of the CoR (adopted in 2012), the SMN carries out different categories of activities:[20]

- *impact assessment consultations* are carried out during the pre-legislative phase in cooperation with the Commission, aiming to assess the territorial impact of certain Commission proposals, and allowing potential subsidiarity issues to be identified at a very early stage of the EU decision-making process;
- *targeted consultations* are focused on subsidiarity and proportionality issues and provide input from the network partners, these can be launched via the SMN in the actual

[17] The network was established in 2007. The official website of the Network is available at *http://extranet.cor.europa.eu/subsidiarity/Pages/default.aspx.*

[18] For the full list of partners see *http://extranet.cor.europa.eu/subsidiarity/Documents/SMN%20-%20List%20of%20Network%20Partners/SMN%20-%20List%20of%20Network%20Partners%20-%20EN%20-%2010%20Apr%202013_MASTER%20LIST.pdf.*

[19] *http://extranet.cor.europa.eu/subsidiarity/activities/Pages/Consultations.aspx*

[20] Taken from Committee of the Regions, 'A New Subsidiarity Strategy for the Committee of the Regions' (2012) p. 7, available at *http://extranet.cor.europa.eu/subsidiarity/Documents/A8782_summary_subsi_strategy_EN_modif1_final.pdf.*

legislative phase, and in the context of the preparation of a draft opinion by a CoR rapporteur;

- SMN partners may also send *open contributions* to any EU initiative for which a subsidiarity analysis is appropriate, such 'spontaneous contributions' are published on the Network's website and forwarded to CoR rapporteurs whenever they relate to an initiative on which the CoR is preparing an opinion at the time.

Similarly to the IPEX website[21] established by national parliaments for swift and easy communication regarding reasoned opinions on subsidiarity, the CoR has set up the REGPEX website, designed firstly to support the participation of regions with legislative powers in an early phase of the EU legislative procedure (i.e. the Early Warning System); and secondly to serve as a platform for information and exchange between regional parliaments and governments in the preparation of their subsidiarity analyses. REGPEX also provides access to customized files containing information related to issues identified as being especially relevant with regard to the Early Warning System, intended for use by CoR rapporteurs and members in the process of assessing compliance or non-compliance with the subsidiarity principle at a later stage.[22]

The CoR tries to make the most of its subsidiarity-related powers, but it is a fact that these possibilities are weak even when compared to those of the national parliaments (who can collectively show a 'yellow' or an 'orange' card to the EU legislators).[23] Critical statements of the CoR 'remained a dull sword' due to their lack of binding legal authority.[24] In the end (just as with the subsidiarity warnings issued by national parliaments) the decision whether a planned measure adheres to the principle of subsidiarity or not is in the hands of the EU legislators in the (ordinary) legislative procedure. The weakness of the *ex ante* review of subsidiarity is somewhat compensated by the right of the CoR to initiate

[21] *http://www.ipex.eu*

[22] A New Subsidiarity Strategy for the Committee of the Regions, p. 7

[23] For more on the possibilities of national parliaments in the EU see Á. Mohay and T. Takács, 'The Role of National Parliaments in the EU after the Lisbon Treaty', in T. Drinóczi and T. Takács, eds., *Cross-border and EU legal issues: Hungary – Croatia* (Pécs – Osijek, University of Pécs, J.J. Strossmayer Univerity of Osijek 2011) pp. 483-498.

[24] C. Ritzer, et al, 'How to Sharpen a Dull Sword – The Principle of Subsidiarity and its Control', 07 *German Law Journal* (2006) p. 747.

annulment proceedings in connection with the infringement of subsidiarity, i.e. the possibility of initiating an *ex post* review of the issue by the CJEU.

4. The Committee of the Regions and actions for annulment before the CJEU

As it was already mentioned, the entering into force of the Lisbon Treaty improved the standing of regions and cities in the EU's political system, and attempted to boost the role of their representative body in Brussels, the Committee of the Regions.

Luc Van den Brande (the president of the CoR at that time) declared that '[w]ith the Lisbon Treaty, European legislation will be adopted more democratically in future, with a stronger Parliament and a Commission which listens to the people, is sensitive to the regional and local impact of European initiatives and is committed to respecting the subsidiarity principle. In addition, the Lisbon Treaty gives territorial cohesion, which is the cornerstone of future regional policy, a fundamental legal basis.'[25]

The Lisbon Treaty also strengthened the institutional role of the CoR by giving it the right to bring legal actions before the CJEU in two situations:

- to protect its own institutional prerogatives and
- to request the annulment of EU legislative acts that it considers being in breach of the principle of subsidiarity.

Mechanisms to monitor the principle of subsidiarity were put in place by the Protocol on the application of the principles of subsidiarity and proportionality. The Treaty of Lisbon reformed the above Protocol fundamentally, in order to improve and reinforce monitoring. The Protocol, introduced by the Treaty of Amsterdam, prescribes compliance with certain obligations during the actual drafting of legislation. Thus, before proposing legislative acts, the Commission must prepare a Green Paper. Green Papers are intended for wide-ranging consultations. They enable the Commission to collect opinions from national and local institutions and from civil society on the desirability of a legislative proposal, in particular in respect of the principle of subsidiarity.

[25] See 'The Lisbon Treaty has been ratified: more respect and power for the Regions and Cities of Europe, available at *http://cor.europa.eu/en/news/Documents/5e182660-ae36-48f7-a36d-b779ce527329.pdf.*

By an action for annulment, the applicant seeks the annulment of a measure (in particular a regulation, directive or decision) adopted by an institution, body, office or agency of the EU. It is the direct way of judicial review of validity of EU law. The indirect way of review is via the preliminary ruling procedure but the latter falls outside of the scope of our paper.

The Lisbon Treaty has introduced certain changes in the organization of these procedures. With the Lisbon Treaty, for the first time, the CoR has been given the right to defend the principle of subsidiarity by bringing an action for annulment against a legislative act that infringes that principle, provided it falls within an area in which the CoR's consultation is mandatory.

Regarding complainants, we can distinguish between three different groups of potential applicants. First group, usually called privileged applicants, because they do not have to show any legal interest to bring the action, comprises of the Member States, and three Community institutions: the European Parliament, the Council and the Commission.

The second category of potential applicants consists of the so-called quasi-privileged applicants – bodies which have the power to ask for annulment of an EU act in order to protect their own prerogatives. The Nice Treaty granted such right to the Court of Auditors and the ECB. The Lisbon Treaty expanded the list with the Committee of the Regions.

In the third group we can find the so-called non-privileged applicants, namely private individuals: in order to be able to initiate annulment proceedings, they have to prove that the act is of direct and individual concern to them.

Three conditions have to be fulfilled for the CoR to bring an action for annulment against a legislative act.

Mandatory consultation. Normally, the Commission will consult the CoR at the earliest stage of legislative procedures in policy areas that directly affect local and regional authorities. As mentioned, the CoR may proactively adopt a position on a particular issue through an own-initiative opinion. There are different types of opinions but for us only opinions on legislative proposals in policy areas for which consultation is mandatory are relevant at present.[26] Thus, an action for annulment

[26] There are also opinions on future European policies; prospective opinions on territorial impact assessment analysis on some European Commission proposals and resolutions on topical political issues. For more information see *http://cor.europa.eu/en/activities/opinions/Pages/opinions-and-resolutions.aspx.*

cannot be brought by the CoR against a legislative act in respect of which the CoR was consulted, but which falls outside the scope of mandatory consultation (namely, optional consultations) or where the CoR issued an own-initiative opinion.

Legislative act. An action for annulment can only be brought against a 'legislative act', so the CoR would thus have to wait for the legislative act to be adopted before it can bring any action before the CJEU. The action for annulment therefore serves as an *ex post* control mechanism. So-called 'non-legislative acts'– such as those adopted by the Commission either as a 'delegated act' (Article 290 TFEU) or as an 'implementing act' (Article 291 TFEU) – are excluded from the CoR's control.[27]

Time limits. Proceedings have to be instituted within two months of the publication of the measure. This means that the CoR's position needs to be well prepared in advance. The decision to bring an action for annulment is taken in accordance with rules laid down in the CoR's Rules of Procedure.[28]

An annulment proceeding before CJEU starts with an application for annulment. The application must contain a brief account of the relevant facts, all the pleas in law on which the application is based and the arguments in support of each plea in law.[29]

Pursuant to the second paragraph of Article 263 TFEU, an act can be annulled on the following grounds: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule of law relating to their application, or misuse of power. Non-compliance with subsidiarity covers the annulment ground of lack of competence.[30]

In an action alleging infringement of the principle of subsidiarity, the CoR will have to adduce evidence to show that it has, throughout the

[27] Committee of the Regions, *Practical guide on the infringement of the subsidiarity principle*, available at *https://portal.cor.europa.eu/subsidiarity/Publications/Documents/Guide%20on%20SubsidiarityFINAL.pdf*.

[28] See Rule 53 – Action for infringement of the subsidiarity principle, Rules of Procedure, OJ L 6, 9.1.2010, pp. 14-31.

[29] For more detailed elements of action see Article 21 – Protocol (No 3) on the Statute of the Court of Justice.

[30] A. Türk, *Judicial Review in EU Law* (Cheltenham, Edward Elgar Publishing 2010) p. 109.

legislative procedure, raised concerns that the legislative proposal infringes that principle.[31]

The CoR can also intervene in proceedings instituted by others: this means in practice that the CoR would then support arguments put forward by other applicants, or even develop or reinforce certain points of those arguments.[32]

For an action before the Court of Justice on grounds of infringement of the subsidiarity principle to have merit, at least one of the two aspects of the subsidiarity principle set out below needs to be disputed:

- in areas which do not fall within its exclusive competence, the Union is to 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,
- by reason of the scale or effects of the proposed action, the objectives of the proposed action can be better achieved at Union level.

The CJEU has established a total of six criteria to determine whether the principle of subsidiarity has – or has not – been infringed by a legal act. Those criteria should serve as guidelines for the CoR when taking decisions on whether to institute proceedings or not.

Firstly, the Court of Justice takes into account whether the situation at issue presents transnational aspects that cannot be addressed satisfactorily by action at Member State level. This criterion was established in the Vodafone case.[33]

As a second criterion, the CJEU looks at whether an action at national level or a lack of action at Union level would be contrary to the requirements of the Treaty (such as, for example, the need to strengthen social, economic or territorial cohesion) or would otherwise harm the interests of the Member States.[34]

Thirdly, the CJEU considers if an action at Union level would present obvious advantages over action at Member State level.[35]

[31] Committee of the Regions, op. cit. n. 27, at p. 58.
[32] Ibid.
[33] Case C-58/08 *Vodafone Ltd. and others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] *ECR I-04999.*
[34] Case C-84/94 *United Kingdom of Great Britain and Northern Ireland v Council* [1996] *ECR I-05755.*
[35] Case T-362/04 *Leonid Minin v Commission* [2007] *ECR II-002003.*

The fourth criterion taken into account is the question whether an action at Union level is justified by the lack of national legislation to address the situation at issue.[36]

Furthermore, the CJEU checks if an action at Union level is justified taking into consideration the substantial disparity of national and/or regional legislation and the effects of that disparity on the internal market.[37]

Finally, it must be analyzed if action at Union level is justified taking into account the wording of an act of secondary law that grants the Union the exclusive right to intervene, even though the policy area at issue does not fall within an area of exclusive competence.[38]

As it is pointed out in the CoR's practical guidelines, judicial review of the application of the principle of subsidiarity is still being developed further.[39]

Unfortunately, since the entering into force of the Treaty of Lisbon, we cannot find any case initiated by the CoR before the CJEU. There are at least two possible reasons as to why. The first one could be that the CoR considers pre-legislative consultations so effective that there is no necessity to initiate actions for annulment. Another reason could theoretically be that the CoR does not take its new powers seriously. However, if we bear in mind that the CJEU has never struck down an EU act for the infringement of subsidiarity yet,[40] this might tell us why the CoR is much more focused on *ex ante* review. The political nature of subsidiarity has been emphasized by many, and the justiciability of the principle has initially been doubted.[41] Nevertheless the CJEU has competence to review EU acts in this regard, and has actually engaged in reviewing actions submitted based on grounds of infringement of subsidiarity, even if the outcome until now has always been that the EU measure in question was indeed in accordance with the principle.[42] To

[36] Case C-121/92 *Staatssecretaris van Financiën v A. Zinnecker* [1993] *ECR I-05023.*

[37] Case C-53/05 *Commission v Portuguese Republic* [2006] *ECR I-06215.*

[38] Case T-326/07 *Cheminova a/s and Others v Commission* [2009] ECR *II-02685.*

[39] Committee of the Regions, op. cit. n. 27, at p. 51.

[40] Chalmers, et al, op. cit. n. 7, at p. 364-365.

[41] For an early perspective see A. G. Toth, 'Is subisidiarity justiciable?' 19 *European Law Review* (1994) pp. 68-285.

[42] For analysis of such judgments see A. Arnull, *The European Union and its Court of Justice* (Oxford, Oxford University Press 2006) pp. 651-653.

be fair, Arnull notes that in the subsidiarity cases to date, the arguments claiming the infringement of the principle have been relatively weak, as the aims of the acts in question simply could not have been achieved individually at Member State level.[43]

III. Examples of regional and cross border cooperation

1. Defining basic terms

The main idea of this paper, after defining the role of Committee of the Regions, is to give an example of regional and cross border cooperation, since the Committee of the Regions is an institution that gives voice to the regions of Europe. Cross-border cooperation is an integral part of the EU's regional policy, that is the reason why it is appropriate to first define the terms 'region', 'regional cooperation' and 'cross border cooperation' in order to understand the examples that are given.

The Community Charter for Regionalization defines region as a "a territory which constitutes, from a geographical point of view, a clear-cut entity or a similar grouping of territories where there is continuity and whose population possesses certain shared features and wishes to safeguard the resulting specific identity and to develop it with the object of stimulating cultural, social and economic progress.[44] A region enjoys full financial autonomy and sufficient funds for a full exercise of its powers. In particular, it is governed by the principles of prudency, effectiveness, efficient fund spending, serviceability towards citizens and transparency in making budgetary decisions. Regions with shared borders promote cross-border cooperation in compliance with applicable national legislation and international laws. In addition to adhering to national legislation and international agreements, regions are authorized to enter into cross-border agreements with the purpose of developing

[43] Arnull, op. cit. n. 42, at p. 652. For example regarding the directive aimed at eliminating the barriers raised by differences between the Member States' laws, regulations and administrative provisions on the manufacture, presentation and sale of tobacco products, the Court came to the conclusion that such an objective 'cannot be sufficiently achieved by the Member States individually and calls for action at Community level, as demonstrated by the multifarious development of national laws in this case'. Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*.[2002] *ECR I-11453*, paras. 181-183.

[44] Art. 1/1 Community Charter for Regionalization, available at *http://ec.europa.eu/regional-policy* (02 May 2013).

cooperation within the limits of their powers. Regions have the right to establish joint advisory bodies or executive bodies within the legal framework of each respective state. [45]

Cross-border cooperation may encompass a wide range of contents, various forms and numerous instruments. The term 'cross-border cooperation' also includes, of course, border cooperation as cross-border cooperation in the narrow sense, primarily between neighboring countries with immediate mutual borders. The basic characteristics of cross-border cooperation include the following: seeking the most advantageous solutions to establish active cooperation, selecting basic aspects of cross-border cooperation, defining the contents, forms, functions and instruments of cooperation, prescribing the terms and conditions of cross-border traffic of goods and services, adopting cooperation legislation harmonized among two countries and providing a border regime to enable cooperation agreed upon.[46] The Opinion of the Committee of the Regions on 'Strategies for promoting cross-border and inter-regional cooperation in an enlarged EU' from 2002 prescribes that cross-border cooperation implies bi-, tri-or multilateral cooperation between local and regional authorities operating in geographically contiguous areas.[47]

In that sense, in the following paragraph we will analyze the work of the Regional Development Agency of Slavonia and Baranja and the Representation office of Slavonia and Baranja in Brussels and we will provide an example of cross border cooperation.

2. Regional Development Agency of Slavonia and Baranja and the Representation office of Slavonia and Baranja in Brussels

The Regional Development Agency of Slavonia and Baranja, a limited liability company for international and regional cooperation, was established by a decision of the Council of the City of Osijek as of 21

[45] T. Petrasevic, 'The Legal Aspects of Cross-Border Cooperation in the Republic of Croatia – Regulations and Sources for Transregional Cooperation', *The Journal of Law* 2008/3-4, p. 81.

[46] A. Šimić, *Prekogranična suradnja u Europi s posebnim osvrtom na Hrvatsku* [Cross-border cooperation in Europe, with special emphasis on Croatia] (Zagreb, Ministarstvo Vanjskih Poslova i Europskih Integracija 2005) p. 16.

[47] Opinion of the Committee of the Regions on 'Strategies form promoting cross-border and interregional cooperation in an enlarged EU – basic document setting out guidelines for the future', OJ 2002 C 192/37.

December 2005. In December 2006, the County Osijek-Baranja, as a regional self-government entity became equal shareholder of the company and on 18 January 2007 the new Company Agreement was signed, as the legal basis for the activities of the Agency. The Agency was established with the goal of creating an operating body that will, through active operation, serve as an instrument of the region's development with a special emphasis on European integrations and attracting foreign investment.[48]

The Agency represents a link between the public, private and civil sectors in building strategic partnerships through the application of projects that contribute to raising the standard of living in the territory of Slavonia and Baranja. Agency Director, Mr. Stjepan Ribić, explained the rationale behind establishing the agency by stating that 'Osijek and Osijek-Baranja County wanted to know where and whom they could contact to utilize assets from the EU pre-accession funds'.[49]

The Agency, which encompasses five counties of Slavonia joined together and comprising the so-called Pannonian Region, will be focused on EU funds and directed to strategic devising of the development of this eastern-Croatian region. The priority should be given to projects related to agriculture, rural tourism development and rural development in general. In the realization of said projects and obtaining assets from the EU funds, and taking into account the position of Osijek-Baranja County, we are, by necessity, focused on cooperation with neighboring counties and/or regions.[50]

On 13 March 2007, the Agency opened its office in Brussels. In an interview, made for the purpose of this paper, the office director of the Representation of Slavonia and Baranja, Slaven Klobucar, answered questions about the work and success of regional cooperation made by the Office since its establishment. Slaven Klobucar stated that the Office of Slavonia and Baranja was founded in 2007 by the City of Osijek and Osijek-Baranja County. The Representation is managed by the Regional Development Agency of Slavonia and Baranja. Director of the Regional Development Agency is also the Director of the Office in Brussels.

[48] Regional Development Agency of Slavonia and Baranja, *http://www.slavonija.hr/index.php?option=com_content&task=view&id=49&Itemid=41* (30.04.2013).

[49] Interview with Agency Director Mr. Stjepan Ribić, *Poduzetnik magazine*, August 2007.

[50] Petrasevic, op. cit. n. 45, at p. 82.

Unlike other regional missions, they decided to buy an office in the heart of the European district of Brussels. Unfortunately, he testified that the establishment of the Office did not go smoothly. There were obstacles of the administrative and financial nature in the process of the establishment of the office and the opening of the office was preceded by intense work on behalf of the Agency in order to fulfill all the conditions set by the Kingdom of Belgium. Another obstacle was the financial one, as for the purchase of the office facilities significant resources had to be provided. Nevertheless, Klobucar considers that the investment has proved justified. Through the office rental, the office becomes self-sustaining without placing a significant burden on the budget of the Osijek-Baranja County and the City of Osijek.

The main objectives of the office in Brussels are to assure strong representation of the regional interests of Slavonija and Baranja and its local industries and companies. to provide information about the ongoing processes in Brussels relevant for the counties and towns of Slavonija and Baranja region in a direct and immediate way with special regard to the working processes of the European Commission, the European Parliament and the Committee of the Regions. Besides the abovementioned, the task of the Brussels Representation of Slavonija and Baranja is to establish horizontal connections with other regions and European Institutions, in order to find Croatian, European and other international resources and partners for the projects and programs that are important for the region. [51]

Slaven Klobucar emphasised some of the results in the period since the establishment of the Office. The Office now represents: City of Požega, City of Osijek, Osijek-Baranja County and Vukovar-Srijem County. City of Osijek has achieved official friend status with the following cities: Pécs (Hungary), Pforzheim (Germany), Maribor (Slovenia), Tuzla (Bosnia and Herzegovina), Ploiesti (Romania), Lausanne (Switzerland), Nitra (Slovakia) District XIII Budapest (Hungary), Prizren (Kosovo) and Subotica (Serbia). The City of Osijek is also a member of the following networks: IFGRA (International Federation of Green Regions Associations), Network of European cultural cities, IFEES (International Federation of educational cities), LDA (Local Democracy Agency), Euro-regional cooperation Danube-Drava-Sava and network of Mayors for Peace. Osijek-Baranja County has achieved official status regions

[51] See *http://www.slavonija-baranja.eu/index.php/representation* (20.03. 2013).

friend with the following regions: County Baranja (Baranya Megye) in the Republic of Hungary, the Autonomous Region of Friuli-Venezia Giulia (Friuli-Venezia Giulia) in the Republic of Italy and the Province of Vicenza in the Republic of Italy. Osijek-Baranja County is a member of the following organizations: Euro-Regional cooperation Danube-Drava-Sava, the Danube Commission, the European Campaign for Sustainable Cities and Towns and the Assembly of European Regions. City of Pozega developed status of a friend with the town Yokneam in Israel. While Vukovar-Srijem County region is a friend with: Autonomous Region of Friuli-Venezia Giulia (Italy), the county Zakapartska State Administration (Ukraine), the Autonomous Province of Vojvodina (Serbia), South Backa Administrative District (Serbia), the City of Sremska Mitrovica, municipality Sid, Ruma, Indjija, Pećinci, Stara Pazova, Irig, (Serbia), Posavina Canton (Bosnia and Herzegovina), County Fejer (Hungary), West Backa district, the City of Sombor, municipality Apatin, Odžaci and Kula (Serbia), the city of Ravenna (Italy), District of Brčko (Bosnia and Herzegovina). Vukovar-Srijem County is member of the Working Community of the Danube region and the Assembly of European Regions.

Further, Slaven Klobucar points out that the Lisbon Treaty did not have an impact on the work of the Office. The Office is not funded by the EU budget, and changes in the EU treaties do not affect the work of the Office, neither positively or negatively. Although the Treaty changes did not affect their work, he points out that the Office is working closely with the Committee of the Regions. The Office has been accredited as a lobbying organization in the European Parliament and in the Committee of the Regions. He emphasized that since the Committee of the Regions is an institution that gives voice to the regions of Europe it represents the most interesting Union institution for the Office regarding cooperation. The Office participates in a number of consultations, conferences and meetings organized by the Committee of the Regions. Also, each year they participate in the open days of the Committee of the Regions where they represent the region of Slavonia and Baranja.[52]

[52] Slaven Klobucar, email interview (02.11.2012).

3. Osijek-Baranja County's cross-border cooperation activities[53]

As it was previously mentioned, Osijek-Baranja County, in addition to being a member of the Euroregional Cooperation 'Danube-Drava-Sava', is also a member of the Working Community of the Danube Regions, the European Campaign for Sustainable Cities and Towns, the Assembly of European Regions, and it has cooperative relations with Baranya County (Baranya Megye), the Autonomous Region of Friuli – Venezia Giulia in Italy and the province Vicenza in Italy.

The cooperation of regions along the state border between Croatia and Hungary has a rich and long tradition. In addition to geographical connection, we are also linked by strong historical, cultural and economic components. This is not surprising taking into account that we once lived in the same union of states. But the interesting fact is that, despite some historical disagreements, we have well-developed neighborly relations nowadays. The cities of Osijek and Pécs established mutual cooperation as early as 1967, which continued from the cooperation of the historical District of Slavonia and the County of Baranya, and in 1973, Osijek and Pécs became sister cities.[54]

Apart from inter-city cooperation, regional cooperation has also developed between then existing community of municipalities of Osijek and Baranya County. This historical cooperation was legally established by the 'Agreement on mutual cooperation between Osijek-Baranja County in the Republic of Croatia and Baranya County in Hungary' dating from 28 June 1995. In the Preamble to this Agreement, the Parties stated: 'Starting from the fact that border regions of the Republics of Croatia and Hungary are geographically and historically referred to mutual cooperation, inspired by positive experiences gained in the course of the cooperation between Osijek and Pécs, other cities, villages and regions of the two countries thus far, encouraged and guided by the desire to contribute to the development of good neighborly relations between the two nations by concerted action, to deepen the friendship among the population of border regions, thus to build a bridge between the neighboring countries.'[55]

[53] Note: authors do not list all the existing forms of cross-border cooperation since it would exceed the scope of this paper.

[54] Petrasevic, op. cit. n. 45, at p. 96

[55] Agreement on mutual cooperation between Osijek-Baranja County in the Republic of Croatia and Baranya County in Hungary, available at

Based on this Agreement, on 7 June 1996, an 'Agreement on the cooperation and friendship between the border municipalities of Osijek-Baranja County and Baranya County' was accepted and signed between Osijek-Baranja County and Baranya County. In the agreement regions have agreed to develop deeper cooperation in the fields of economy, regional development, health, culture, protection of nature, sport, tourism, and regional marketing. They have obliged to assist and support inter-municipal cooperation to make it more versatile, based on mutual reciprocal benefits in economic, cultural, health, sports and other fields. In that respect, mayors have agreed to meet at least twice a year in regular meetings to analyze the implementation of the Agreement, and to provide information on the possibility of development of the relationship set forth in the agreement.[56] Finally, on 29 June 2005, an 'Agreement on cooperation in the field of protection and rescue from natural accidents and disasters' was signed between the two counties.

From the ten year process of the development of the relationship it is obvious that regions have created good and long term relations which are ongoing to this date. Unfortunately, according to the documentation provided on the web-site of the Osijek-Baranja County, no further cooperation is being developed.[57] Since there are no new legal documents concerning the regional cooperation with Baranya from the period following the establishment of the Brussels office, Slaven Klobucar emphasised that today's collaboration with Baranya is kept up mainly through a number of projects carried out by various institutions and local governments in Slavonia and Baranja (not just the Osijek-Baranja County).[58] He stated that communication before project development does not necessarily go via the Brussels office because Baranya no longer has an office in Brussels.[59] On the other hand, the director of the Regional and Development Agency of Slavonia and

http://www.obz.hr/hr/pdf/Sporazum%20o%20me%C4%91usobnoj%20suradnji%20Osje%C4%8Dko.pdf (15.04.2013).

[56] Agreement on the cooperation and friendship between the border municipalities of Osijek-Baranja County and Baranya County, available at *http://www.obz.hr/hr/pdf/Sporazum%20o%20suradnji%20i%20prijateljstvu.pdf* (18.04.2013).

[57] Agreement on cooperation in the field of protection and rescue from natural accidents and disasters, available at *http://www.obz.hr/hr/index.php?tekst=92* (18.04.2013).

[58] Slaven Klobucar, email interview (05.02.2012).

[59] http://www.ddriu.hu/htmls/brussels_office.html (15.05.2013).

Baranja, and Director of the Office in Brussels, Stjepan Ribic, mentioned 87 projects of a total value of 36140792.61 euros that were realized by participating companies from the areas of Osijek-Baranja County and Hungary. He pointed out that twenty projects are not yet listed on the Agency website, so the next analysis is based on the 67 projects on which data is currently available.[60] In the available information provided on the website, which was updated 20 February 2013, we can find 67 projects, in 15 of those projects, the county Baranya or entities in the county Baranya were partners.[61] Although the connection within the counties achieved through the EU financed projects are successful, attention must be drawn to the inactivity of the Brussels Office in achieving cooperation and the non-existence of new legal documents at the county level. Maybe it can be justified by the fact that with an already developed network, good connections and a number of EU projects, the focus of the office shifts to establish other regional connections or perhaps the closing of the Baranya office in Brussels is also an option. Nevertheless, it must be noted that in regional cooperation, even the best one, there is always room for progress and relationship development.

Other examples of regional cooperation can be found in the Protocol on the cooperation between the Province of Vicenza and Osijek-Baranja County, signed on 20 February 1995. The aim of the Protocol was to provide Osijek-Baranja County with help following the Croatian war for independence. Pursuant to this Protocol, the cooperation has been maintained particularly in the field of economy, with the coordination of the two regions' chambers of economy.[62] Although, the Protocol from 1995 is the only legal document that has been singed with the Province of Vicenza, Stjepan Ribic emphasized the international project 'Art and Earth',[63] which was implemented in cooperation with the region of

[60] Stjepan Ribić, email interview (05.08.2012).

[61] Projects of Osijek Baranja county, available at *http://www.slavonija.hr/index.php?option=com_content&task=view&id=12&Itemid=28* (03.05.2013).

[62] Protocol on the cooperation between the Province of Vicenza and Osijek-Baranja County of 20 February 1995, available at *http://www.obz.hr/hr/index.php?tekst=332* (20.04.2013).

[63] *http://www.slavonija.hr/images/izmedija/2013/glas_slavonije_27_04_2013.pdf*

Vicenza and the planned signature of friendship agreement between city of Osijek and the city of Vicenza.[64]

The cooperation of Osijek-Baranja County with the Autonomous Regions of Friuli – Venezia Giulia is based on the Republic of Italy's program for assistance to the reconstruction of the Croatian Danubian Region. The Lead Partners of the program are Vukovar-Srijem County and Osijek-Baranja County from the Croatian side and the Ministry of Foreign Affairs of the Republic of Italy and the Friuli-Venezia Giulia Region from the Italian side. On these bases, the Cooperation Agreement was prepared and signed in Osijek on May 28, 2002. The protocol is based on the collaborational interests that are significant for both regions. In the process of continuing the collaboration, the delegation of Osijek-Baranja County and the Autonomous Region of Friuli-Venezia Giulia have signed a new agreement in Brussels on 6 October 2009. The subject of the agreement is cooperation in various sectors of the economy (agriculture, food, industry and trade), environmental protection, education and culture and administration for a period of four years.[65] Considering the fact that the contract was signed in Brussels, Slaven Klobucar states that the Office is involved in the process of establishing connections after which the contract details are arranged by the region leadership.[66] Here we can find the good example of how the Osijek and Osijek-Baranja County was involved in the process of negotiation and preparation. In the end, we should point out the fact that the Protocol signed between these two regions expires this year, so it would be interesting for further research to follow the future and the effect of the agreement and the eventual possibility of extension or the signing of a new contract after the expiry of the existing one.

IV. Concluding remarks

The idea to enable regional and local interests to shape European integration is a concept that is definitely positive from the point of view of the representation of the interests of smaller communities and local initiatives in an ever growing European Union, keeping in mind also that

[64] Stjepan Ribić, email interview (05.08.2012).

[65] Agreement of the cooperation between the Osijek-Baranja County and the Autonomous Region of Friuli-Venezia Giulia, available at *http://www.obz.hr/hr/pdf/2011/SPORAZUM%20Furlanije%20julijske%20kranije%20i%20OB%C5%BD%20-%20hrvatski.pdf* (20.04.2013).

[66] Slaven Klobucar, email interview (05.02.2012).

citizens' access to local or other sub-national policy making fora is easier when compared to national level political institutions.[67] The Committee of the Regions however is a relatively weak institution (even deemed 'relatively unsuccessful'), as its opinions exert only modest influence on the actual decision-making institutions.[68] Still, the CoR is quite active in the pre-legislative monitoring of subsidiarity: the Committee set up an internal early flagging system to ensure the proper monitoring of legislative and non-legislative drafts that might raise subsidiarity issues. The system is based on analyzing the work program of the European Commission and its legislative roadmaps in advance, and involves the identification and planning of the subsidiarity monitoring activities to be carried out throughout the year by the CoR, both before and after the Commission adopts its proposals.[69] In the Protocol on Cooperation between the CoR and the Commission, the latter recognized the 'privileged role' of the Committee and undertook to cooperate closely with it in implementing the subsidiarity and proportionality protocol, inter alia by providing for pre-legislative consultations taking into account the regional and local dimension of the envisaged measures. The two bodies also agreed to share information regarding subsidiarity monitoring on a regular basis, including the relevant opinions issued by national and regional parliaments. The CoR proclaimed that it will inform the co-legislators immediately should it encounter substantial concerns regarding the respect of the principle of subsidiarity in the course of a legislative procedure.[70] The general activeness of the CoR in identifying subsidiarity problems as early on as possible and its effective cooperation with the legislative institutions (especially the Commission) may – at least in part – make up for the lack of stronger formalized powers of the Committee.

The Lisbon Treaty provided the CoR with the right to bring legal actions before the CJEU to protect its own prerogatives and to monitor the

[67] C. Harlow, 'Citizen Access to Political Power in the European Union', in *Collected Courses of the Academy of European Law* Vol VIII, Book 1 (The Hague, Kluwer Law International 2001) p. 22.

[68] Chalmers, et al, op. cit. n. 7, at p. 90.

[69] Committee of the Regions, Subsidiarity Annual Report 2012, available at *http://extranet.cor.europa.eu/subsidiarity/Publications/Documents/Subsidiarity%20Annual%20Report_2012_EN.pdf* p. 3.

[70] Protocol on cooperation between the European Commission and the Committee of the Regions, p. 9.

principle of subsidiarity. The CoR may seek the annulment of an EU measure only in cases in which the CoR's consultation is mandatory. Although the CJEU has established criteria relevant to determine whether the principle of subsidiarity has – or has not – been infringed by a legal act, it has not struck any EU act because of the infringement of that principle yet. This may be one of the reasons why the CoR tends to place enhanced focus on the *ex-ante* review of subsidiarity, even though it is not expressly entitled by the TFEU to issue 'early warnings' regarding potential infringements of the principle. (National parliaments may however consult regional parliaments when scrutinizing EU draft legislative acts from the perspective of subsidiarity as part of the process provided by the relevant protocol.[71]) The provision empowering the CoR to initiate annulment proceedings can be seen as extending the otherwise rather weak armory of the CoR, providing an effective tool to bring the (no doubt somewhat politicized) question of whether the EU should regulate an issue within its shared competence before the judicial institution that is entitled to provide the authentic interpretation of EU law. The possibility that the CoR can initiate annulment proceedings no doubt has the potential to give more weight to its pre-legislative opinions, as the EU legislators must bear in mind that should the reservations of the Committee be disregarded, this might result in the judicial review of the act following its adoption.

Regarding direct regional representation, it follows from the information gathered for the purpose of this paper that the Lisbon Treaty did not have an impact, either positive or negative, on the work of the Regional Representation of Slavonia and Baranja in Brussels. Representation of Slavonia and Baranja in Brussels served as an example of regional representation, so in that sense we can conclude that Lisbon changes neither improved nor deteriorated the process of direct regional representation.

[71] See Article 6 of Protocol No 2 on the application of the principles of subsidiarity and proportionality.

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Regional development in the Republic of Croatia and Hungary: current situation and future perspectives

I. Introduction

Regional development and regional policy have become an important driving force through which the development of a certain economy is achieved in conditions of globalization, and research carried out by many scientists in the field of economics and other social sciences proves the importance of these issues on the European level and on a global scale.[1]

Balanced regional development is a global issue, and regional disparities are recognized as a kind of threat on the levels of national economies, the European or a global level. Regional disparities/inequalities imply a situation where per capita income, a country's standard of living,

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[1] See more R. Hudson, 'Regions and Regional Uneven Development Forever? Some Reflective Comments upon Theory and Practice, Special Issue: Whither Regional Studies?' 41 *Regional Studies*, No. 9 (2007) pp. 1149-1160, available at *http://www.tandfonline.com/doi/abs/10.1080/00343400701291617* (05.05.2013); R. M. McGahey, 'Regional Economic Development in Theory and Practice', in R. M. McGahey and J. S. Vey, eds., *Retooling for Growth: Building a 21st Century Economy in America's Older Industrial Areas* (Washington, Brookings Institution 2008) available at http://www.community-wealth.org/content/regional-economic-development-theory-and-practice (27.04.2013); G. Ajmone Marsan and K. Maguire, 'Categorisation of OECD Regions Using Innovation-Related Variables', OECD Regional Development Working Papers (2011/03), OECD Publishing, available at *http://dx.doi.org/10.1787/5kg8bf42qv7k-en* (04.052013); A. Ascani, R. Crescenzi and S. Iammarino, 'Regional Economic Development: A Review', *WP1/03SEARCH WORKING PAPER* (2012), available at *http://www.ub.edu/searchproject/wp-content/uploads/2012/02/WP-1.3.pdf* (04.05.2013); M. S. Krimi, Z. Yusop and L. S. Hook, 'Regional Development Disparities in Malaysia', 6 *Journal of American Science*, No. 3 (2010), available at *http://www.sciencepub.net/american/am0603/10_2063_Regional_am0603_70_78.pdf* (28.04.2013).

consumption, industrial, agricultural and infrastructure development are not uniform. Although regional disparities are not recent phenomena, these issues have been attracting a good amount of attention lately because of the negative impacts they have on balanced regional development.[2] Thus, some regions have showed significantly higher growth rates compared to the rates of other regions, as well as a variety of effects created in the social structure. Regional development ceased to be an area mostly related to economic impacts and research, and the study of the issue has become very common in other social sciences as well. However, the prevalence of thinking about certain issues does not necessarily suggest the existence of simplicity in the definition itself. That is the case with the definition of the region for which there is no single agreed upon definition among scientists, which confirms the complexity of the area in question.[3]

Regional economic development can be seen from a quantitative or a qualitative point of view, although the focus is directed towards a quantitative measurement of indicators such as increase/decrease in prosperity and the level of income, participation in business activities and the level of employment, access to goods and services and improvement in financial security, while in recent years emphasis is placed on the qualitative aspect in terms of providing creative capital, creating social equality, achieving sustainable development, creating a spread in the range of employment, and the impact on the improvement of living conditions.[4]

Regional economic development can be understood as a product or a process. If we look at regional economic development in terms of the product, attention is focused on measuring jobs, wealth, investment, standard of living, and working conditions of people living, working, or investing in a specified region, and the improvement of these indicators is typically associated with economic development, whereas in terms of the process it refers to a situation when economic development is observed by economists or people involved in functional planning of

[2] Krimi, et al., loc. cit. n. 1.

[3] C. J. Dawkins, 'Regional Development Theory: Conceptual Foundations, Classic Works, and Recent Developments', 18 *Journal of Planning Literature* No. 2 (2003).

[4] R. R. Sough, R. Stimson and P. Nijkamp, 'An Endogenous Perspective on Regional Development and Growth', in Karima Kourtit, Peter Nijkamp, Roger R. Stough, eds., *Drivers of Innovation, Entrepreneurship and Regional Dynamics, Advances in Spatial Science* (Springer 2011) pp. 3-20.

individual regions in the industrial sense, analysis of labor markets and market development. It is very difficult to match the desired outcomes of economic development with the processed used, and a common mistake in the approach occurs when economists want to maximize profit, thereby excluding new approaches and strategies that will have an effect on sustainable development of a specific region.[5] Furthermore, when it comes to regional theory, it offers solutions at the level of interregional development on the basis of structural reforms conducted in developing countries. For the promotion of regional development through the foundations of regional policy it would be indispensable to raise awareness of the importance of political economy for future development of regions lagging behind in their development.[6] Traditional approaches to supporting economic development include top-down approaches, which have almost no influence on regional development since they are focused exclusively on monitoring elements, while bottom-up approaches to development are based on the assertion that goals should be chosen according to the specific characteristics of the location and past experiences of the specific region.[7] In addition to these two types of approaches, the paper emphasizes the selected theories of regional development, e.g., the neoclassical growth model, the endogenous growth theory, and others.

In practice, the selection of a particular application of regional development theory is based on government decisions and economic policy makers. Different economies struggle against existing regional disparities in various ways, and the remnants of former regimes in certain transition economies have left a particularly strong mark. In Central and Eastern European countries (hereinafter CEECs), e.g. Croatia, Hungary, Poland, Slovakia, the Czech Republic, the differences on economic, but also social levels, are especially noticeable. In addition, regional policies play a significant role in reducing regional disparities and the impact on regional development. In the case of uneven development, there is a threat in the long term referring to a

[5] R. J. Stimson, R. R. Stough and B. H. Roberts, *Regional Economic Development, Analysis and Planning Strategy* (Berlin, Heidelberg, New York, Springer 2006).

[6] S. Chakravorty, 'How Does Structural Reform Affect Regional Development? Resolving Contradictory Theory with Evidence from India', 76 *Economic Geography* No. 4 (2000), available at *http://astro.temple.edu/~sanjoy/eg.pdf* (28 April 2013).

[7] Ascani, et al., loc. cit. n. 1.

significant reduction in performance of a certain economy or a region, and the success of a region is usually monitored by concrete indicators – GDP per capita, unemployment, dispersion of regional unemployment rates, employment rates, and others. Balanced regional development should surely be a long-term goal, that is, judging by the amount of funds allocated currently by the European Union to its realization through cohesion policy (one third of the total EU budget), actually viewed as one of the key objectives.

Since the goal of the paper is to study regional development and regional policies in Croatia and Hungary, indicators of regional statistics at the NUTS 2 level are considered. The NUTS 2 classification is usually considered as one of the key criteria for the implementation of policies of structural funds and the definition of the right to withdrawal of European Union funds. To view regional disparities in Croatia and Hungary, statistical analyses were used with the additional descriptive statistics tool which explains various elements of regional disparities.

This paper is composed of six chapters. Introductory remarks are focused on the importance of even regional development, wherein the purpose and the goals of the paper are identified. Furthermore, in a variety of existing theories, theories of regional development are selected and presented together with the principles of regional development. The central part of the paper is focused on the regional policy of the European Union and a description of the shift from traditional EU regional policy that was quite selective and supportive of the transfer of external investments to disadvantaged areas to the contemporary (new) regional policy that is more oriented towards promoting indigenous economic development. In addition, regional policy in Croatia and Hungary is observed through frameworks of countries representatives of Central and Eastern Europe and through selected statistical indicators of both countries (e.g. GDP, income, gross wage, unemployment, economic activities, and spatial disparities). Chapter 5 discusses regional policy instruments for regional development in the Republic of Croatia and Hungary by focusing on issues such as regional competitiveness, the role of regional and local actors in managing development, policy evaluations, etc. By analyzing and comparing current regional development and regional policies in the Republic of Croatia and Hungary, Chapter 6 provides suggestions for the improvement of the current policy approach.

II. Regional development theory

There are various views on the importance of regional development, whereby various different theories of regional development are developed.[8]

Regional development theories often come into conflict with their implementation and application in practice. Theory should serve governments in the management of regional development, and it can facilitate the clarification of certain events from the past, interpret and explain current events or serve as a tool to predict events that will occur in the future. However, all three cases determine facts and situations, but do not serve as an influential factor in controlling the implementation of regional development. Theorists of regional policies that were more focused on the analysis of the market and its functioning and essentially not only on the application of the theory are neoclassical theorists.[9] Neoclassical theory has been recently replaced by other models and theories, which are focused on the individual strengths and benefits, while at the same time there is some sort of transition to endogenous growth models.

There may exist numerous classifications and ways of identifying theories of regional development. If regional development theories are observed in terms of the concept of underdeveloped regions and the causes of their underdevelopment, it is possible to determine the existence of several different theories: i) modernization theories – dualism theory, strategy theories, social-psychological theories; ii)

[8] See more D. C. North, 'Location Theory and Regional Economic Growth', 63 *Journal of Political Economy*, No. 3 (1955) pp. 243-258, available at *http://www.jstor.org/stable/1825076* (05.05.2013); S. Illeris, 'An inductive theory of regional development', 72 *Papers in Regional Science* No. 2 (1993) pp. 113-134, available at *http://link.springer.com/article/10.1007%2FBF01557454#* (27.04.2013); B. W. Ickes, 'Endogenous Growth Models' (Spring 1996), available *at http://econ.la.psu.edu/~bickes/endogrow.pdf* (06.05.2013); R. Capello, 'Regional Growth and Local Development Theories: Conceptual Evolution over Fifty Years of Regional Science', 11 *Géographie, économie, société* No. 1 (2009) pp. 9-21, available at *http://www.cairn.info/resume.php?ID_ARTICLE=GES_111_0009* (27.04.2013).

[9] B. H. Higgins, B. Higgins, D. J. Savoie, *Regional Development Theories & Their Application* (New Brunswick, New Yersey, Transaction Publishers 2009), available at *http://books.google.hr/books?id=l6WfYYhvrC4C&dq=theory+of+regional+development&hl=hr&source=gbs_navlinks_s* (28.04.2013).

dependence theories – external trade theories, imperialism theory, dependency theories. The standpoint of modernization theory is directed towards internal factors of a particular economy as reasons in which lies the answer to the insufficient level of development, e.g. illiteracy, traditional agrarian structure, the traditional behavior of the population of a certain economy, a low division of labor, the lack of communication and infrastructure, so that changes to exogenous factors are the key to development which can be seen in the increased production and efficiency expressed by comparison of per capita income. Dependence theories are focused on causes of underdevelopment of industrialized countries while the internal factors of developing countries are considered to be irrelevant or representing symptoms and consequences of dependence. Development of industrialized countries and underdevelopment of developing countries belong to the same part of the historical process, whereby developing countries relate to dependent countries affected by economic and political interests of industrialized countries that thus determine the level of development/underdevelopment. At the heart of the dependence theory there are explanations for underdevelopment, while strategies to overcome this situation are completely marginalized.[10]

Some theories are aimed at the market as a response to changes that occur in pricing, and they relate to regional growth theory, theory of competitive advantage and trade, disequilibrium models, growth pole theory, and location theory. Free movement of capital and labor between regions is the basis of the regional growth theory, and the fundamental reason for the differences in wage and growth rate among regions is considered to be a result of technology and the free movement of investments and labor that lead to convergence of incomes in different regions. The theory of competitive advantage and trade emphasizes the differences of natural and politically oriented powers between the regions, whereby the strength of the region will focus on the production of those goods that use the free flow of capital, labor, knowledge, and other factors between regions. Disequilibrium models rely on cumulative causation leading to investment in growing regions and to

[10] F. Kuhnen, 'Causes of Underdevelopment and Concepts for Development, An introduction to development theories', 3 *The Journal of Institute of Development* (Development Studies, Studies, NWFP Agricultural, 1986, 1987), available at *http://www.professor-frithjof-kuhnen.de/publications/causes-of-underdevelopment/0.htm* (27.04.2013).

long-term divergence of regional income. Location advantages of growing regions are protected and emphasized by the internal migration of new economic activities. The growth pole theory applies to investments in growing industries of the strategic location center that creates growth in businesses related to industries of a technological orientation. The location theory is aimed at finding the optimal location for the company in order to minimize the costs incurred due to the distance of the materials used and the final market, including transportation costs.[11] Growth pole theory was created as a result of inadequate traditional approaches to local problems; this model was for the first time presented by F. Perroux and it was followed by a more frequent use in the theoretical sense, but also in practical applications.[12]
In addition to regional growth theory as one of the theories of regional development, many other theories may also occur, such as theory of (spatial) location or agglomeration theory. In recent years, the key points in regional development are innovation, entrepreneurship, and knowledge.[13] However, regional theories have been developed from several different intellectual traditions. Some of the earliest theories of regional development are neoclassical economic theory, and theories of international trade and national economic growth, which predict that the existing differences in the cost of labor and other factors between regions will disappear over time and shift towards convergence. When clarifying international factors of price convergence using international models of balance, the majority of neoclassical trade theorists rely on the Heckscher-Ohlin-Samuelson theorem. The fundamental characteristic of this theorem is focused on the existing comparative advantages of the region upon which depend the extent to which the region will export, import or specialize in specific activities and the way in which it will optimize the relationship in the use of labor and capital.

[11] H. A. Goldstein, M. I. Luger, 'Theory and Practice in High-Tech Economic Development' in R. Bingham, and R. Mier, eds., *Theories of local economic development: perspectives from across the disciplines* (Newbury Park, Sage Publications Inc. 1993), available at *http://vreadings.wordpress.com/category/urban-and-regional-theory/* (28.04.2013).
[12] N. M. Hansen, 'Development Pole Theory in a Regional Context', 20 *Kyklos* No 4. (1967) pp. 709-727, available at *http://onlinelibrary.wiley.com/doi/10.1111/j.1467-6435.1967.tb00871.x/abstract* (28.04.2013).
[13] P. Nijkamp, M. Abreu, 'Regional development theory', (2009), available at *http://ideas.repec.org/p/dgr/vuarem/2009-29.html#author* (25.04.2013).

This model is supplemented by Ricardo's theory of comparative advantage establishing why comparative advantages lead to specialized production, while the Heckscher-Ohlin model focuses on the reasons for the existence of comparative advantages. Neoclassical growth theory offers two different types of convergence, i.e. conditional and absolute convergence. Conditional convergence provides the ability to distinguish certain indicators in different countries (interest rates, the level of consumption, depreciation), while absolute convergence is focused on the existence of identical parameters in the growth model for all countries, whereby it is implied that the richer countries will grow more slowly than the poor countries, and incomes per capita will be equalized over a certain period of time. However, it should be noted neoclassical growth models differ from dynamic models relating to convergence in growth rates and neoclassical trade, but both are aimed at long-term convergence of per capita income of individual regions.[14] Regional development theories may be mutually exclusive in their views on how to start regional development, as is the case with e.g. the neoclassical model and new economic geography.[15] One of the weaknesses of the neoclassical model is the fact that the model does not explain the current causes of the differences in economic growth, though it is a fact that different economies showed different rates of economic growth.[16]

Exogenous growth theory is viewed through the context of the significance of the influence on the regional context, but also the restrictions it may lead to. Long-term convergence of per capita incomes and production of a certain country is the basis for initiating discussions on the development of the endogenous growth theory in which we move away from the point of view of neoclassical theory, and involve factors referring to technological progress and human capital in the context of the exogenous neoclassical growth model.[17] Endogenous factors have

[14] Dawkins, loc. cit. n. 3.

[15] B. Fingleton and M. M. Fischer, 'Neoclassical Theory Versus New Economic Geography: Competing Explanations of Cross-Regional Variation in Economic Development' (2008), available at *http://ssrn.com/abstract=1111590* (06.05.2013).

[16] B. T. McCallum, 'Neoclassical vs. Endogenous Growth Analysis: An Overview', 82/4 *Federal Reserve Bank of Richmond Economic Quarterly* (1996), available at *http://homepage.ntu.edu.tw/~kslin/macro2009/McCallum1996.pdf* (06.05.2013).

[17] R. Martin and P. Sunley, 'Slow Convergence? The New Endogenous Growth Theory and Regional Development', 74 *Economic Geography* No. 3, (1998), available at

been recognized lately as key factors in the initiation of economic development, and these factors rely on existing resources and knowledge that can be found in a particular region. Endogenous factors usually include entrepreneurship, innovation, and adoption of new technologies, leadership, institutional capacities, skills and learning.[18] Investment and development of human capital are emphasized as an especially critical factor in regional development.[19] Endogenous growth theory appeared in the 80s, and its distinction in relation to the neoclassical model is based on the fact that economic growth is an endogenous outcome of an economic system, and in no way the result of external forces.[20]

One of the theories of regional development involves inductive theory concerning the structural composition of the economy in which the important role is played by the region in encouraging development. It will depend greatly on local conditions in which the region is situated whether it will have profit or loss, and they include political institutions, regional policy, infrastructure, supply of skilled labor, social skills, pricing and population density factor, and this theory fits into the framework of a service-oriented society.[21] Regional development theory focused on improving the quality of regional business and the impact on the development of entrepreneurial activities through which it will also accomplish positive impacts in the field of employment and the creation of innovation is the new integration theory of sustainable regional development which is empirically verified and its main components are

http://www.jstor.org/discover/10.2307/144374?uid=3738200&uid=2129&uid=2&uid=70&uid=4&sid=21101958312813 (28.04.2013).

[18] R. J. Stimson and R. R. Stough, 'Changing Approaches to Regional Economic Development: Focusing on Endogenous Factors', Buenos Aires, 13-14 March 2008, available at *http://www.bcra.gov.ar/pdfs/investigaciones/paper%20stimson.pdf* (06.05.2013)-

[19] Z. Kalnina-Lukasevica, 'Development of Regions in Latvia – Growth Factors', Policy Alternatives, Synthesized Development, 2013 International Conference – Tampere, Regional Studies Association (2013), available at *http://www.regionalstudies.org/uploads/RSA_Tampere_Zanda_Kalnina-Lukasevica.pdf* (28.04.2013).

[20] P. M. Romer, 'The Origins of Endogenous Growth', 8 *Journal of Economic Perspective* No. 1 (1994) pp. 3-22, available at *http://www.development.wne.uw.edu.pl/uploads/Courses/de_jt_romer1.pdf* (06.05.2013).

[21] Illeris, loc. cit. n. 8, at pp. 113-134.

business environment quality, the innovation potential of companies and the use of human resources,[22] and theories of regional development incorporate a stylized theory of regional development as well.[23]
Due to the existence of numerous regional development theories, this paper is focused only on selected theories of regional development that are most frequently mentioned in the overview of the literature referring to regional development, spatial economy, geography of space, and other literature focused on monitoring long-term development and regional balance. However, regional development theories are not self-sufficient, but they are used as a base for creating adequate regional policies that should be an optimal solution when initiating and ensuring long-term regional growth. In the following chapter we will present the detailed organization and implementation of EU regional policy and its goals.

III. Regional policy of the European Union

The European Union is one of the richest geographical areas, but the differences between the Member States are growing steadily, which especially came to the fore in recent expansions. EU regional policy is used as a tool for trying to influence the reduction of existing disparities and for restoring balance.
EU policies aimed at regional development are based on theories of regional economic development, but in addition to being focused on regional development theories, they are also associated with measures of administration, investment and public participation in policy making. Policies most frequently avoid subsidies to poorer regions, but direct their power to the development of competitiveness in the region.[24] It could be concluded that such approach is an active approach to linking a theoretical approach and the selected policy. The existing or potential comparative and competitive advantages of each region are directed

[22] M. Viturka, 'Integration Theory of Sustainable Regional Development – Presentation and Application', 15 *Politická ekonomie* No. 6 (2011) pp. 794-809, available at *http://ideas.repec.org/a/prg/jnlpol/v2011y2011i6id822p794-809.html* (28.04.2013).
[23] For more detail see: R. Ossa, 'A gold rush theory of economic development', 13 *Journal of Economic Geography* No. 1 (2012) pp. 107-117(11), available at *http://faculty.chicagobooth.edu/ralph.ossa/research/gold.pdf* (05.05.2013).
[24] Kalnina-Lukasevica, loc. cit. n. 19.

towards the same goals represented within the strategy of implementing EU regional policy.

A number of goals have been set that the regional policy of the EU is focused on (also during its implementation: i) assisting regions to achieve their full potential, ii) improving competitiveness and employment through investments at the regional level in the areas of high human resources taking into account realized added value for the EU as a whole, and iii) approximation of living standards to the EU average as soon as possible in the countries that joined the EU in the 2004 enlargement.[25] Funding focused on regional development is applied in several areas. According to the range of investment priorities, investments are used and directed to innovation (24%), transport (22%), human resources (22%), environment (19%) and other goals (13%).[26] Hence, given the amount of investment funds, we may designate an area on which EU regional policy is most focused, which in this case is the area of innovation, while transport and human resources are also of high priority in the regional policy of the EU.

In addition to promoting regional development of particular economies, EU regional policy is focused on regionalization beyond national borders of the economy, e.g. EU regional policy for the Danube Region, a strategy proposed in 2010 by the European Commission. The Danube Region covers the area that also includes (non-)EU Member States. Benefits from the EU Strategy for the Danube Region will be enjoyed by the residents of the region through improving and accelerating transport by road and rail, cheaper and safer energy, achieving a more prosperous region via joint efforts in the field economy, education, social inclusion, research and development, etc.[27] As can be seen from the example of the Danube Region, regionalization includes not only areas within the EU, but also areas in non-EU Member States. In terms of regionalization, Hungary belongs to the Danube Region as a Member State and it can claim all the benefits deriving from said status, while Croatia as an EU acceding country belongs to the same region.

The period Croatia has gone through as an acceding country was focused on large and significant demands concerning with harmonization with EU principles, not only in the field of regional

[25] EU Regional policy, available at *http://europa.eu/pol/reg/* (07.05.2013).
[26] Ibid.
[27] EU Strategy for the Danube Region, available at *http://ec.europa.eu/regional_policy/cooperate/danube/index_en.cfm#5* (07.05.2013).

policy but also in all other areas that required modifications in order to remove barriers due to existing differences.
Regional policy is imposed as one of 33 different chapters each acceding country should conform to when it comes to EU principles. The remaining chapters are focused on the free movement of goods, people, capital, intellectual property protection, financial services, food protection, etc. The EU deals with several different fields at the same time, whereby its primary goals are to create peace, stability and prosperity ensuring thereby economic growth and new jobs not only in new but also in old Member States, improving living conditions, and opportunities for strengthening the role of Union in the world.[28]

IV. Regional disparities in the Republic of Croatia and Hungary

Traditional measurement tools, such as GDP proved to be inefficient for measuring the real position of a region. Alternative regional development indicators are developed (such as ARC, i.e. Aggregated Regional Competitiveness[29]), but what is also missing is measuring really important factors, such as the level of bio- and social diversity. Current economic development trends represented by leading countries have resulted in a widening gap between the poor and the rich. East-Central Europe is on the poor, peripheral side, where the situation is getting worse. Therefore, this traditional pattern should not be followed. A Hungarian and a Croatian region will be analyzed briefly in the following section.
Hungary is a peripheral country, and the South Transdanubian Region is the periphery of the periphery. According to the latest report of the Hungarian Central Statistical Office,[30] the following data prove the peripheral nature of the county. The per capita industrial production of Baranya county in 2011 is the weakest one (736,000HUF), and the reduction in the number of small and medium-sized companies is the highest one. The unemployment rate is nearly the highest one (14.7%) and is on increase. The reproductive rate is -5.4, and migration of the young generation is continuous.

[28] A. Stajano, *Research, Quality, Competitiveness, European Union Technology Policy for the Knowledge-based Society* (New York, Springer 2009) pp. 309-419.
[29] K. Barna, 'Measuring Regional Competitiveness', 8 *Journal of Central European Agriculture* No. 3 (2007) pp. 343-356.
[30] KSH (2012) *Dél-dunántúli statisztikai tükör* 2012/4.

Baranya and the South Transdanubian Region were provided by the most per capita support between 2004 and 2006.[31] Baranya county's regional government received 125 million HUF of research-oriented support in the period 2007-2010, but could not improve the competitiveness of the county. However, important investments were implemented by the leadership of the County's government, such as the following two European Cultural Capital investments: the Regional Library and Science Centre and the Museum street project, where their own resources of 684 million HUF were provided by the local government. About the same amount (675 million HUF) was provided by the local government for the complete rebuilding of Orfű beach, creating an active water tourist center. The Adventure Bikal Estate is also an example of significant regional development[32]).

The gap between the central region and other regions of the country is increasing with respect to practically all important indicators, such as income inequalities.[33] The Gini coefficient of the country is low (24.96). The region is very weakly industrialized. Foreign investment is low (81.5 million HUF in 2008).[34] Considering the traditional index of regional GDP, the South Transdanubian Region's GDP was 75.7% of the Hungarian per capita GDP in 2000. This value was reduced to 69.6% in 2009 (1,762,000 HUF). Further reduction followed in 2010, i.e. 67.5% of the country's average.[35]

Following the traditional path for leveling the differences between these regions and the regions in the center (see the different EU and Hungarian documents discussed later) does not result in an appropriate development level and economic-social structure of the peripheral regions, and the situation is getting worse.

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[31] T. Besze and K. Horváth, 'Analysis of the Hungarian Polycentric Spatial Development Goals and its Achievements Concerning the South-Great-Plain Region' *Annals of Faculty Engineering Hunedoara – International Journal of Engineering* Tome VIII (Year 2010) Fascicule 1.

[32] Hargitainé Solymosi Beatrix, 'A megyei önkormányzatok terület- és településfejlesztési tevékenysége', 20 évesek az önkormányzatok – Konferenciaelőadás, *PTE-BTK Politikai Tanulmányok Tanszék és a Pólusok Társadalomtudományi Egyesület Konferenciája*, PTE 2010.

[33] Gyula Horváth, 'Regional Development and Faint-hearted decentralisation in Hungary' (2012) available at *http://isfd-tppa.rkk.hu/doc/horvath_regional_development.pdf.*

[34] Ibid.

[35] KSH, loc. cit. n. 30.

The Republic of Croatia is currently considered an acceding country and this period is characterized by a number of changes to the planning and implementation of the existing economic policy aiming at providing the best possible coordination with chapters and policies that operate within the EU's economic policies.

Adjustments to the principles of regional policy were seeking changes in the statistical regionalization of Croatia at NUTS 2 level, since the above classification is most commonly used when comparing performance across regions as well as the manner of implementing the policy of structural funds. The criteria used in the selection of optimal regionalization by Lovrinčević, Marić, Rajh are focused on meeting the three criteria, i.e. a Eurostat population criterion, the maximum financial impact of access to structural funds in the long term and the criterion of homogeneity of individual regions, which will allow the successful management of long-term consistent regional development policy. Based on these criteria, not only statistical regionalization and the effects of such division in the financial and developmental terms are considered, but also the concept of the optimal management of regional policy towards a more specific approach.[36]

The period in which significant changes and harmonization were carried out in the planning and the implementation of the EU related to the period 2009-2011. Adequate changes were carried out in accordance with the existing documents of the Croatian Government, *inter alia* the Strategic Development Framework 2006-2013, the Economic and Fiscal Policy Guidelines and Pre-accession Economic Programs (PEPs). The aim of the documents is to maintain macroeconomic stability and achieve sustainable economic growth by increasing the level of employment and strengthening competitiveness of the Croatian economy. Furthermore, their aim is to strengthen the level of entrepreneurship and the entrepreneurial climate, complemented by the restructuring and privatization of dependent sectors, improving the financial sector, influencing the reduction of corruption through reform processes in the field of public administration and the judiciary, the development of transport and energy infrastructure, environmental protection, ensuring labor market flexibility through education and

[36] Ž. Lovrinčević, Z. Marić and E. Rajh, 'Kako optimalno regionalizirati Hrvatsku?' [How to make an optimal regionalization of Croatia?], 56 *Ekonomski pregled* No. 12 (2005) pp. 1109-1160.

harmonization of the workforce needs, and ensuring social justice while maintaining the health and social security system.[37]

Both the Republic of Croatia and the entire world market have experienced the global crisis, after which there followed a long period of recovery which was actually a continuation of the transition crisis. The year 2010 was marked by a multitude of unfavorable tendencies in most of the real estate sector that began to decline slightly, but in some sectors the negative trend is even deeper. The problems of the Croatian economy can in no way be identified as simple due to the continuing contraction in domestic demand caused by rising unemployment and a fall in households' disposable income, rising insolvency in the real sector, and entrepreneurs' financial indicators getting worse. Also, the rising fiscal deficit is recorded, as well as the gross external debt exceeding the level of the gross domestic product achieved. The causes of these problems can be found *inter alia* in the fact that the Croatian economy has not been completely restructured over the last twenty years and the fact that the concept of neo-liberal capitalism has been completely accepted. In April 2010, the Government launched a comprehensive economic recovery program, and the past model of growth of our economy was based on foreign capital which partly caused long-term stagnation.[38]

Due to the significant resources the European Union allocates through the Cohesion Fund to reduce the existing differences, the Republic of Croatia directed its regional policy and measures towards the goal of removing the existing differences. The Croatian economy faces the problems of regional disparities and that can be exemplified by many indicators, such as GDP, income, gross wage, unemployment, etc. Jurun & Pivac present in detail the differences of regional GDP through the analysis of twenty one Croatian counties which are divided into three NUTS 2 regions. These Croatian counties show significant economic and social disproportions, although the three NUTS regions are more

[37] Pretpristupni ekonomski program 2009-2011. [Pre-Accession Economic Programme 2009-2011] (Zagreb, 2009), available at *http://hidra.srce.hr/arhiva/24/37137/www.mfin.hr/adminmax/docs/PEP_2009.-2011..pdf* (02.03.2013).

[38] Hrvatsko gospodarstvo 2010. godine [Croatian economy at 2010] (Zagreb, HGK 2011), available at: *http://hidra.srce.hr/arhiva/77/74604/www2.hgk.hr/en/depts/makroek/Hrvatsko%20gospodarstvo%202010%20godine.pdf* (02.05.2013).

geographical and political areas rather than real and homogenous socio-economic areas. Thus, comparative analysis of research results confirms that the spatial distribution of NUTS regionalization completely neglected the socio-economic component and focused only on the administrative geographical and demographic category. This fact is the reason why the legal structure of the counties still provides a better overview of the socio-economic and geographical status of development and the economic indicators of the Republic of Croatia. Regional GDP is measured through a set of regional variables (employment, gross investment, production of more important agricultural products, GVA per person employed, construction works value, exports, imports, nights by foreign tourists, ecology, etc.). The aim of the promotion of development goals and instruments is to leverage the success and development of regions lagging behind in development, thus improving the regions affected by industrial decline by combating long-term unemployment, facilitating professional orientation of young people, and accelerating structural adjustments in the agricultural sector.[39]

GDP is not the only but it is certainly one of the key indicators of economic development and growth, which indicates the need to determine levels of regional GDP per inhabitant available at constant prices as well as to track changes that occur over time. Regional disparities but also promotion of growth in regions are established through cohesion policy within which the structural funds are predominantly directed to NUTS level 2 regions whose GDP per capita is less than 75% of the EU-27 based upon the three-year average level. The data on regional household incomes at constant prices are also taken into consideration. The fact that GDP per capita ranged from 27% of the EU-27 average (6400 PPS) in the region Severozapaden in Bulgaria to 332% of the EU-27 average (78000 PPS) in the capital city region of Inner London in the United Kingdom illustrates well the gap in regional disparities at EU NUTS 2 level.[40] Given such developments in Europe, indicators for Hungary and Croatia are identified as well as their regions by the NUTS 2 level classification from which it is possible to notice

[39] E. Jurun and S. Pivac, 'Comparative regional GDP analysis: case study of Croatia', 19 *Central European Journal of Operations Research* Is. 3 (Springer 2011) pp. 319-335.

[40] Eurostat, Regional GDP per inhabitant, *http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/GDP_and_household_accounts_at_regional_level* (02.05.2013).

both significant differences and the gap that exists between particular regions and economies (Table 1).

Table 1 Gross domestic product (GDP) at current market prices by NUTS 2 regions[41]

Country/region	**2010**	**2009**	**2008**
EU-27	24,500	23,500	25,000
HU-Hungary	8,400	7,600	9,500
HU1-Közép-Magyarország	9,700	8,500	10,200
HU10- Közép-Magyarország	6,600	6,300	7,200
HU2-Dunántúl	6,100	5,900	6,800
HU21- Közép- Dunántúl	5,900	5,600	6,600
HU22-Nyugat- Dunántúl	6,100	5,900	6,600
HU23-Dél-Dunántúl	6,300	6,100	7,100
HU3 Alföld és Észak	35,000	36,100	40,300
HU31 Észak-Magyarország	35,000	36,100	40,300
HU32 Észak-Alföld	23,000	24,600	27,900
HU33 Dél-Alföld	39,400	40,300	44,800
HR- Croatia	9,700	9,100	10,500
HR0 Croatia	15,900	15,300	17,300
HR-03 Adriatic Croatia	15,900	15,300	17,300
HR-04 Continental Croatia	8,300	7,500	9,000

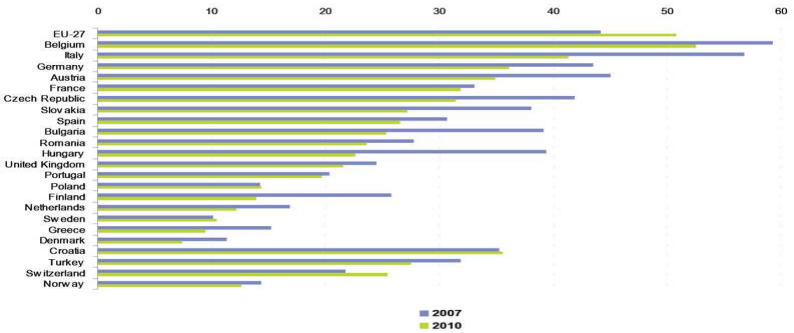
When comparing Croatia with the European Union in 2010, it should be pointed out that according to the GDP indicator, Croatia was one of the least successful country in regard to Member States. Only Greece (-3.5%) and Portugal (-2.2%) recorded a decline in GDP on an annual basis, and countries Croatia is often compared with in relation to certain indicators achieved relatively high growth rates compared to the EU average, i.e. the Czech Republic (2.3%), Poland (3.8%), Slovakia (4.0%), while in Germany, as the strongest national economy in Europe, the economy grew by 3.6%.[42] In addition to GDP, the unemployment rate recorded in a particular economy is also considered an important indicator.

Regional differences in unemployment rates across the whole of the EU-27 widened in the period of 2007-2010 suggesting that the labor market effects of the crisis were spread unevenly. Figure 1 shows the dispersion of regional unemployment rates in 2007 and 2010, through which it can be determined whether the gap in unemployment rates was reduced or

[41] Source of data: ibid.
[42] Loc. cit. n. 38.

increased. In the Member States, the dispersion was generally reduced and during the crisis period unemployment rates were usually on the rise, even if the dispersion between different regions of the same country was narrowing. The largest decrease in unemployment rate was recorded in the period from 2007 to 2010 in Hungary, Italy, and Bulgaria. While monitoring the unemployment rate policy makers find the long-term unemployment rate and youth unemployment to be the most important factors.[43]

Figure 1 Dispersion of regional unemployment rates, persons aged 15-74 years, by NUTS 2 regions, 2007 and 2010 (1) (coefficient of variation)[44]



(*) Estonia, Ireland, Cyprus, Latvia, Lithuania, Luxembourg, Malta and Slovenia comprise only one or two NUTS 2 regions, therefore dispersion rates are not applicable; Denmark, 2009 instead of 2010.

At NUTS 2 regional level, the employment rate data are shown following the trend of 2008-2011 (Table 2). It can be seen that the regions recording high rates of employment maintained their stable position, which also applies to the case of Croatia and Hungary. Thus, the stability of the employment rate was not challenged in the leading regions.

[43] Eurostat, *http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Labour_markets_at_regional_level* (02.05.2013).
[44] Source of data: ibid.

Table 2 Employment rates by NUTS 2 regions (%) in Hungary and Croatia[45]

Country/region	2008	2009	2010	2011
EU-27	37.5	35.1	34.0	33.5
HU-Hungary	19.7	18.1	18.1	16.4
HU1-Közép-Magyarország	18.0	16.0	16.6	16.4
HU10- Közép-Magyarország	16.9	15.7	16.0	15.3
HU2-Dunántúl	18.2	16.2	16.8	17.0
HU21- Közép-Dunántúl	18.7	15.9	17.0	16.9
HU22-Nyugat-Dunántúl	45.8	44.1	44.8	44.7
HU23-Dél-Dunántúl	45.8	44.1	44.8	44.7
HU3 Alföld és Észak	45.8	44.1	44.8	44.7
HU31 Észak-Magyarország	69.3	68.0	63.0	63.5
HU32 Észak-Alföld	66.9	65.9	62.0	60.6
HU33 Dél-Alföld	65.0	62.2	58.7	58.6
HR-Croatia	34.5	34.6	35.5	37.1
HR0 Croatia	33.9	33.8	37.0	39.6
HR-03 Adriatic Croatia	35.1	35.4	33.9	34.3
HR-04 Continental Croatia	32.8	31.7	33.6	37.1

In addition to the differences that exist as regards economic indicators, there are significant differences that exist and that will take place as regards demographic indicators in the regions between but also within Member States. There are several demographic processes that have and will have an impact on the regions, and about one third of European regions located mainly in Central and Eastern Europe, Eastern Germany, Southern Italy and Northern Spain will face population decline. Significant population ageing in Central and Eastern Europe is expected in the long term, as the current population structure is characterized by the young population. Demographic changes will certainly have an impact on regional economic growth through a reduced ratio of labor

[45] Source of data: Eurostat, Employment rate, *http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfst_r_lfe2emprt&lang=en* (02.05.2013).

force, and population ageing will lead to large increases in public spending due to e.g. payment of pensions.[46]

V. Regional policies in the Republic of Croatia and Hungary: institutional (policy) approach

The European Union Cohesion Policy 2014-2020 proposes the reinforcement of the strategic dimension of the policy, and appoints long-term goals for intelligent growth and jobs ('Europe 2020'[47]). Development of regional policies should include mobilization of internal and external resources; therefore, we must also devote attention to the complexity of territorial development.[48]

Regions were sometimes considered as a solely compulsory formal requirement posed by the European Commission; however, they had their appropriate role of increasing the quality of local public services, which served the improvement of the living standards of the population.[49] Within the region – cities and their agglomerations – a common development strategy is needed, where each part's development strategies are interdependent and constitute a coherent whole which is also an organic part of a bigger entity, a country, and the European Union.

As Barna states,[50] in the Hungarian development documents for the period 2007-2013, competitiveness is a main goal for spatial development [see the National Spatial Development Concept (NSDC), the National Development Policy Concept (NDPC) and the New Hungary Development Program (NHDP)].

Albeit Hungary was the first in East Central Europe that established a spatial sectoral policy (Act on Spatial Development, Parliamentary Decree on the National Spatial Development Concept), since then about

[46] Regions 2020, demographic challenges for European regions (2008) Brussels, available at *http://ec.europa.eu/regional_policy/sources/docoffic/working/regions2020/pdf/regions2020_demographic.pdf* (7 May 2013).

[47] See e.g. *http://ec.europa.eu/regional_policy/what/future/proposals_2014_2020_en.cfm* (18.05.2013).

[48] Horváth, loc. cit. n. 33.

[49] Ibid.

[50] Barna, loc. cit. n. 29.

ten different administrative organizations have been managing the spatial policy in Hungary without any smashing effect. [51]

One of the most significant strategies of the region was the so called 'Pole strategy' in 2005, where Pécs and its region were nominated as the region of the quality of life. This strategy included three advantaged industries: environment, health, and culture. Since then, this region has had a better capability for development of these areas than other regions. Current developments, i.e. a modification of the recent Local Government Act, are controversial regarding the future direction of regional development. Counties can gain a fundamental role in regional development through the expansion of their tasks and allocated sources; at the same time, they could lose their public service tasks and the institutions, which are also important local government roles.[52]

Horváth profoundly argues that decentralization would equally result in monetary and social benefits. The spatial structure of the Hungarian economy is not able to respond to the competitive requirements of European integration. Local, regional centers could be the main drivers of development. However, realization of the priorities of the new European Cohesion Policy is not possible without autonomy of the development policy in the regions. 'A country where the concentration of modern space structuring forces is outstandingly high is not able to implement an active and competitive cohesion policy.'[53]

Regional policy development and implementation in Croatia are directed through strategies and acts, especially the *Regional Development Strategy for the Republic of Croatia* and the *Regional Development Act.*

In addition to the aforementioned, significant institutional changes are ongoing in Croatia in the area of regional policy that are visible *inter alia* through the establishment of the NUTS 2 classification, with the aim of reducing the regional gap. For better implementation, a special ministry as well as Regional Development Fund was established, and the previously mentioned strategy and the Regional Development Act were adopted.[54] It can be said that a more serious approach to shaping regional policy in Croatia started with the entry into force of the

[51] Horváth, loc. cit. n. 33.
[52] Hargitainé, loc. cit. n. 32.
[53] Horváth, loc. cit. n. 33. at p. 10.
[54] Ž. Tropina Godec, 'Približavanje Europskoj uniji i regionalna politika u Hrvatskoj [EU approximation and regional policy in Croatia]', 9 *Hrvatska javna uprava* No. 1 (2009) pp. 51-67.

Regional Development Act at the end of 2009. Nevertheless, several obstacles that need to be overcome when it comes to a successful system of managing regional policy are also noteworthy. Obstacles arise in connection with institutionalizing the system of managing regional policy, improving administrative coordination by a vertical and a horizontal dimension, transforming the role of local and regional governments as well as capacity building for public policy at all levels of the territorial administrative system.[55]

The *Regional Development Strategy* is one of the strategic documents, and its operation focuses on development goals in terms of socio-economic development of the Republic of Croatia, reduction of regional disparities in the development and strengthening of those parts of the country that are lagging behind in order to achieve the highest possible level of competition. The strategy has been adopted by the Croatian Government, while the Ministry in charge of regional development is responsible for its development and implementation. The final goal aims at creating conditions favorable for realization and strengthening the competitiveness of existing development potentials.[56]

VI. In lieu of a conclusion: policy suggestions

By analyzing and comparing current regional development and regional policies in the Republic of Croatia and Hungary, Chapter 6 provides suggestions for the improvement of the current policy approach. Regional development and the corresponding regional policy should regard the notion of sustainability. Sustainable development principles have a diverse meaning depending on customs, habits, the type of institution, etc. This paper addresses sustainability targets. This target can best be achieved by the Blue Economy principle as a proper

[55] V. Đulabić, 'Novine u regionalnom razvoju i regionalnoj politici' [News in regional development and regional policy], Paper presented at the conference of the Croatian Institute of Public Administration 'Kakva reforma lokalne samouprave?', Zagreb, 2010, available at *http://www.pravo.unizg.hr/_download/repository/VDjulabic_Novine_u_regionalnom_razvoju_i_regionalnoj_politici.pdf* (23.05.2013).

[56] Strategija regionalnog razvoja Republike Hrvatske (2010). Ministarstvo regionalnog razvoja, šumarstva i vodnog gospodarstva [Regional Development Strategy of Croatia, 2010, Ministry of regional development, forestry and water management of the Republic of Croatia], available at *http://www.mrrsvg.hr/UserDocsImages/STRATEGIJA_REGIONALNOG_RAZVOJA.pdf* (24.05.2013).

sustainable development method, which promotes the fulfillment of EU targets. This type of development is based on regional resources, includes the network of cities and their surroundings, increases the wellbeing of inhabitants of the region and enhances the biocapacity of the region.

The renewed Lisbon strategy of the European Union (to become the most competitive and dynamic knowledge-based economy in the world) also comprises the necessity of sustainable development and greater social cohesion, but the European Council agreed in Gothenburg to enhance the Lisbon strategy with a strong environmental emphasis.[57] Combating climate change, responsible natural resource management are coherent means for a renewed strategy. The European Spatial Development Perspective (ESDP[58]) also contains the three pillars of sustainable development: society, environment and economy.

Current European policies are appropriate for creating effective regional policies; however, they do only show the traditional framework for local strategies. Therefore, there is a strong tendency of peripheral regions to follow the traditional paths of development indicated and dictated by developed countries. However, these traditional paths could in a global extent lead to severe shocks to the current form of the economic and social systems.[59]

The mainstream view of sustainable development only wants to extract resources from nature (as a means) in an eternally maintainable way. Instead, harmony and co-existence with nature should be implemented. There is a main element that should be targeted by regional policies: zero waste business processes. It means that all the outputs of certain processes are inputs for others. Industrial ecology[60] attempts to build up the current infrastructure of business operations based on the waste minimization principle in the traditional industry environment.

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[57] See e.g. *http://ec.europa.eu/archives/growthandjobs_2009/, http://www.srneurope.net/docs/Langhe%20Lisbon%20and%20Gothenburg%20Agendas_OVERVIEW.pdf* (12.05.2013).

[58] *European Spatial Development Perspective: Towards a Balanced and Sustainable Development of the Territory of the EU* (Committee for Spatial Development, Luxembourg 1999).

[59] D.H. Meadows, et al., *Limits to Growth: The 30-Year Update* (Chelsea Green, 2004)

[60] E. Lowe and A. Garner, 'Industrial Ecology' (March 1995), available at *http://www.umich.edu/~nppcpub/resources/compendia/INDEpdfs/INDEannobib.pdf* (05.08.2009).

Remarkable literature about industrial efficiency is the study of von Weizsäcker and co-authors.[61]

Following a sustainable way in the traditional sense is not fruitful, because it does not result in real achievements. An example is the global CO_2 emission, which reached the highest level ever recorded.[62] However, a new interpretation of sustainability called the Blue Economy[63] provides a more reasonable way, other than following the leading countries. In this field peripheries often have a much better position. Following the traditional path, however, endangers peripheries; they might lose their significant competitive advantage, which is – in the case of the Blue Economy – the natural environment.

The Blue Economy follows Nature's path, develops an economy where the basic needs are fulfilled locally and competitively, and produces zero waste – as nature does. It has been gradually built up from the basics, from the local natural environment, with help of local communities and blue innovations. These innovations and new business models are competitive (profitable), therefore viable in their traditional sense as well.

Indigenous people should be enabled to manage their local economy and community, which is in agreement with regional autonomy requirements. There are development forms that help communities to live in a healthy natural environment. Green and competitive methods[64]) are useful in a sense that they promote resource efficiency using fewer natural resources with cost reduction. These technologies help us to slow down the consumption of resources.

Some proven directions as to what regional policy tools should address are as follows: Prahalad describes several useful methods in his book 'The future at the bottom of the pyramid', where the development of radically new products helps the people in the BOP (Bottom of the Pyramid).[65] Another example refers to the way small farms in England operate in the Community Supported Agriculture (CSA) scheme. Each

[61] Ernst Ulrich von Weizsäcker, Amory B. Lovins, L. Hunter Lovins, *Factor Four: Doubling Wealth, Halving Resource Use* (Earthscan, London 1997).

[62] See e.g. *http://www.mpg.de/6678112/carbon-dioxide-climate-change* (18.05.2013).

[63] G. Pauli, *A Kék Gazdaság* [Blue Economy] (PTE KTK Kiadó, Pécs 2010).

[64] M.E. Porter, Claas Van Der Linde, 'Green and competitive', *Harvard Business Review* 1995, September-October pp. 120-134.

[65] C. K. Prahalad, *The Fortune at the Bottom of the Pyramid* (Wharton School Publishing 2005) p. 48.

year, community members pay a certain share to the farmer who provides fresh, seasonal agricultural products throughout the year. Costs and risks are shared as well. This business method is not needs-driven, but capability-driven, which is also a Blue Economy principle. The CSA results in an economically stable relationship and strengthens communities as well.[66]

A traditional Blue Economy example is Las Gaviotas in Columbia, where Paolo Lugari built up in the rainforest a viable community living from and on their natural environment – in sustenance safety, regarding their meal and fuel.[67]

Finally it can be concluded that both Croatia and Hungary should change their regional policies in order to achieve real sustainability.

[66] B. Wright, 'What is Community Supported Agriculture?' *Direct Marketing in Wisconsin* (2005), available at *http://learningstore.uwex.edu/Assets/pdfs/A3811-04.pdf.*

[67] See e.g. *http://www.nytimes.com/2009/10/16/world/americas/16gaviotas.html?pagewanted=all&_r=0* (18.05.2013).

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Possibilites to use EU structural funds for regional development in Croatia and Hungary

I. Introduction

In order to strengthen the economic and social unity in the EU Member States, and mitigate the differences within the region, structural funds were established as financial instruments to boost growth, competitiveness and employment in all Member States and their regions. Like every responsible national government, the EU also sets its political priorities to opening new working places, achieving sustainable economic growth and reducing social differences between countries. The European Structural and Cohesion Funds are constantly being referred to as one of the greatest advantages of EU membership. The experience many Member States have so far had only supports the fact that it is necessary to meticulously study the procedural and application phases in order to successfully use the available funds.
Taking into consideration all the possibilities but also the challenges the Republic of Croatia is about to face with regard to using the financial aid for encouraging national and regional competitiveness, it is essentially important to promote quality for strategic planning, successful administrative coordination and efficient EU funds application. The pre-accession financial aid[1] has so far provided a valuable experience for the further application of the Regional Policy

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[1] The total utilization of pre-accession funds (before IPA) was 86,91%. After adding the current IPA utilization to the utilization analysis, there is a totally different result, which is the total utilization is under 50%. Ministry of Finances, *Izvješće o korištenju pretpristupnih programa pomoći Europske unije za razdoblje od 1. siječnja do 30. lipnja 2010.* [The Report of EU pre-accession funds utilization in the period from January 1st to June 30th 2010], *http://www.mfin.hr/adminmax/docs/Sabor_I_polovica_2010.pdf.*

instruments.[2] Local and regional authorities have to be ready to use the offered financial aid in the most appropriate and socially useful manner.[3] All project activities have to set a common goal and that is to attract and encourage investments enabling social-economic growth, achieving competitiveness of all sectors. In order to successfully apply for different projects and therefore use the financial aid at hand, it is necessary to build administrative capacities and most importantly to hire and adequately educate qualified and experienced personnel with the possibility of offering them a permanent occupation at state offices as well as to develop adequate organizational skills and procedures. Research has shown that every EU member state has had problems with providing additional education and skills development as well as with the idea of the permanent employment of the personnel.[4]

Of the existing instruments, for the purposes of this article, we will highlight the European Regional Development Fund. Then we will set forth the fundamental objectives of the cohesion policy as well as ways of participating in it. Finally, we will consider the way the RC is preparing for the use of the structural funds. This paper focuses on establishing a suitable institutional frame as a basis for the efficient use of financial aids provided by the Structural Funds. The legislative and institutional Regional Policy and Development Frame[5] can only be

[2] To access the realized preparations in the area of regional development see D. Hajduković, Projekt CARDS 2002: Strategija i jačanje kapaciteta za regionalni razvoj-prikaz, [CARDS Project 2002: Strategy and capacity building for regional development – depiction], 1 *Hrvatska Javna Uprava* (2006) pp. 53-62.

[3] A. Musa, eds., *2. Forum za javnu upravu*, „preface to Hrvatski apsorpcijski kapacitet za EU - fondove: potrebe i mogućnosti" (Zagreb, Friedrich Ebert Stiftung i Institut za javnu upravu 2012.) p. 5, available at *http://www.iju.hr/page15/files/2_FORUM_web_stranice.pdf.*

[4] Bulgaria, Hungary, Lithuania, Poland and Slovenia have faced the problem of recruiting new administrative personnel, necessary for successful application and project implementation. Due to the application procedures and documentation complexity, only 48% of the projects in Poland were awarded the resources from the SAPARD program in the first nine months. A similar thing happened to Bulgaria, where the full application documentation contained more than 2000 pages. For more see S. Hajdinjak and G. Mišić, *Iskorištavanje pretpristupnih fondova Europske unije: Problem administrativnih kapaciteta u Hrvatskoj* [Pre-accession EU Funds Utilization: Administrative capacities problem in Croatia] (Zagreb, Sveučilište u Zagrebu, Fakultet političkih znanosti 2009) p. 20.

[5] The set goal is also confirmed in the Proposal for an act on the regional development of the Republic of Croatia, the final draft of which was submitted by

further developed and successfully applied if it is based on partnership and collaboration principles, in other words, on public, private and civil sector unity. The system is to be estimated as successful only if it proves capable of rightful structural instruments use and if it requires no additional EU and Croatian financial benefits.

One of the top priorities is to strengthen the absorption capacities,[6] which can be realized only if all the relevant institutions in charge of EU Funds cooperate and work together as a team. After the Republic of Croatia becomes one of the EU Member States (the second half of the year 2013) €450 million will be assigned to Croatia to dispose of at will, and in the year 2014 this amount will reach one billion Euro; on the other hand, one should not forget the membership fees of €226 million that are to be deposited in the EU Funds. Seeing that the Croatian GDP per capita is less than 75% of the European average, the Republic of Croatia should be treated as a European special interest investment area. But, nonetheless, caution is advised since the data show that in the year 2011 Croatia used only 19% of the €150 million financial resources predetermined for its use, and in the year 2010 only 55% of the contracts were signed, and 33% of financial resources paid out – this only shows that most of the money was left unused.[7] In the year 2013 (component III Regional Development), only 31,000,00€ were allocated to Croatia while it had 95,456,1357€[8] available to dispose of. One could not help

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the Government of the Republic of Croatia on November 26th 2009, p. 2; Articles 12-21 of Law on Regional Development of the Republic of Croatia, Official Gazette, Narodne novine, NN 153/09.

[6] The absorption capacity is one of the conditions prescribed by the European Commission, setting the upper limit of absorption possibilities when distributing EU Funds resources. The limit represents 4% of the country's GDP. It depends mostly on public administration and its organizational and functional quality. More on the absorption capacity and EU Funds in V. Đulabić, 'Apsorpcijski kapacitet i korištenje sredstava fondova Europske unije: izazovi i prilike za Hrvatsku [Absorption capacities and EU Funds implementation: challenges and opportunities for Croatia]', in A. Musa, eds., *2. Forum za javnu upravu* (Zagreb, Friedrich Ebert Stiftung i Institut za javnu upravu 2012) pp. 12-15.

[7] *www.slobodnadalmacija.hr/Hrvatska/tabid/66/aricleType/ArticleView/articled/2013 03/Default.aspx*

[8] Communication from the Commission to the European Parliament and the Council, Instrument for Pre-Accession Assistance (IPA) revised Multi-Annual Indicative Financial Framework for 2012-2013, Brussels, 12.10.2011, COM(2011)641 final,

but wonder whether every step has been taken to prepare Croatia for successful EU funds application.

One way of improving the efficiency of using EU funds is to follow the examples provided by other countries.[9] The problem is the lack of cultural collaboration. The situation would improve significantly if neighboring countries would share their experiences, because cooperation and mutual help is not only more than welcome but also advisable and necessary within the European boundaries.[10]

The economic crisis that has engulfed the entire world has contributed to the fact that more and more EU countries are involved in European projects. In this regard, it is necessary to increase the administrative preparedness of listed ventures and accept the rules defined in EU documents. It is obvious that the country should not expect that the EU will solve its economic problems, but it must have a high-quality development strategy which will allow the EU to be only one segment that will monitor and support the implementation of the set objectives.[11]

In the last few years, many debates have arisen raising the question of a Structural Funds reform within the European institutions and Member States. The main problem is that Member States exhibit different levels of development and a continuous growth in regional differences.[12] The GDP of several new Member States is less than 50% of the European

available at *http://ec.europa.eu/enlargement/pdf/how_does_it_work/miff_12_10_2011. pdf*, p. 6.

[9] There are numerous examples of many EU Member States that have so far successfully used EU Funds to enhance their social growth, competitiveness and national industry innovation, to achieve more successful agricultural production, realize infrastructural projects and strengthen social cohesion. By using EU Funds in the financial period 2007-2013, it is visible that the Nordic countries, Benelux countries and the UK invest over 60% of the received resources, while the new Member States get only 20% , and some of them even half of this (Greece, Slovakia, Romania and Bulgaria). Available at *http://www.seebiz.eu/europski-fondovi-jacatce-inovativnost-hrvatske/ar-23318/* p. 2.

[10] V. Bilas et al., 'Predpristupni fondovi Europske unije i Republika Hrvatska', 1 *Ekonomska misao i praksa* (2011) p. 304.

[11] Bilas, et al., loc. cit. n. 10, at p. 300.

[12] Some data refer to economic disproportions between the EU states – 10 % of the EU Member States' population lives in the most developed regions – 19% of total EU27 GDP, 10 % of the population lives in the least developed regions and contributes 1, 5% GDP, convergency regions make up 12,5% of the total share in the EU 27 with 35% of the population. Positive examples for funds utilization are Poland, Italy, Sweden, Germany, Finland, Lithuania, Portugal, and Estonia.

average. Every state is taking a reactive stand towards this problem but none has defined its policy[13] relating to it. It is noticeable that there are significant differences in approaching the question as to how the EU Regional Policy should be formed in the future. However, discussions about financial aid allocation and distribution are currently taking place, but without the definition of any special method or criteria. By observing the experiences Hungary has so far had with EU Funds, 3,5% of their GDP has been allocated through funds, Croatia could make preparations in due course placing emphasis on paying attention to weaknesses and challenges we have so far faced. If Croatia succeeds in achieving high quality project management and a higher degree of EU Funds exploitation, the country could develop more rapidly with regional differences almost disappearing; moreover, economic growth would also be positively affected.

II. The instruments for implementing the European Regional Policy

Since the accession of the Republic of Croatia to the European Union is almost due, there is a significant rise in public interest in the possibilities of using and financially benefiting from Structural and Cohesion Funds, the main goal of which has been set on achieving economic and social cohesion on the unified European market. The main reason for using the aforementioned funds is to lessen the regional differences[14] within the boundaries of the EU as well as within the EU Member States. The regional differences within the EU have always been considered the main obstacle to achieving harmonious development and cohesion. The

[13] The common basis within the EU states refers to three areas: 1) EU Regional Policy is very important and necessary for encouraging solidarity between poor and rich parts of the EU country; 2) the least developed areas should remain the main priority of the future regional policy; 3) EU Regional Policy procedures should be simplified. V. J. Bachtler and R. Downes, *The reform of the Structural Funds: A Review of the Recent Debate*, (Glasgow, United Kingdom, European Policies Research Centre, University of Strathclyde 2002), available at *http://www.eprc.strath.ac.uk/eorpa/Documents/EoRPA_02_Papers/EoRPA_02-3.pdf* p. 2.

[14] The term regionalism is discussed in more detail in V. Đulabić, 'Regionalizam i regionalna samouprava – komparativni prikaz temeljnih dokumenata [Regionalism and regional self-administration – comparative portrait of the fundamental documents]', 6 *Hrvatska Javna Uprava* (2006) pp. 159-162.

European Structural Funds have been following developments in the trends of the European Regional Policy simultaneously.[15]

Why support the Cohesion Policy? The fundamental instruments promoting both the European Regional Policy as well as the European Cohesion Policy are the European Regional Development Fund, the European Social Fund and the Cohesion Fund.[16] The Cohesion Policy is not only becoming one of the most significant European policies, but it is considered to be the main European policy with the purpose of achieving continuous and increasing growth, improving competitiveness and raising employment rates in the European Member States. In the European financial period 2007-2013 347,4 billion EUR have been assigned to the activities connected with the Cohesion Policy objectives. The amount in question is to be distributed between the following Member States – Poland (€67,28 billion), Spain (€38,22 billion) and Italy (€28,81 billion). The criteria used for the distribution of resources from European funds are the population, regional and national welfare and the unemployment rates. The financial resources from the funds are first and foremost intended for the underdeveloped regions and Member States. Regions whose gross domestic product (GDP) is under the 75% of the European gross domestic product fall in the category of underdeveloped regions, whereas countries whose gross national income (GNI) is less than 90% of the European average belong in the group of underdeveloped countries. The European Regional Development Fund and the European Social Fund are designed to provide support to the regions whose development is slow in pace, and for underdeveloped countries help is assured through the Cohesion Fund. The following

[15] M. Vojnović, 'Strukturni fondovi Europske unije i IPA – Instrument pretpristupne pomoći [European Union and IPA Structural Funds – Pre-accession Instruments]', 8 *Hrvatska Javna Uprava* (2008) p. 367. It is important to emphasize that the Republic of Croatia gained the right to use the resources provided by IPA Funds in January 2007 as a part of the EU pre-accession aid. The main objective is to provide necessary assistance in adapting and applying European laws while encouraging changes in almost every social and economic aspect.

[16] R. Jurković, 'Regionalna politika Europske unije i njeni instrumenti: strukturni i kohezijski fondovi [The EU Regional Policy and its Instruments: The Structural and Cohesion Funds]', 56 *Računovodstvo i financije* (2010) p. 110. The first two funds are referred to as Structural Funds and the third is the Cohesion Fund (It is highly important to point this out because there is a wrong idea that there is more than one Cohesion Fund, which is not true.).

pages will provide an insight into the main objectives of the Cohesion Policy instruments.[17]

III. Cohesion policy objectives

The general Cohesion Policy objectives are: 1) The Convergence Objective – sets the main focus on the faster development of the least developed European countries and regions by ensuring the right conditions for permanent growth and increasing employment. For this to be possible the quality of investment in both human resources and real estate has to be enhanced. Moreover, the countries` growth is encouraged by developing innovations and a knowledge society, by adapting to and accepting social and economic changes, by protecting and improving the environment and increasing administrative efficiency.[18] 2) Regional Competitiveness and Employment – the intention is to make the average or above average developed countries even more competitive and attractive for potential future investments and employment. This also includes the improvement of the quality of investment into human resources, supporting innovations and encouraging the development of a knowledge-based society and entrepreneurship as well as policies relating to the protection and improvement of the environment and expanding the labor market etc.[19] The last main objective is 3) European Territorial Cooperation – the idea it represents is to strengthen cross-border cooperation by undertaking common local and regional initiatives, by supporting transnational collaboration through activities designed to encourage integrated

[17] B. Bešlić, 'EU fondovi: Troškovi i proračun projekta u okviru IPA bespovratnih sredstava [EU Funds: The Costs and Project Budget in the IPA Financing Resources]', 5 *Računovodstvo i financije* (2012) p. 144. Every available EU Fund can be extremely helpful when it comes to financing; local self-administrative bodies, unions, cooperatives, associations, foundations, public bodies etc.

[18] This objective refers to the European regions which are on level 2 of the European Nomenclature of Territorial Units for Statistics (NUTS level 2). NUTS represents the nomenclature of the EU territorial units used for EU regional statistics information. For example, when listed in the NUTS levels, the Republic of Croatia consists of the following units: NUTS level 1 includes the entire state, NUTS level 2 comprises two regions: Continental Croatia and Adriatic Croatia, and NUTS level 3 includes the Croatian counties.

[19] The objective is set for all regions and countries which, according to their economic indicators, do not belong in the convergence objective.

territorial development and cross-regional collaboration and experience exchange. [20]

After providing a thorough insight into the main objectives of the Cohesion Policy, it is worth mentioning that in the period 2007-2013 the whole EU Cohesion Policy budget was €347,4 billion. This sum was divided and distributed to support different Cohesion Policy objectives – 81,5% of the total resources were assigned to the realization of the convergence objectives, only 16% were allocated to the 'regional competitiveness and employment' objective and merely 2,5% were intended for territorial cooperation (it is obvious that objectives 2 and 3 – 'regional competitiveness and employment' and 'territorial cooperation' – have been financially neglected and that in the future resources should be evenly distributed). A perfect example is Poland, which in the period 2007-2013 received €67,3 billion from the common European Regional Policy Fund,[21] thus taking the biggest share of the resources intended for common use.

IV. In which way can one participate in the Cohesion Policy?

After the Council and the European Parliament had reached all the decisions referring to the budget and the rules about how to use the instruments of the European Cohesion Policy, the Commission then forms strategic (al) guidelines to which the Member States are to adjust their own policies in order to achieve coherence with EU priorities. Using the given guidelines every member state forms its own National Strategic Reference Framework. [22] The documents define the strategy chosen by every member state and propose an operational programme list which Member States will then try to implement. After receiving all the necessary documents, the Commission has a three-month deadline for making any comments or seeking further information about the

[20] Jurković, loc. cit. n. 16, at p. 111. The objective covers NUTS level 3 (the term equivalent to Croatian counties) referring to the areas located along national borders (areas that are within 150 km of the borders).

[21] R. Jurković, 'Provođenje EU regionalne politike u Poljskoj [EU Regional Policy Implementation in Poland]', 57 *Računovodstvo i financije* (2011) p. 151. This means that every fifth Euro from the EU budget is allocated to Poland. Despite the problems they had in the initial years, the Polish have succeeded in achieving maximum financial benefit from the EU Regional Policy Funds.

[22] The rule is that the Member States have a five month period in which they are obligated to deliver their NSRF – National Strategic Reference Framework – to the Commission.

programme, and is afterwards obligated to provide feedback by approving the realization of the particular parts of the National Strategic Reference Framework, as well as every operational programme.[23]
The Member States (and all their regions) have to agree with the terms of the aforementioned programmes, implement them as well as control their realization and provide feedback by grading their successfulness during the application. The Cohesion and Structural Funds[24] objective is not to replace the much needed investments in infrastructure and resources, but to operate as a significant addition to them. It is good to know that the main rule when it comes to spending EU resources is n+2: financial resources planned for year *n* are to be spent by the end of year *n+2* (financial resources planned to be used in 2010 are to be spent by the end of 2012). For the new Member States there is a so called 'transition' rule n+3 (due to the lack of the necessary experience for implementing the complicated EU programme procedures.) [25]

V. The European Regional Development Fund (ERDF)

In this section, more will be said about one of the most important Cohesion Policy instruments. This is, of course, the aforementioned European Regional Development Fund (hereinafter ERDF). It will also be observed which priorities and areas of investment it is intended for. The main reason for establishing ERDF is to deal with regional imbalance within the EU in order to reduce and partially restore balance

[23] For example, in the period 2007 – 2013 the Commission has approved more than 400 operational programmes (this is a really impressive number of programmes).
[24] J. Cuculić, et al., 'Fiskalni aspekti pridruživanja: možemo li u Europsku Uniju s proračunskim deficitom? [Fiscal accession aspects: Can we join the EU with the budgetary deficit?]', 28(2) *Financijska teorija i praksa* (2004) p. 162 The resources from the Structural Funds are a part of the so called additional financing, which means that they are not to be replaced by funding through national sources.
[25] B. Bešlić, 'EU fondovi: Nova pravila Praktičnog vodiča za procedure ugovaranja vanjskih aktivnosti koje se financiraju iz zajedničkog proračuna EU (PRAG) [EU Funds: the New Rules of the Practical Guidelines for the contracting of activities financed from the common EU Funds (PRAG)]', 2 *Računovodstvo i financije* (2013) p. 232. This rule is applicable for the pre-accession funds as well, the IPA Fund, which Croatia can use until it becomes a member state. If an IPA applicant is to make contracts for the purposes of project implementation, which are approved as project costs, one is obligated to search for the offers of potential contractors, and to assign the job to the contractor with the best quality and price ratio. While doing so one has to follow the two basic principles: the transparency principle and the equal treatment principle.

between differently developed European regions and, at the same time, to offer financial support to underdeveloped EU regions. Doing so, the ERDF financially contributes to productive investments which directly influence the rate of creating and sustaining new working places, investing in the infrastructure and developing countries' own potentials while applying regional and local development[26] supporting measures.

Supporting the convergence objectives, this fund is eligible for allocating financial aid and support to programs which aim to modernize the economic structures by addressing the following priorities: research and technological development, innovations and entrepreneurship, improving connections between small and medium enterprises, educational facilities, research facilities, developing business networks, encouraging public-private partnerships, information-based society, developing the electronic communications infrastructure, developing on-line public services, local development initiatives as well as supporting the service providing structures of neighboring countries, ecology, waste water disposal and air quality, integrated intervention and pollution control, reducing the effects of climate change, risk prevention, development and implementation of plans for the prevention and treatment of natural and technological risks, tourism, the promotion of natural wealth, the improvement of tourist services, investment in culture, cultural heritage protection, cultural infrastructure development, improving the provision of cultural services, transport investments, enhancing trans-European networks, developing passenger and freight traffic, investing in energetics, improving trans-European energetic networks and energetic efficiency, investing in education, developing vocational education, investing in medical and social infrastructure, raising the quality of life.[27]

When referring to regional competitiveness and employment objectives, ERDF focuses on three major priority groups: innovation and knowledge-based society, ecology and risk prevention and access to traffic and telecommunication services which are significant for the state's economy.

Taking the third Cohesion Policy objective – EU territorial cooperation and collaboration – into consideration the focus of ERDF aid is set on the following priorities: development of cross-border economic, social

[26] Jurković, loc. cit. n. 16, at p. 112.
[27] Ibid.

and ecological activities and establishing transnational collaboration. One can agree with Lovrinčević and co-authors, who claim that, by intensifying EU expansion, the differences in both structural characteristics and development between Member States are becoming more and more obvious, making it extremely complicated to manage the common social and economic policy. [28]

VI. What actions is the Republic of Croatia taking as a way of preparing for the use of Structural Funds?

Only after becoming a European Union member state will the Republic of Croatia be able to use financial support offered by the Structural Funds and at the same time take part in creating a multi-year programme perspective for the period 2012-2014. With the arrival of the Structural Funds certain changes have been noted in the local and regional self-administration systems in almost every transition country.[29] Đulabić points out the main challenges when it comes to managing the country's regional development:

- finishing the institutionalization of the regional policy systems
- improving administrative coordination
- transformation of local and regional self-administration
- invigoration of administrative capacities for public policy.[30]

The available means are only a path to reaching the set goals formed in strategic plans and projects.[31] The European Commission requirements,

[28] For more see Lovrinčević, et al., 'Kako optimalno regionalizirati Hrvatsku [How to regionalize the Republic of Croatia]', 56(12) *Ekonomski Pregleg* (2005) p. 1109.

[29]Romanian experience in the implementation of structural instruments can be used as an example, in the year 2013 €19,7 billion were allocated to Romania and in the process Romania itself added further €5,5 billion of its own resources. EU aid will be used to increase the GDP by 15 to 20% by the end of 2015 and also to increase the employment rates from 57, 4 % to 64 %. It will also enable roads construction or renewal in the length of 1.400 km. So far the country has implemented 386 projects worth €332 million.

[30] V. Đulabić, 'Novine u regionalnom razvoju i regionalnoj politici' [News in regional development and regional policyu] in I. Koprić, ur., *Reforma lokalne i regionalne samouprave u Republici Hrvatskoj* [Local and Regional self-administration reform in the Republic of Croatia] (Zagreb, Institut za javnu upravu, Pravni fakultet Sveučilišta u Zagrebu, Studijski centar za javnu upravu i javne financije 2013) pp. 119-120.

[31] V. S. Maleković, 'Strukturni i investicijski fondovi EU-poticaji gospodarskom razvoju' [Structural and Investment EU Funds – a boost to economic growth] 6161 *Informator* (2013) pp. 2-3.

preparatory procedures and project applications are both time-consuming and extensive. Different projects ask for different approaches, some are based on tighter collaboration and cooperation between several ministries as well as better vertical and horizontal coordination. Cooperation, partnership, information flow, motivated and educated personnel, regional development intentions modulated to match the national ones – are only some of the conditions that are to be met in order for the entire system of the use of EU Funds[32] to function properly. It is essential to establish an efficient control system so as to avoid the possibility of mistakes and irregularities occurring at any phase of the project.

The Law for establishing an institutional reference framework for using EU structural instruments in the Republic of Croatia[33] regulates the acts of Institutional Reference for using EU structural instruments in the Republic of Croatia intended for the realization of the operational programmes of the 2007-2013 programme period. It also determines the functions and responsibilities of the structures which form the financial control and regulation system. Attention is to be drawn to the fact that many conditions need to be fulfilled before we start using the EU Structural Funds; the most important ones are: well-prepared strategic documents (including the *National Strategic Reference Framework as well as operational programmes*[34]), detailed projects and administrative capacities, i.e. institutions responsible for controlling the instrument managing systems.

The Ministry of Regional Development and EU Funds issued the *Strategic Plan* for the period 2012-2014 in January 2012 in which six main goals are presented (each containing detailed plans for achieving not only the main but also specific goals); the following goals are to be pointed out: 1) Realization of national development priorities through quality planning and efficient EU Funds application, 2) Development of

[32] I. Lopižić, 'Hrvatski apsorpcijski kapacitet za EU fondove: potrebe i mogućnosti' [Croatian EU Funds absorption capacities: needs and possibilities], 4 *Hrvatska i komparativna javna uprava – Vijesti* (2012) p. 1261.

[33] NN 78/12.

[34] Several operational programmes are to be pointed out, for example: Operational programme 'Traffic', Operational programme 'Environment', Operational programme 'Regional competitiveness', Operational programme for 'Cross border cooperation with Hungary', etc.

counties and statistical regions, 3) Raising the absorption and efficiency level of EU Funds resources[35].

Some of the basic advantages of the implementation of the EU Regional Policy and the application of Structural Funds are to be summarized as follows:

- extensive administration education programs for quality Regional Policy management,
- enhancing possibilities for knowledge and skills transfer in the area of development management,
- significant rise in available resources from both the Structural Funds and the Cohesion Fund and regional involvement in the development policy activities.

After emphasizing the advantages, it is important to mention that, on the other hand, there are certain challenges to be faced, like: cost increase in the public sector, long-lasting and complicated procedures resulting in slow realization of investment possibilities, achieving successful collaboration with the national institutions which control EU funding, and possible negative reactions and influence on regional differences as a consequence of a failed attempt to strengthen the capacities of underdeveloped areas for which the EU funds[36] have been set up in the first place.

VII. Management and control system relating to the application of structural instruments

One of the most important responsibilities of the Member States is to establish a stable and reliable management and control system in accordance with EU regulations. The government of each member state is responsible for its own country's regulations and application of funds whereas the European Commission carries responsibility for the lawful enforcement of the EU budget in accordance with the regulations and reports on this to the European Parliament. Their task is to ensure cooperation in the phase of funds implementation. The established systems should aim to stop and uncover any irregularities and

[35] Ministarstvo regionalnog razvoja i fondova Europske unije, *Strateški plan za razdoblje 2012.-2014*. (Zagreb, siječanj 2012) pp. 1-89.

[36] Information about the advantages and challenges of using the Structural Funds is available in B. Božana, 'EU fondovi: Strukturni fondovi za hrvatske projekte od 2013. ' [EU Funds: the Structural Funds for Croatian Projects in 2013], 1 *Računovodstvo i financije* (2013) p. 312.

unauthorized payments. Three basic system functions refer to management, confirmation and revision. The proper functioning of the systems is a guarantee that all the main goals of the Cohesion Policy[37] are being considered when using the Structural Funds. The Internal (the European Commission) and the External Audit (the European Court of Auditors and Governmental Audit) contribute to funds improvement and ensure their efficient use.

The control of financial resources is one of the most problematic areas because there are numerous possibilities for mistakes, irregularities and fraud, making the control of financial resources vital[38] for the entire process. The project management methodology (the project cycle) consists of five parts which include the evaluation and audit processes. Some of the major problems when implementing EU Funds relate to the following areas: a) mistakes in the management and control systems; b) the implementation of large projects; c) administrative capacities; d) public procurement; e) absorption capacities. After Croatia has become an EU member state there will be significant changes in planning approaches as well as the financing of development projects because the national resources will have to be redirected towards ensuring the necessary resources in the EU budget distribution. If proprietal-legal relations fail to be resolved promptly, the use of EU Funds can be jeopardized.

In October 2010 the Croatian Government passed *the Decree about strategic documentation and institutional framework for using the EU Structural Instruments in the Republic of Croatia*. This Decree defines the EU Structural Instruments to be used by the Republic of Croatia, prescribes strategic paperwork and documents for the use of EU Structural Instruments, coordinative structures, payment verification and external audit, as well as institutions authorizing the preparation, management and application of particular strategic documents.

[37] L. Pernar, 'Revizija sustava upravljanja i kontrola operacijskih programa sufinanciranih sredstvima Europske unije' [Implementation system audit and operation programs control co-financed by the EU resources] 3 *Računovodstvo i financije* (2010) p. 145.

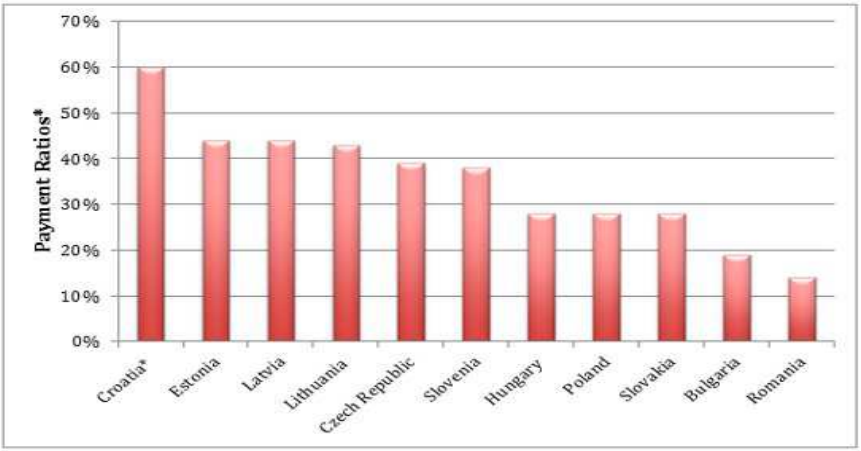
[38] The importance of establishing an implementation and control system is discussed in European Union Common Position, (Accession document, Chapter 22: Regional Policy and coordination of structural instruments); Revision of CONF-HR 16/09), Brussels, 2011, available at *http://www.mvep.hr/custompages/static/hrv/files /pregovori/ ZSEUEN/22.pdf,* p. 7.

Regulation on the instruments of the management and control systems for the use of EU Structural Instruments in the Republic of Croatia[39] defines the authorities responsible for the functioning of these systems. The central agency for financing and contracting relating to EU programmes and projects (SAFU) is responsible for the entire control and regulation of resources, tender procedures, payments and financing reports within the decentralized programme management system[40] in Croatia. It is the leading promoter of EU rules and procedures concerning procurement and it also connects the EU Delegation in the Republic of Croatia with other public bodies. In February 2013 the European Commission abolished the *ex-ante* control of IPA components I, II, III, while the permission for IPA component IV is still pending. This means that the authorized Croatian institutions are allowed to proceed independently with the IPA contracting processes, which represents an enormous improvement in using the EU resources after the EU accession. The institutional framework in the financial period 2014-2020 regards efficient coordination and management as highly important instances including a strong control function and the enforcement of administrative capacities on all levels and within all the entities relevant from the aspect of EU regulations, previous IPA experiences and programme framework.

[39] NN 97/12. Competent authorities: 1) Coordination authority (the Ministry of Regional Development and EU Funds); 2) Audit authority (Audit agency for EU programs realization); 3) Ratification authority (Ministry of Finance); 4) Management authorities (various ministries depending on the operational programme); 5) Mediating authority 1 and 2 (SAFU).

[40] Decentralized Implementation System – as opposed to Centralized Implementation System – means that there is a partial responsibility to be undertaken by the beneficiary country and not only the European Commission when referring to implementation systems. The European Commission still controls the process (in the form of *ex-ante* and *ex-post* control). See more in M. Radnić, *EU fondovi na dohvat ruke* [*EU Fundsiwithin a hand's reach*] (Zagreb, Folpa 2012) p. 263.

Table 1 Payment rations for EU funds in Central and Eastern Europe 2007-2011[41]



VIII. Connections between regional policy, regional development and aid policy

Regional policy – which comprises the totality of aims, measures and procedures directed at the reduction or elimination of the backwardness of a given geographical, administrative or statistical planning unit compared to the development of other units or a given economic-political community – looks back on a relatively short history in Hungary as well as other countries of Europe.[42]

Reasons for this (in Hungary) include, among others, strong centralization, the dominance of the sectoral approach and the basically non-regional (but county-based) territorial units.[43] The increase in disparities between the individual countries and between the various regions within the countries as well as the diverging developments in their (quantifiable) economic indicators render necessary, on the one

[41] In the case of Croatia, the figure is the absorption rate for pre-accession assistance until December 2012, available at *http://blogs.Ise.ac.uk/europpblog /2013/01/16/croatia-eu-funding-lessons/.*

[42] Cf. Boros László, et al., *Kérdések és válaszok az Európai Unióról* [Questions and answers on the European Union] (Budapest, Napvilág Kiadó 2012) p. 24.

[43] Cf. Csefkó Ferenc, 'Területfejlesztés [Regional Development]', in Fábián Adrián and Rózsás Eszter, szerk., *Közigazgatási jog. Különös Rész* [Administrative Law. Specific Provisions] (Budapest – Pécs, Dialóg Campus Kiadó 2011) p. 93.

hand, *regional development* (within the country borders) and on the other hand – the aid policy exerting external influence on the given country.
Regional aid policy at the level of the European Union appeared by the setting up of the European Regional Development Fund (EFRA) (1975), which aims to achieve a general reduction in the economic and social differences between the regions.
Concerning regional policy, the Treaty of Maastricht (1992) emphasized the reduction of regional disparities (moreover, it defined it as an objective). As a consequence, the aid policy built on structural funds was expanded by a new source, the Cohesion Fund (1993); it is not regions, but countries that are entitled to support from this Fund.
The allocation of structural funds is determined based on the five-level NUTS playing a dominant role in the regional policy of the Union.

IX. The management of structural funds following Hungary's accession to the Union

The European Union's enlargement of 1 May 2004 brought about a basic change concerning the issue of economic and social cohesion. As a result of the enlargement, differences in development between the Member States have increased significantly. This, on the one hand, provides repeated justification for the existence of the Union's economic and social aid policy and, on the other hand, it renders the possibility of financing more difficult, as there is a need for a substantial increase in resources. With regard to the planning of the structural and cohesion funds of the financial period of 2007-2013, attention had to be paid to the fact that from 2007 these funds would be available to the states joining the Union in 2004. Having regard to this, the composition of the structural and cohesion funds changed and their objectives were defined jointly as follows. The convergence objective supports the speeding up of the convergence of the least developed Member States and regions from the ERDF, the European Social Fund and the Cohesion Fund. The main targets of support under the convergence priority are the NUTS 2 regions.[44] Objective 2 is aimed at improving the regional competitiveness and employment situation of the regions that are not covered by the convergence objective. To NUTS 3 regions, support is

[44] Those supported include regions where the GDP per person did not reach 75% of the Union average between 2000 and 2002.

provided by the ERDF for strengthening cooperation at the cross-border, transnational and interregional levels (Objective 3).[45]

1. Development plans

Although Hungary has been receiving support from the financial resources of the Structural Funds since 1989 through the *pre-accession programmes* (Phare 1989, SAPARD 2000). However, in order to receive support from the Funds after the accession to the Union, Hungary had to define her development objectives specifically in a National Development Plan (2004-2007) and she had to set up the relating institutional framework to manage the implementation of the plan. Operational programmes[46] which are prepared based on the development plan for the implementation of the Community aid framework are approved by the European Commission, then, on the basis of these operational programmes, action plans are prepared. In the financial period of 2007-2013 two development plans of national importance have been prepared in Hungary.

The main objective of the *New Hungary Development Plan* of 2007-2010 (NHDP) was to increase employment and to create the conditions for lasting growth. The most relevant objective of the New Hungary Development Plan related to raising the level of employment and establishing conditions underpinning permanent growth.

Therefore, coordinated state and EU development was launched in 6 priority areas, namely: the economy, transport, initiatives targeting social renewal, environmental protection and energy, regional development and tasks relating to state reform.[47] The Government submitted fifteen operational programmes in connection with the NHDP to the *Directorate-General for Regional Policy*.

The European Commission fully approved of the eight sectoral operational programmes (economic development, transport, social infrastructure, environment and energy, electronic public administration, implementation, state reform, social renewal) and the seven general regional operational programmes. The Government prepared action plans concerning these programmes.

[45] Cf. Horváth Zoltán, *Kézikönyv az Európai Unióról* [Handbook of the European Union] (Budapest, HvgOrac 2011) pp. 383-384.

[46] Operational programmes also form part of the development plan.

[47] *http://www.nfu.hu/uj_magyarorszag_fejlesztesi_terv_2*

The New Széchenyi Plan (NSP) has modified and put on a new footing the objectives and programmes of the NHDP in several respects. It focuses on increasing employment, maintaining financial stability, establishing the conditions for economic growth and improving competitiveness.[48] Accordingly, the sectoral and regional operational programmes of the NSP have been organized around seven focal points: health industry, development of the green economy, residential property policy, development of the business environment, transit economy, science-innovation and employment, which programmes can be found in the action plans for the period of 2011-13.

The Managing Authorities of the NSP[49] participate in finalizing the Operational Programme and in talks with the European Commission; furthermore, they take part in the planning of the budget and conduct the implementation of the announced projects and central programmes through the involvement of Intermediate Bodies. The twenty-five intermediate bodies act in competences transferred to them by the Managing Authority.

Besides these two comprehensive national development plans, numerous development documents relating to sectors as well as the whole of the economy or society have been prepared.[50]

2. The institutional system

The *Ministry of National Development* is in charge of sectoral management. The minister carries out, on the one hand, a preparatory activity relating to the government's regional development policy activity, he prepares impact analyses based on regional aspects and, on the other hand, he coordinates the activities of organs of public administration connected with regional development and bears responsibility for the spending of Union funds.[51]

[48] Cf. Csefkó, loc. cit. n. 43, at p. 92.

[49] Managing authorities for the Implementation, Economic Development, Human Resource, Environment, State Reform, Transport, Regional Development and International Cooperation Programmes.

[50] Convergence Programme, Széll Kálmán Plan, Magyary Programme, Darányi Programme.

[51] Government Decree 212/2010 (VII. 1.) on the scope of activities and competence of the individual ministers and the State Secretary heading the Prime Minister's Office.

The Government Committee on National Development formulates a position for the Government on the development and planning tasks, especially the tasks relating to the financial period of 2014-2020, the government measures required for the spending of budgetary resources allocated for planning tasks, the setting up and operation of the institutional system required for the spending of such support funds and the regulations that may be justified in this field.[52]

In 2006, by decree, the Government established the *National Development Agency* (NDA), which constitutes a central operational and implementing organization in the institutional system connected with the development policy.[53] The tasks of the NDA include the performance of long-term and medium-term development and planning tasks relating to the implementation of the New Széchenyi Plan, the preparation of plans and operational programmes required for application for Union funds as well as the setting up and operation of the institutional system required for spending the funds.

The NDA is a central agency headed by the minister in charge of development policy, which coordinates the eight managing authorities – operating also under ministerial management - and several intermediate bodies.[54] The *managing authority* (e.g. for economic development, human resources and the public administration reform programmes) is an authority (national, regional or local state or private organ) assigned to the management of an operational programme. The *intermediate body* is an organ/service that belongs to the public or private sphere which acts and performs tasks relating to the beneficiaries on behalf of a managing authority.[55] The efficiency of implementation of the operational programmes is examined by *monitoring committees.*

The minister shall operate a *regional development agency* in the region in the form of a non-profit business association for the preparation and implementation of development decisions connected with the implementation of the development programme of the county and the

[52] Government Decree 140/2012 (VII. 2.) on the Government Committee on National Development.

[53] Government Decree 130/2006 (VI. 15.) on the National Development Agency.

[54] The institutional system set up and operated in accordance with Community law (Council and Commission Regulations) consists of the following elements: managing authorities, intermediate bodies, monitoring committees and a paying authority.

[55] In Hungary there are 25 intermediate bodies involved in the NSP.

capital as well as for supplying with information the regional organs in charge of regional development tasks and assisting them with their work.[56] The tasks of the agency include – among others – organizing the implementation of regional development programmes and participation in their performance, furthermore, the management of programmes relating to project applications and regional planning.

The *Széchenyi Programme Offices* established by the Government are charged with the task of ensuring the implementation of the principles of an applicant-centered approach, quality and efficiency announced by the New Széchenyi Plan.[57] The 19 county offices operating in the seven regions provide assistance to project applicants and beneficiaries locally – within the framework of national cooperation – in the interest of promoting the spending of development funding. In practice this means that the counselors of the offices assist applicants and potential applicants in choosing the call for project application that is most suited to their business interests, in the submission of the project application and, provided there is some administrative difficulty during or following the evaluation, they also provide help with solving this problem. Development counselors monitor the whole application process beginning from the formulation of the idea of the project to the closing of the financial accounting. The counseling activity of the offices extends to all calls for project applications of the New Széchenyi Plan and – with the exception of tenders relating to public administration – also to the earlier calls for tender of the second national development plan.[58] Offices are assisted in the performance of their tasks by the National Development Agency.

3. Aims, projects and funds

In the budgetary period of 2007-2013 the Union has allocated a funding of € 24,9 thousand million to Hungary as financial assistance from the Union budget through the Cohesion Policy Funds. This amount is supplemented by further €4,4 thousand million from the national contributions to funding.[59] (The value of financial assistance calculated

[56] Art. 17(a) of Act XXI of 1996 on Regional Development and Regional Planning

[57] Government Decree 68/2011 (IV. 28.) on Széchenyi Programme Offices.

[58] *http://www.szpi.hu/index.php?action=recordView&type=places&category_id=227&id=33311*

[59] Magyarország Nemzeti Stratégiai Jelentése a 1083/2006/EK 29. alapján [Hungary's National Strategic Report under Article 29 of Council Regulation (EC)

in forints equals 8 200 thousand million HUF.) According to the data summing up the absorption of cohesion policy funds, the managing authorities had awarded more than 17,7 thousand million EUR worth of (Union) funding to applicants by the end of the year of 2011.

The framework system for the drawing of funds is the *National Strategic Reference Framework* (NSRF). Hungary has defined 15 operational programmes, including seven sectoral and seven regional operational programmes and one operational programme relating to implementation.[60] The general objectives of the National Strategic Reference Framework – relating to the given period – have been to increase employment and to promote lasting growth.

Accordingly, *(the general objectives of) the sectoral operational programmes are as follows*:

- Economic Development Operational Programme (OP): encouraging permanent growth of the Hungarian economy through increasing the competitiveness of the productive sector;
- Transport OP: improving accessibility in order to increase competitiveness and strengthen social-territorial cohesion;
- Environment and Energy OP: reduction of harmful environmental effects, preserving the natural environment serving as a basis for growth, prevention, efficiency and an integrated approach toward tackling complex problems,;
- Social Renewal OP: increasing labor market participation;
- Social Infrastructure OP: increasing activity;
- State Reform OP: enhancing the (procedural) performance of public administration;
- Electronic Public Administration OP: enhancing the (infrastructural) performance of public administration;
- Implementation OP (IOP): efficient and successful implementation of the Reference Framework, promoting the full and timely absorption of the available financial resources.[61]

The following general objectives are present in the seven *regional operational programmes (ROP)*:

1083/2006], available at *http://ec.europa.eu/regional_policy/how/policy/doc/strategic_report/2012/hu_strat_report_2012.pdf.*

[60] Cf. the objectives of the New Széchenyi Plan.

[61] Stratégiai Jelentés – Magyarország, 2012. [Strategic Report – Hungary, 2012], available at *http://ec.europa.eu/regional_policy/how/policy/doc/strategic_report/2012/hu_strat_report_2012.pdf.*

- improving competitiveness;
    - helping the specific region catch up with the more developed regions of the country;
- reducing social and economic disparities between the different areas within the region;
- increasing employment;
- economic and social innovation, effective implementation of the elements of permanent renewal;
- environment-conscious planning of developments, implementation of the principle of sustainable development;
- an economic and public services infrastructure adjusted to regional conditions.[62]

4. A story about success (?)

The European Union's regional policy is usually evaluated as a success story. It is undisputable that – taking only the current budgetary period of 2007-2013 into account – innovation and small business have been given a major boost by the investments financed within the framework of the cohesion policy and there has been significant progress in the field of employment too.[63] The reports of the Member States on the most important strategic sectors (research, innovation, development of railways, energy, sustainable city transport, job creation and training) attest to development and progress.

In the past six years in Hungary – with funding from the EU – large investments and motorways have been realized and, on the other hand, roads, public buildings and sewage systems have been built by joining forces locally (within small regions and micro-regions).[64]

Nevertheless, it may be stated that in spite of the huge amounts of financial aid disparities between regions and small regions have not decreased but rather increased in the past decade, the pace of falling behind of some regions has also increased, therefore – in the present situation of financial and economic crisis – the effectiveness of the aid policy is questionable.[65]

[62] Ibid.
[63] *http://europa.eu/rapid/press-release_IP-13-336_hu.htm*
[64] Cf. Csefkó, loc. cit. n. 43, at p. 104.
[65] Csefkó, loc. cit. n. 43, at p. 105.

X. Conclusion

The accession of the Republic of Croatia is quite soon becoming a reality. Therefore, extensive preparations have to be made if all the financial opportunities offered to Croatia are intended to be used. Special attention is to be paid to the preparation of the administrative personnel, their level of education and abilities to draw financial resources from the EU Funds (it is necessary to keep a constant information flow) and how well they are generally informed. One of the most important questions is the rate at which funds are successfully used, or better put, the problem of their insufficient use. After the accession, the aforementioned European Regional Development Fund, oriented towards infrastructural and manufacturing investments with the purpose of creating new employment possibilities and at the same time towards supporting local growth and the development of small and medium entrepreneurship, will become available for Croatia to use as well. Even and sustainable economic and social development should be the main priority set by the national policies. The Cohesion Policy, being one of the most important EU policies, sets out to diminish social, economic and territorial differences between the EU regions, thus strengthening global competitiveness of the European economy. It is no wonder the Cohesion Policy is also referred to as the 'Solidarity Policy'. There is a necessity to emphasize the importance of organizing educational activities and programmes on both state and county level in order to ensure quality when planning and preparing projects and managing EU financial resources. To achieve that, it is critical to establish the administrative capacities, to employ and offer further education to experienced and reliable personnel, to keep that personnel permanently employed in the state offices and to organize and adjust the necessary procedures. Research has shown that every EU member state has encountered the same problem, how to educate and later offer permanent employment to administrative personnel needed for the realization of EU Funds. The problem can be solved partly by achieving mutual collaboration between various institutions, by using information-communication technologies, by educating teams of experts and by establishing a national IT system to monitor the project realization phases.

What do EU Funds mean for Croatia? They represent a possible solution to get out of the ongoing crisis, they also ensure foreign investments and set long-term development priorities, they enhance the infrastructure and

employment while contributing to local and regional development, and they promote research activities, strengthen institutional capacities and improve the efficiency of public administration. By the end of the year 2013, public procurement for nine huge projects is to be expected. A good example of how well EU projects can be used in Croatia is set by the Istrian Development Agency, which has applied for 26 projects (16 have been realized). There are simply not enough qualified people to participate in the project preparation activities, and many counties are not able to provide the financial means to co-finance the projects. Since the Republic of Croatia as a member state will have access to more than a billion € per year, it will be of outmost importance to make detailed preparations for timely project applications. The European Commission's priorities when evaluating the project ideas will be the effect they have on the growth of Croatian competiveness; therefore, all the given opportunities are not to be taken for granted. All the European countries are extremely careful and serious when it comes to EU Funds. Their success rate depends on their country's economic and social strategies being coherent and compatible with the EU projects. The EU Funds do not present a magic way out of the long-term crisis, but are an excellent way of directing a country toward creating a knowledge-based society that applies technological and social innovations and makes the national economy attractive. Experience shows that the Funds influence the economic innovations because of their acceleration potential. How successfully they will be used in Croatia, depends only on ourselves. While learning from other countries' experiences one can conclude that EU accession is to be used as an opportunity to change for the better, because EU membership presents only a possibility, not a guarantee. Otherwise, it could work in the opposite direction and weaken the country even more. We are now to take the necessary time into consideration and then change the possibility into reality and therefore avoid missing the given chance and turning it into regret.

Attila Pánovics[*]
Rajko Odobaša[**]

The conditions of active and effective NGO participation in regional development policy

Partnership has been for a long time one of the key principles of EU cohesion policy. The active involvement of all stakeholders throughout the whole programme cycle (preparation, implementation, monitoring and evaluation) is crucial for successful implementation of European Union Common Strategic Framework (CSF) funds, and it is necessary for securing a higher impact of the use of public money. The acknowledgement of partnership is common across all Member States, but there are wide differences on the application of the partnership principle. The central aim of this paper is to explore the role of non-governmental organisations (NGOs) representing civil society. The analysis begins with a brief introduction to the concept of the partnership principle in cohesion policy. This will be followed by an overview of the definition of the term 'NGO' in Hungarian and Croatian law. NGOs often lack the resources in terms of personnel and infrastructure to participate actively in strategic planning, programming and decision-making processes. The paper looks at the obstacles to achievement of active involvement of NGOs, and analyses new elements of EU cohesion policy in the next programming period (2014-2020) that have the potential to encourage the development of partnership. NGOs can also serve as potential project applicants for EU funding, and therefore they are able to improve the absorption capacity of CSF funds in the Member States. The paper claims to provide concrete support for capacity building of NGOs, and introduces an existing good practice in the frame of the South-Transdanubian Operational Programme between 2011 and 2013.

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I. The new framework of EU Cohesion Policy

Cohesion policy[1] is an EU policy offering substantial added value and has its own *raison d'être*: economic, social and territorial cohesion.[2] It has traditionally been considered as a useful tool to advance the economic integration of the EU by helping less developed regions in their convergence process with more developed ones. It is founded on financial solidarity between the EU Member States whose contributions to the EU budget are given to the less affluent regions and vulnerable social groups. It has risen in political and economic significance from the beginning of *1975*, and is still crucial for ensuring competitiveness and economic development[3] while taking into account regional specificities. Undoubtedly, without the Cohesion Policy of the EU, economic, social and territorial disparities would be greater across the EU, especially in the less developed regions.

EU Cohesion Policy has been gaining relevance in the European budget since the creation of the European Regional Development Fund (ERDF) in 1975,[4] to become today one of the main instruments of EU intervention. *Structural and Cohesion Funds*[5] (EU funds[6]) account for one third – at €347 billion – of the current EU budget for the period 2007-2013, making this *the second largest spending line* within the EU

[1] Due to its characteristics Cohesion Policy is often referred to as the Regional Policy or Regional Development Policy of the EU.

[2] According to Article 174 of the Treaty on the Functioning of the European Union (TFEU), in order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion, and in particular shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions such as rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicap.

[3] Unfortunately, the EU's different 'agendas' have always been formulated in line with a growth paradigm that accentuated and prioritised the quantitative expansion of economies.

[4] OJ L 73., 21.3.1975, pp. 1-7.

[5] Structural Funds are made up of the European Regional Development Fund (ERDF) and the European Social Fund (ESF). The Cohesion Fund, which was set up in 1994, provides funding for environmental projects and trans-European network projects.

[6] The European Regional Development Fund (ERDF), the Cohesion Fund (CF), the European Social Fund (ESF), the European Agricultural Fund for Rural Development (EAFRD), and the European Maritime and Fisheries Fund (EMFF).

budget after the Common Agricultural Policy.[7] That is the reason why Cohesion Policy is permanently at the centre of the debate about the effectiveness of the EU budget.

The strategic dimension of EU Cohesion Policy is provided through *Council Regulation (EC) No 1083/2006* (hereinafter the General Regulation), the Community strategic guidelines on Cohesion (hereinafter the Strategic Guidelines),[8] the National Strategic Reference Frameworks (NSRFs) and the Operational Programmes (OPs).[9] The structure of the OPs should also reflect the focus of EU interventions on the objectives of the Europe 2020 strategy.[10]

EU Cohesion Policy plays a pivotal role on the way towards full achievement of the EU 2020 goals, though national public spending cannot only be used to co-finance but also to finance investments which are complementary and linked to EU funded projects. EU Cohesion Policy is implemented through programmes which run for the duration of the *seven-year budget cycle* of the European Union.[11] The EU budget covers all of the Union's activities, and only complements national budgets. It is the responsibility of the EU Member States to utilise the EU support appropriately and enhance Cohesion in their countries.

The forthcoming Multiannual Financial Framework (MFF 2014-2020) will present the budgetary priorities of the Union for the years 2014 to 2020. The process started with the Commission tabling its proposals for a regulation laying down the next MFF[12] and a legislative package[13] in

[7] EU funds amounted to €344 billion of the total €975 billion EU budget for the 2007-2013 period.

[8] OJ L 291/11 OF 21.10.2006.

[9] OPs present the priorities of the countries and their regions. The implementation of the OPs is organised by 'managing authorities' (MAs) in the Member States.

[10] The objective of Europe 2020 is to turn the EU into a smart, sustainable and inclusive economy, delivering high levels of employment, productivity and social Cohesion. The strategy is focused on five ambitious goals in the areas of employment, innovation, education, poverty reduction and climate/energy. European Commission: EUROPE 2020 – a strategy for smart, sustainable and inclusive growth, COM(2010)2020.

[11] The *Multiannual Financial Framework* (MFF) translates into financial terms the political priorities of the EU for at least 5 years. Article 312 TFEU provides that the MFF is laid down in a regulation adopted unanimously by the Council of the EU after obtaining consent from the European Parliament. It sets annual ceilings for EU expenditure as a whole and for the main categories of expenditure.

[12] COM(2011) 398 final, Brussels, 29.6.2011.

2011. These proposals opened a period of negotiation which should conclude with the adoption of the Regulations by the European Parliament and the Council before 2014.[14] Among the policy areas of the EU that the proposed MFF 2014-2020 allocates funding to, cohesion is both the most important in terms of financial allocation and has been the most controversial in negotiations so far.[15]

The programming process for the period 2014-2020 foresees two major new elements, and both of them aim at more effective policy coordination between the European Commission and the EU Member States:

- the *Common Strategic Framework* (CSF) at EU level which is intended as an overarching strategic guidance, and
- the *Partnership Contract* at national level which is proposed by the Member State concerned and is subject to approval by the Commission.[16]

In order to promote the harmonious, balanced and sustainable development of the EU, the CSF will translate the Europe 2020 objectives and targets into concrete investment priorities for Cohesion Policy, rural development and maritime and fisheries policy.[17] It contains the EU's top priorities and applies to all EU funds. All these funds pursue complementary policy objectives and their management is shared between the Commission and the Member States. To be able to deliver greater European added value, they need to both concentrate

[13] Proposal for a Regulation laying down common provisions on the ERDF, the ESF, the CF, the EARDF and the European Maritime and Fisheries Fund covered by the CSF and laying down general provisions on the ERDF, the ESF and the CF, COM(2011)615; Proposal for a Regulation on specific provisions concerning the ERDF and the Investment for growth and jobs goal, COM(2011)614; Proposal for a Regulation on the CF, COM(2011)612.

[14] Unfortunately, the whole setting and the rather tight timelines make quite clear that in practice the programming task for the period 2014-2020 is going to be a rolling procedure; OPs have to be developed in parallel to the Partnership Contracts.

[15] In order to allow these programmes to start in January 2014, a political agreement on the ceiling in the MFF should be taken no later than 18 months before the framework comes into force. The absence of the new financial framework would considerably complicate the adoption of new programmes.

[16] Partnership Contracts for 2014-2020 will replace the National Strategic Reference Frameworks (NSRFs) of the current period.

[17] For 2007-13, EU cohesion policy focuses on only three main objectives: 1) Convergence (solidarity among regions), 2) Regional Competitiveness and Employment, 3. European territorial cooperation.

their support on EU priorities and coordinate with other EU policies and financial instruments.[18]

II. The partnership principle

The concept of 'partnership' has many meanings. Generally speaking, it refers to joint activities, and refers to a certain degree of engagement and commitment of the partners and reasonable empowerment. Partnership is *much more than simple cooperation* between different stakeholders. Successful partnership must be based on *a long-term perspective* of real participation, *providing equal opportunities* for other partners to play an active role alongside the public authorities.

Partnership must be seen in close connection with the *multi-level governance* approach in the EU. The principle of partnership, as defined by the Community Strategic Guidelines 2007-2013,[19] is based on reinforced multi-level governance. Multi-level governance – that cannot be limited to 'inter-institutional governance' – describes a new model of policy coordination between such actors through vertical and horizontal networks at local, regional, national and EU levels. It helps to reduce coordination and capacity gaps in policy-making in terms of information, resources, funding, administrative and policy fragmentation.[20]

Multilevel governance is necessary to implement partnership with all socio-economic and civil society stakeholders in the framework of 'multi-actors governance' at every level.[21] The system of multi-level governance varies between the Member States of the EU and also between regions within the EU Member States. National governments and sub-national actors have different degrees of participation in decision-making and power.

[18] Such as Horizon 2020, Erasmus or LIFE.

[19] There are some other key principles that underpin EU Cohesion Policy: additionality, concentration and programming.

[20] See in particular OECD Policy Brief 'Bridging the gaps between the levels of government', available at *http://www.oecd.org/regional/regional-policy/43901550.pdf* (10.05.2013).

[21] *Cohesion Policy – Play the partnership card, Open letter to the Council,* the European Parliament and the European Commission on the Partnership principle in the Common regulation. The full letter is available at *http://www.epha.org/IMG/pdf/FINAL_Joint_letter_Play_thePartnership_Card of__061112.pdf* (10.05.2013).

All Structural instruments covered by the EU funds are governed by the general principles of support such as partnership, multi-level governance, equality between men and women, sustainability and compliance with applicable EU and national law. Partnership does not cover only *'vertical' partnership* within the public sphere, i.e. between the European Commission, the Member States, and regional, local and other public authorities at different levels. It also implies close and real cooperation between public authorities at national, regional and local levels and with the private and third sectors. Moreover, partners should be actively involved throughout the *whole programme cycle:* preparation, implementation, monitoring and evaluation.

As a horizontal principle, the term 'partnership' requires effective and efficient cooperation between different actors: EU institutions and bodies, national parliaments and governments, public authorities, official consultative structures, public agencies, private deliverers, academia (universities), research institutes, mass-media, small and medium-sized enterprises (SMEs), business networks, research institutes and clusters, representative bodies such as social partners and a range of non-governmental organisations (NGOs). Nevertheless, partnership is also a tool for sustainable development (sustainability) that is a main goal of the European Union.[22] Its earliest roots can be found in the Treaty of Rome (1957), when the ESF was set up.[23] The main principles by which it operates were laid down as part of the general reform of the Structural Funds in 1988.[24]

In the beginning, partnership focussed on traditional economic and social actors only; Council Regulation (EC) No 1083/2006/EC[25] now lays considerable emphasis on the involvement of the so-called *'civil society organisations' (CSOs)*. Partnership includes 'any other appropriate body representing civil society': the economic and social partners (the main employer and union federations), environmental partners, NGOs, and bodies promoting gender equality.[26]

[22] See Art. 3(5) of the Treaty on European Union (TEU).
[23] See Art. 124 of the Treaty.
[24] See Regulation (EEC) No 2052/1988.
[25] Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999.
[26] See Art. 11 of Council Regulation 1083/2006/EC.

The proposed Common Provisions Regulation (*CPR* or Draft General Regulation) repealing Council Regulation 1083/2006 lays down rules for both vertical (that is to say EU-to-MS) and horizontal (that is to say between different stakeholders) partnership. Under *Article 5* of the CPR, Member States (MSs) shall organise a partnership with the following partners:

- competent regional, local, urban and other public authorities, representatives of universities, educational facilities, research centres, and other national public bodies;
- economic and social partners (in particular general cross-industry organisations and sectoral organisations, national chambers of commerce and business associations, and equivalent bodies organised at national/regional level); and
- bodies representing civil society (including environmental partners, NGOs, and bodies responsible for promoting social inclusion, gender equality and non-discrimination).

In accordance with the multi-level governance approach, the partners shall be involved by Member States in the preparation of Partnership Contracts and progress reports and in the preparation, implementation, monitoring and evaluation of programmes. They also shall participate in the monitoring committees for programmes. At least once a year, the Commission shall consult the organisations which represent the partners at Union level on the implementation of support from the CSF funds.

III. The limits of partnership

The partnership principle forms an essential part of EU regional development processes. The balance of EU funding, the number of programmes and the most suitable architecture must be developed in partnership with stakeholders in the Member States and in negotiations with the European Commission. The participation of all relevant partners is a fundamental condition of the effectiveness and success of EU cohesion policy.

Because of the self-evident advantages attributed to partnership, the acknowledgement of the partnership principle is *common across all EU Member States* to a greater or lesser degree. All governments seem to be well aware of the desirability of partnership structures, and the overall implementation of the partnership principle seems to have improved over the years. Partnership which is genuine and profound in character leads to more targeted and effective use of EU funds, and thereby to

more successful projects.[27] Experience shows however that there are wide differences across the Member States on the *application* of the partnership principle, depending on national institutional set-ups and political cultures.

There are several factors leading to the success or failure of the partnership principle in Cohesion Policy. In general, the effectiveness of the different Structural instruments depends on sound policy, regulatory and institutional frameworks. Investments can only have optimal impact if an appropriate policy, legal and administrative framework is in place.

In practice, the implementation of EU funding provides several challenges to the participating actors. These conditions have given rise to a shared management system, between the European, national, sub-national (regional and local) levels. Regional development requires highly complicated decision-making processes, and the capacities of different stakeholders vary widely.

National ministries or executive agencies dependent on those ministries are normally the key national administrations supporting, coordinating and sometimes controlling the drafting processes that have been set up in Member States on programming the national development strategies. There is real evidence of a structured dialogue between high and middle level officials from different ministries in the preparation of national development strategies.

There is also clear evidence of a *real desire* by central administrations to reach out to other CSOs. In certain specific programme areas including issues of gender equality or equality for persons with disabilities, environmental concerns, and ethnic minority considerations, the selection of CSOs was relatively straightforward. In such activities these organisations are quite prominent throughout Europe, and enjoy a high reputation for their work among the general public. In other, more horizontal or multi-sectoral areas, such as economic competitiveness, education, unemployment or poverty reduction, the choice of CSOs was occasionally more difficult.[28]

[27] European Economic and Social Committee, *It takes two to tango. An EESC study on Developing the Partnership Principle in EU Cohesion Policy* (2011) p. 10., available at *http://www.eesc.europa.eu/resources/docs/cese-2011-05-en.pdf* (11.05.2013).

[28] *Governance and partnership in regional policy,* Ad hoc note of the European Parliament's committee on Regional Development, PE 397.245, Brussels, 04.01.2008 p. 5., available at

At national level, partnership processes can take place:

- through the involvement of formal consultative mechanisms (such as Economic and Social Committees or Chambers of Commerce),
- through direct participation, and
- quite frequently through a mixture of both approaches.[29]

Effective and efficient involvement of all stakeholders should be performed at the earliest stages of the design and adoption of programming documents (Partnership Contracts, Operational Programmes, etc.), so that the recommendations can be discussed by partners in working groups and incorporated before the political decision on approval by national authorities is taken.[30] Finally, particular attention shall be paid to innovative activities in the context of partnership, and *continuous capacity-building* of the partners is crucial: technical assistance resources should be made available to economic and social partners and civil society in all Operational Programmes (OPs).[31]

IV. NGOs in cohesion policy

CSOs' influence on shaping public policy has emerged over the past decades. Engagement with civil society is essential to build stronger democratic processes and accountability systems and to achieve better outcomes.

The term 'civil society' refers to the wide array of non-governmental and not-for-profit organizations that have a presence in public life, expressing the interests and values of their members or others, based on different (cultural, political, scientific, ethical, religious, etc.) considerations. Civil society is varied in its nature and composition. For this reason definitions of civil society vary considerably based on differing conceptual paradigms, historic origins, and country context. CSOs therefore refer to a wide array of organizations, the term 'civil society organisation' is broad and inclusive of associations, foundations, advocacy groups, trade unions, indigenous groups, community groups, charitable organizations, etc.

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http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/pe_397245_/pe_397245_en.pdf (11.05.2013).

[29] Ibid.

[30] In EU Cohesion Policy CSOs are private partners, not public authorities.

[31] Measures of technical assistance can be aimed at all partners, beneficiaries of the funds and the general public.

'NGO' is another term that is not used consistently.[32] As a result, it is difficult to define and classify NGOs, and there are many different classifications in use. All in all, it is an imperative criterion that NGOs must be independent, and not represent private (personal, individual) interests (the term 'civil society' or 'third sector' is also commonly used to denote a distinction from the state and the economic sphere). NGOs should do more than serve the needs of a narrowly defined social group or category, such as members of a family, or a closed circle of private persons.

1. NGO participation in Hungary

In Hungary, today there are over 78.000 NGOs (e.g. associations and foundations) registered. Recently a new non-profit law for CSOs entered into force: *Act CLXXV of 2011* on the Freedom of Association, on Public-Benefit Status, and on the Activities of and Support for Civil Society Organizations integrated into a unified statutory instrument several laws dealing with the management of civil society. A main goal of the new legislation is to ensure transparency and restore the prestige of the public benefit status. A prerequisite of the status is that NGOs have to choose any public duty defined in any law. In addition, they must prove they have support within society and that they have appropriate resources.[33]

The Hungarian institutional system of cohesion policy has significantly been centralized after 2007. The *National Development Agency* (NDA[34] has become the chief organ responsible for EU related programming and programme implementation, supervised by the Ministry for National Development. In principle, NGOs could participate in the elaboration of the New Hungary Development Plan (NHDP or the National Strategic Reference Framework) and its OPs,[35] and were represented in the

[32] There are many alternative or overlapping terms in use, including civil society organization (CSO), non-state actor, voluntary organization, non-profit organization or third sector organization.

[33] *http://www.kormany.hu/en/ministry-of-public-administration-and-justice/news/regulation-of-civil-society-in-hungary* (31.05.2013).

[34] All OP managing authorities are placed under NDA's umbrella. In co-operation with the ministries concerned and the development regions, the NDA is responsible for the planning and implementation of the entire NHDP as well as for performing managing authority functions with respect to all OPs.

[35] Between 2007 and 2013, there are 15 OPs in Hungary, of which there are 8 sectoral and 7 regional OPs.

monitoring (sub)committees. In practice, NGOs were not involved fully;[36] sometimes they were consulted, but mostly completely ignored. The work is often very formal and does not fulfil the demand for a genuine partnership.

In 2004, after the amendment of Act XXI of 1996 on Regional Development and Land Use Planning, a Government decree[37] called for nationwide, regional and local *civil conciliation forums* as consultative bodies to be set up to assist the decision-making procedures of the Nationwide, regional and micro-regional development councils. Without any external support for NGOs, the civil conciliation forums could not play a decisive role in Hungarian cohesion policy, and there was no connection between the civil forums at different levels.

Human and financial resources of Hungarian NGOs are highly variable. For example, some NGOs employ paid staff, while others are entirely staffed by volunteers. EU subsidies are crucial in the development of the NGO sector with special regard to the capacity-building of the organisations, but only a few Hungarian NGOs have experiences in the management of EU co-funded projects.

In 2010, the new Hungarian Government transformed the institutional system of regional development. The former regional development councils were transformed into 7 regional development conciliation forums at regional level; the councils' functions were put to the county governments and the county consultative forums. As the entire process is under time pressure and characterised by difficulties in coordinating effective and efficient planning, it is not clear whether NGOs will have a specific role to play in the preparation of the development plans during 2013.

2. The role of NGOs in Croatia

There are almost 50,000 CSOs in Croatia founded mostly as a spontaneous expression of a desire for civic organizing around some values or interests. The development of the Croatian civil sector and the work of some organizations have significantly been influenced by a number of international organizations and donors transferring the necessary knowledge and skills ('imported civil society'). Most Croatian CSOs (more than 21,000 associations and most of the foundations) are

[36] The role of NGOs was significant particularly in the social sector and environmental protection.

[37] See decree of the Government 258/2004 (IX. 16.).

linked to the capital and four other cities. The number of organizations and interest in the establishment of associations is growing slowly in smaller towns.[38]

The civil society in Croatia consists of associations, trusts and foundations, private institutions and cooperatives.[39] All of these organizations are a form of expression of citizens' rights to freedom of association, and have legal personality and a prescribed procedure of registration. The Central State Office for Administration maintains the Register of Associations of the Republic of Croatia.

The *Government Office for Cooperation with NGOs* was founded in 1998 with the aim of performing expert work in the domain of the Croatian Government with regard to creating conditions for cooperation and partnership with the non-governmental, non-profit sector, especially with associations. The Office closely cooperates with the Council for the Development of Civil Society[40] (an advisory body of the Government), and monitors the implementation of the *National Strategy for the Creation of an Enabling Environment for Civil Society Development (2012-2016).* The budget of the Office has continuously changed since its establishment, taking into account the new circumstances, e.g. the new opportunities for financing projects and programs of organizations from EU funds.[41]

The preparation of the *Regional Development Strategy of Croatia (2011-2013)*[42] was led by the Ministry of Regional Development, Forestry and Water Management which consulted with the representatives of relevant ministries and other stakeholders at national, regional and local levels. The Strategy emphasizes the importance of consensus-based partnership of different stakeholders. The final draft of the document was presented to the Commission and discussed during

[38] G. Bežovan and S. Zrinščak, *Civilno društvo u Hrvatskoj* [Civil Society in Croatia] (Zagreb, Naklada Jesenski i Turk, Hrvatsko sociološko društvo 2007) pp. 62-63.

[39] Ibid. pp. 95-96.

[40] The Council has 27 members, 12 representatives of relevant government bodies and offices, 3 representatives of foundations, trade unions and employers' associations, and 12 representatives of NGOs and other CSOs.

[41] *http://www.uzuvrh.hr/stranica.aspx?pageID=227* (21.05.2013).

[42] *http://www.mrrfeu.hr/UserDocsImages/STRATEGIJA_REGIONALNOG_RAZVOJA.pdf* (21.05.2013).

the negotiations on the accession of Croatia to the EU (Chapter 22: 'Regional policy and coordination of structural instruments').
International researches conducted in Croatia show that the most critical areas of civil society in Croatia are linked to the limited space for action, as well as certain legal, political and socio-cultural frameworks conducive to the development of civil society. Although citizens generally have a positive attitude towards CSOs, they are not yet sufficiently involved in civil society initiatives. This situation is the result of the inadequate development of the culture of giving and volunteering for projects and programs in the interest of the common good.

V. Conclusions

EU Cohesion Policy is a major investment tool at the disposal of the EU to boost growth, employment and competitiveness across EU regions, in line with the *Europe 2020 strategy* and the necessity of fiscal discipline. EU funds fundamentally determine the strategic direction of a country's development at all levels. In the light of the current economic situation and the increasing scarcity of public resources, EU financial instruments are expected to play an even stronger role in the 2014-2020 programming period.[43] There is a need for an even stronger commitment of social partners and other civil society organisations as well.
The implementation of the partnership principle has been slow since it was launched in 1988. Partnership is a key principle for programming and implementation of EU Cohesion Policy, but the *impact* of partnership-building so far is limited. Public authority actors always perceive partnership in programming as more or less problematic. First, there is a general feeling that the partnership process works well at the strategic planning level, but can be less effective when it comes to deciding on actual programmes and projects. Second, it is also often seen as time consuming and requiring extra-effort without a real added value.
Partnership should not be seen as a constraint, but rather as a way to provide added value and ensure effectiveness. In order to mobilise fully all involved, representation of local and regional stakeholders, social partners and civil society in both the policy dialogue and

[43] Moreover, EU funds will have a key role to play in supporting financial instruments that can leverage private investment and so multiply the effects of public finance.

implementation of Cohesion Policy should be strengthened.[44] This involves enhancing efforts to promote a conducive environment for NGOs, and increasing their capacities to effectively perform their roles as fully-fledged actors.

NGOs always welcome the opportunities to participate in the identification of priorities and the planning and execution of programmes, but the *capacity* of civil society to respond to opportunities remains limited. Only a few organisations have the necessary structures and staff, while others lack the resources to fully participate in decision-making. That is the reason why partnership processes must generally be *encouraged and facilitated* by the pivotal national authorities.

EU legislation is a key in defining the scope and application of the partnership principle, since partnership is one of the cornerstones of EU Cohesion Policy. In April 2012, the Commission presented a *working paper on a European Code of Conduct on Partnership (ECCP)* in order to ensure a stronger involvement of civil society in all phases of Cohesion Policy (project planning, development, monitoring and evaluation).[45] The objective of the ECCP is not to impose constraints where the relationship between the NGOs and their governments is satisfactory but rather to extend 'good practice' across the EU MSs, and create win-win situations for all stakeholders.

The Code of Conduct lays down *minimum requirements* for national authorities to ensure a high quality involvement of partners. ECCP is not going to be a guidance document; the Commission will have control measures to ensure compliance with the rules of the Code of Conduct. Under Article 5(3) of the CPR the Commission is empowered to adopt a *delegated act*[46] to provide for the Code of Conduct that lays down objectives and criteria to support the implementation of partnership and to facilitate the sharing of information, experience, results and good practices among MSs.[47]

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[44] *Fifth report on economic, social and territorial Cohesion*, Report from the Commission (November 2010) available at *http://ec.europa.eu/regional_policy/sources/docoffic/official/reports/cohesion5/pdf/5cr_en.pdf* (31.05.2013).

[45] *The partnership principle in the implementation of the Common Strategic Framework Funds – elements for a European Code of Conduct on Partnership*, Commission staff working document, SWD(2012)106 final, Brussels, 24.4.2012.

[46] See Art. 290 TFEU.

[47] The provisions of the Code of Conduct shall not in any way contradict the relevant provisions of the EU Regulations on CSF Funds.

The Draft Delegated Act sets out the proposed structure and content of ECCP.[48] The document emphasizes that MSs should apply the partnership principle in a transparent manner, in particular with regard to the identification of partners and their access to necessary information with respect to the obligations laid down by MSs and managing authorities related to data protection, confidentiality and conflict of interest. This means that still the EU MSs should determine the most appropriate procedures and timing to ensure involvement. With regard to the consultation processes they should:

- ensure timely disclosure and easy access to adequate information;
- allow sufficient time for partners to analyse and comment on key preparatory or draft documents;
- ensure availability of channels for partners through which they may ask questions, provide their contributions and receive feedbacks;
- ensure dissemination of the outcome of the consultation process.

ECCP will prescribe that *managing authorities* shall carry out an evaluation of the performance and the effectiveness of the partnership during the programming period. The Draft ECCP also contains the importance of *capacity building* that means the enhancement of the participation of partners in the preparation, implementation and monitoring of the CSF funds at all stages. It is necessary for partners to contribute substantially to the process in the MSs. The Draft ECCP also contains that *technical assistance* but also *an appropriate amount of CSF resources* can be allocated to capacity-building activities of social partners and NGOs involved in the programmes.

In accordance with targeted financial resources, one of the best Hungarian examples is the elaboration of a *civil construction* in the frame of the South-Transdanubian[49] Regional Operational Programme

[48] *The European Code of Conduct on Partnership – The Delegated Act – Preparatory Fiche No. 1,* 18 January 2013, available at *http://ec.europa.eu/regional_policy/what/future/pdf/preparation/fiche_code_conduct_2013_01_21.pdf* (31.05.2013).

[49] South Transdanubia is one of the seven NUTS 2 regions in Hungary; three counties make up the region: Baranya, Somogy and Tolna. It is one of the poorer regions in the whole EU on a range of economic indicators, and peripheral in the sense of being on the southern border of the country.

(STROP). The preparation of the new call was primarily influenced by the Regional Civil Conciliation Forum that was set up in 2004 (after the amendment of Act XXI of 1996 on Regional Development and Land Use Planning) as a consultative body of the Regional Development Council.[50]

Since STROP and its action plans[51] did not intend to ensure real access to subsidies for NGO applicants between 2007 and 2010, at the end of 2009 the Forum decided to initiate a campaign for the inclusion of a civil construction into the Regional OP. With the assistance of 3 civil houses and 55 NGOs, a new construction titled *'The development of the infrastructural conditions of regional civil organisations'* was carried out and adopted in 2010.[52]

Because of the demarcation requirement of activity and finance between different OPs (especially the Environment and Energy OP, the Social Renewal OP and the 6 Convergence OPs), only an infrastructure development scheme could be announced for civil organisations under Priority Axis 3 of the STROP ('The development of human public services').[53] Applicants could request inclusion of ESF cost items (education, training, etc.) up to a 30% limit, but these activities had to be in direct relationship with the implementation of the infrastructural project. The EU support could exceed 90% of the total support.

Altogether, only an amount of 300 million HUF (more than 1 million EUR) was the available grant support indicated in the call for tender. Finally 9 projects were awarded a subsidy, and all contracts were

[50] The Hungarian regions are planning (or statistical) but not administrative entities. County and municipal governments exist, but there is no regional level in the nation's formal governmental structure (no 'NUTS2' level), officials are not elected to any office at the regional level. Regional Development Councils (RDCs) for each region produce regional development plans, just like STROP.

[51] STROP is detailed in two- and/or three-year action plans (2007-2008, 2009-2010 and 2011-2013). These are government-approved documents of implementation, setting out the detailed content of the interventions. Action plans were developed on the bases of the five priority axes of STROP.

[52] The number of the new call is DDOP-3.1.3/F. The social discussion of the new call for proposals was only a two-week procedure on the website of the NDA, and the majority of the recommendations of the public could not be accepted.

[53] STROP has five priority axes: 1) Competitive economy based upon the development of urban areas; 2) The strengthening of the tourism potential in the region; 3) The development of human public services; 4) The support of integrated urban development actions; 5) The improvement of accessibility and environment development.

concluded with the beneficiaries (6 associations and 3 foundations) during 2012. These projects can serve as a good basis for more purposeful and systematic engagement of NGOs whereby they could proactively assist the future development of the region.[54]

[54] Finally, it is worth mentioning that at the end of May 2013, the Hungarian Government came out with a decree about the survey on the subsidy systems of civil organisations, and the Government requested the Minister of Human Resources to size up the free capacities of 4 ministries, and submit a proposal on their possible contribution to civil programmes, and the Minister for National Development to prepare a report on the results of the New Széchenyi Plan's constructions between 2011-2013, in which civil organisations could be potential beneficiaries for EU funding.

Regional governance: local governments

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Transparency at local and regional level in Croatia and Hungary

The importance of the principle of transparency is unquestionable. To justify this position, it is maybe enough to say that a democratic process without transparency is unthinkable. As one of five essential pillars of (the European) good governance – besides participation, accountability, effectiveness and coherence,[1] defined in the 2001 White Paper on European Governance (hereafter: the White Paper)[2] – transparency can be considered as one of the fundamental principles of democracy and the rule of law, which can serve as 'a framework for assessing the state of the political system and the realization of the constitutional principles and constitutional norms in each country'.[3] The principle of transparency and other principles of good governance apply to all levels of government: global, European, national, regional and local and, therefore, require efforts, or 'concerted action by all the European Institutions, present and future Member States, regional and local authorities, and civil society'.[4]

Although the meaning of transparency depends on many factors, including 'the context in which it is used, the function it is expected to

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[1] Here we have to mention that each principle is important by itself (but they cannot be achieved through separate actions) and that the application of these five principles reinforces those of proportionality and subsidiarity.

[2] European Commission, *European Governance: A White Paper*, Brussels, COM(2001)428, 25.7.2001, available at *http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf.*

[3] B. Smerdel, Neposredno odlučivanje i njegove ustavne granice, *Hrvatska pravna revija*, 10 (2010) 11, p. 1.

[4] White Paper, loc. cit. n. 2, at p. 9.

fulfill and therefore also the interests it is aiming to protect',[5] for the purposes of this paper we shall limit ourselves to transparency as a constituent element of local democracy.

While transparency in general, according to a (very broad) definition from the European Ombudsman Jacob Söderman, means that: 1) the process through which public authorities make decisions should be understandable and open; 2) the decisions themselves should be reasoned; 3) as far as possible, the information on which the decisions are based should be available to the public,[6] transparency at local and regional level can be viewed through the prism of 'a tool to help local authorities make public their work, properly conduct their opportunities, and be responsible for their daily activities'.[7] As a powerful force, transparency can help improve governance, strengthen local and regional development, and fight corruption; and *vice versa*.

Keeping in mind all of the above, in the first part of the paper we focus on the concept of good governance (point I.1) and the principle of transparency (point I.2), and stress the notion and importance of transparency at local and regional level (point I.3). We continue with the analysis of the different aspects of the transparency principle at local and regional level in Croatia (point II) and Hungary (point III), including, *inter alia*, the right of access to information, the transparency of the decision-making procedures, and public participation. In conclusion (point IV), we present the observed differences and similarities in the Croatian and Hungarian regulations and practices.

I. Transparency as a principle

In order to analyze the current situation regarding the various aspects of transparency at local and regional level in Croatia and Hungary, it is necessary to focus on clarifying the meaning of the notions of good governance and transparency, and revealing the specificities of local

[5] S. Prechal – M.E. de Leeuw, 'Transparency: A General Principle of EU Law', in J. Bernitz, J. Nergelius, and C. Cardner, eds., *General Principles of EC Law in a Process of Development* (the Hague, Kluwer Law International 2008) p. 202.

[6] General Report prepared by the European Ombudsman Jacob Söderman for the 1998 FIDE Congress, J. Söderman, 'The citizen, the administration and Community Law', Stockholm, June 3-6, 1998, available at http*://edz.bib.uni-mannheim.de/daten/edz-b/omb/07/fide-1-eng.pdf.*

[7] *Local Transparency&Public Participation, A Handbook*, supported by USAID, p. 15, available at *http://emi-kosovo.rti.org/repositoy/docs/Handbook-on-Local-Transparency-and-Pubic-Participation.pdf* (09.04.2013).

transparency. Since the beginning of the 1990s, when the World Bank introduced the concept of good governance,[8] major international organizations (first and foremost among them the World Bank, the International Monetary Fund, the Organization for Economic Co-operation and Development, the United Nations), policymakers and, of course, academics, have contributed to the debate on good governance. Besides these, one of the focus points of our considerations will be the European Commission's White Paper on European Governance for establishing the framework of our research.

1. Good governance

Thus, we mention as an example that in the World Bank's 2007governance and anticorruption strategy, governance is defined as 'the manner in which public officials and institutions acquire and exercise the authority to shape public policy and provide public goods and services.'[9]

The United Nations Development Program (hereafter UNDP) definition of good governance is set out in its 1997 policy paper 'Governance for Sustainable Human Development' as follows: 'Good governance is, among other things, participatory, transparent and accountable. It is also effective and equitable. And it promotes the rule of law.'[10] According to this paper, good governance's essential characteristics are participation, rule of law, *transparency*, responsiveness, consensus orientation, equity effectiveness and efficiency, accountability and strategic vision.

Very similar list of good governance characteristics are contained in the Organization for Economic Co-operation and Development (hereafter: OECD) definition, which includes following principles: respect for the rule of law, openness, *transparency* and accountability to democratic

[8] The notion of good governance was used for the first time in the 1989 World Bank Report on Sub-Saharan Africa, which characterized good governance as follows: 'Private sector initiative and market mechanism are important, but they must go hand-in-hand with good governance – a public service that is efficient, a judicial system that is reliable, and an administration that is accountable to its public'. See World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth*, November 1989, p. xii, available at *http://www.wds.worlbank.org.*

[9] World Bank, *Strengthening World Bank Group Engagement on Governance and Anti-Corruption*, March 21, 2007, p. 3, available at *http://siteresources.worldbank.org.*

[10] UNDP, *Governance for Sustainable Human Development*, January 1997, available at *http://mirror.undp.org/magnet/policy.*

institutions, fairness and equity in dealing with citizens, efficient and effective services, clear, transparent and applicable laws and regulations, consistency and coherence in policy formation, and high standards of ethical behavior.[11]

In 2009, the United Nations Economic and Social Commission for Asia and the Pacific (hereafter UNESCAP) in its paper 'What is good governance' identified eight major characteristics of good governance: 'It is participatory, consensus oriented, accountable, *transparent*, responsive, effective and efficient, equitable and inclusive and follows the rule of law. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision making. It is also responsive to the present and future needs of society.'[12] As we can see, this definition differs only slightly from previously mentioned OECD definition.

In 1996, the International Law Association established a Committee on the Accountability of International Organizations which discussed the principle of good governance in its 2002 Third Report. According to this Report, good governance contains the following elements: *transparency* in both the decision-making process and the implementation of institutional and operational decisions; a large degree of democracy in the decision-making process; access to information open to all potentially concerned and/or affected by the decision at stake; the well-functioning of the international civil service; sound financial management, and appropriate reporting and evaluation mechanisms.[13]

Apart from the definitions of various international and other organizations, some authors have also contributed to a better understanding of good governance. For example, according to *Surendra Munshi*, good governance signifies 'a participative manner of governing that functions in a responsible, accountable and *transparent* manner based on the principles of efficiency, legitimacy and consensus for the purpose of promoting the rights of individual citizens and the public interest, thus indicating the exercise of political will for ensuring the

[11] OECD, *Public Governance and Management*, available at *http://www.oecd.org*.

[12] UNESCAP, *What is good governance*, p. 1, available at *http://www.unescap.og/pdd/ps/PojectActivities/Ongoing/gg/govenance.pdf.*

[13] ILA, Committee on Accountability of International Organizations, *Third Report*, Consolidated, revised and enlarged version of recommended rules and practices, 2002, available at *http://eee-ila-hq.org/html/layout_committee.htm.*

material welfare of society and sustainable development with social justice'.[14]

Paul Hirst defines good governance as 'creating an effective political framework conductive to private economic action – stable regimes, the rule of law, efficient state administration adopted to the roles that governments can actually perform and a strong civil society independent of the state'.[15]

According to *Adrian Leftwich*, good governance has three main levels of meaning which may be defined as systemic, political and administrative. From a first, systemic point of view, good governance means a democratic capitalist regime presided over by a minimal state which is part of the wider governance of the new world order. The second, political sense of good governance explicitly means a state enjoying legitimacy and authority, derived from a democratic mandate and built on the traditional liberal notion of a clear separation of legislative, executive and judicial powers. Finally, from an administrative point of view, good governance means an efficient, independent, accountable and open public service.[16]

Even this brief review shows that the good governance concept is quite popular. But despite this popularity, or even just because of it, it is a fact that a large number of different definitions has generated to 'an increasing confusion regarding the boundaries of the concept.'[17] On the other hand, despite these different understandings, interpretations and definitions we find in the literature, there is, at least, 'some kind of "common understanding" […] with respect to the core elements of good governance.'[18] These include, without doubt, the principle of

[14] Quote by United Nations Economic and Social Council, Committee of Experts on Public Administration, *Definition of basic concepts and terminologies in governance and public administration*, E/C.16/2006/4, 2006, p. 4.

[15] P. Hirst, 'Democracy and Governance', in J. Pierre, ed., *Debating Governance* (Oxford, Oxford University Press 2000) p. 14.

[16] A. Leftwich, 'Governance, the State and the Politics of Development', *Development and Change*, Vol. 5, Issue 2 (2008) p. 371, available at *http://onlinelibrary.wiley.com/doi/10.1111/j.1467-7660.1994.tb00519.x/pdf.*

[17] C. Santiso, 'Good governance and Aid Effectiveness: The World Bank and Conditionality', *The Georgetown Public Policy Review*, Vol. 7, Number 1, (Fall 2001) p. 4.

[18] F. Weiss and S. Steiner, 'Transparency as an element of Good Governance in the Practice of the EU and the WTO: Overview and Comparision', *Fordham International Law Journal*, Vol. 30, Issue 5 (2006) p. 1547.

transparency, which is the core element of nearly all definitions of good governance.[19]

This is also the case with the 'European understanding' of good governance. Namely, in the European context good governance was defined by the European Commission in the 2001 *White Paper on European Governance* (hereafter: the White Paper), which 'proposes opening up the policy-making process to get more people and organizations involved in shaping and delivering EU policy' and which 'promotes greater openness, accountability and responsibility for those involved'.[20] The White Paper defines good governance as a set of rules and methods based on five principles: *openness*/*transparency* ('the Institutions should work in a more open manner'), *participation* ('improved participation is likely create more confidence'), *accountability* ('each of the EU institutions must explain and take responsibility for what it does'), *efficiency* ('policies must be effective and timely') and *coherence* ('policies and action must be coherent and easily understood').[21] Each principle is important by itself for establishing more democratic governance, but they cannot be achieved through separate actions. They underpin democracy and the rule of law in the Member States, and they apply to all levels of government – global, European, national, regional and local.[22] Finally, the application of these five principles is underlined by two further principles: proportionality and subsidiarity.

2. Principle of transparency

As has been shown above, the principle of transparency is one of the essential elements of good governance. Although the exact meaning of transparency depends on many factors, including 'the context in which it

[19] Besides transparency, other basic principles of good governance include: participation, rule of law, accountability, responsiveness, equity, effectiveness and efficiency. According to Vladimíra Dvořáková, the hierarchy of these principles can be debated – however, we can agree that the most important principles are the rule of law, accountability, and transparency. See V. Dvořáková, 'The Metamophorsis of Governance in the Era of Globalization', in *The Scale of Globalization. Think Globally, Act Locally, Change Individually in the 1st Century* (Ostrawa, University of Ostrawa 2011) p. 12, available at *http://conference.osu.eu/globalization/publ2011/11-16_Dvorakova.pdf.*

[20] A White Paper, loc. cit. n. 1, at p. 3.

[21] A White Paper, loc. cit. n. 1, at p. 10.

[22] Ibid.

is used, the function it is expected to fulfill and therefore also the interests it is aiming to protect',[23] and this is probably the reason why it often remains unclear what transparency actually means, one can recognize an obvious 'common-core content in the notion of transparency, namely the opposite of opaqueness, complexity or even secretiveness'.[24]

As we will see, in defining transparency 'scholars remain broad and somewhat vague'.[25] For example, according to *Craig and de Búrca* the notion of transparency includes 'holding meetings in public, the provision of information and the right of access to documents'.[26]

The definition given by the Advocate General *R. J. Colomer* in the case C-110/03 (Belgium v. Commission) can also be 'regarded as satisfactory to describe the general contours'[27] of the notion of transparency. According to this definition, 'transparency is concerned with the quality of being clear, obvious and understandable without doubt or ambiguity'.[28]

The European Ombudsman *Jacob Söderman* also gave a (very) broad definition of transparency. According to him, transparency means that: 1) the process through which public authorities make decisions should be understandable and open; 2) the decisions themselves should be reasoned, and 3) as far as possible, the information on which the decisions are based should be available to public.[29]

Janet Mather has also identified three dimensions of transparency: 1) the comprehensibility and availability of information; 2) access to the thinking behind decision, and 3) opening-up the decision-making process to non-governmental participation.[30]

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[23] See n. 5.

[24] Prechal, de Leeuw, loc.cit. n. 5, p. 202.

[25] O. Heitling, *The principle of transparency in public procurement* (Maastricht University, Faculty of Law 2012) p. 4.

[26] See ibid.

[27] Referred to by Karageorgou. V. Karageorgou, 'Transparency principle as an evolving principle of EU law: Regulative contours and implications', p. 1, available at *http://www.idec.gr/iier/new/Europeanization_Paper_PDF*.

[28] Opinion of Advocate General: Opinion od Advocate General Colomer in Case C-110/03 *Commission v. Belgium* [2005] ECR I-02801, para. 44.

[29] See n. 6.

[30] See W. Davis, *Rights and remedies for public access to documents as an aspect of multidimensional transparency within the European Union* (Durham theses, Durham

According to *Bo Vesterdorf*, the former president of the Court of First Instance of the European Communities, it is important to emphasize that while the notion of transparency, as invoked by politicians, essentially involves only the question of access to information for the general public, it actually covers more than that – namely, it covers (at least) the four principles: 1) the right to a statement of reason for a decision; 2) the right to be heard before a decision is taken; 3) a party's right of access to the file, and 4) the public's right of access to information.[31]

Transparency in the *UNESCAP*'s definition means that: 1) decisions taken and their enforcement are done in a manner that follows rules and regulations; 2) information is freely available and directly accessible to those who will be affected by such decisions and their enforcement, and 3) enough information is provided in easily understandable forms and media.[32]

The European Commission *White Paper* defined the principle of transparency as follows: 'the institution should work in a more open manner. Together with the Member States, they should actively communicate about what the EU does and the decisions it takes. They should use language that is accessible and understandable for the general public. This is of particular importance in order to improve the confidence in complex institutions'.[33]

The previously quoted definitions show that transparency is more than a popular or fashionable expression. The importance of the principle of transparency is unquestionable and to justify this position it is maybe enough to say that a democratic process without transparency is unthinkable. As *Prechal and E. de Leeuw* point out, the principle of transparency functions at (at least) two levels: 1) at the political or constitutional level, transparency operates in respect of the legislative and general policy decision-making process and is closely related to the principle of democracy and legitimacy, and 2) at a (more concrete) administrative level. Onwards, 'the most well developed aspect of transparency is that where it is linked to open government, and in particular the right of public access to documents. Openness in the

University) p. 28, available at: *http://etheses.dur.ac.uk/3834/1/3834_1395.pdf?UkUDh:CyT*.

[31] See B. Vesterdorf, 'Transparency – Not Just a Vogue Word', *Fordham International Law Journal*, vol. 2, Issue 3 (1998) pp. 902-903.

[32] See n. 12, at p. 2.

[33] A White Paper, loc. cit. n. 1, at p. 10.

decision-making process and in particular the right of public access to documents underlying this process has been closely linked to the principles of democracy and legitimacy'.[34]

In the EU context, the close link between transparency and democracy was for the first time clearly recognized in Declaration No. 17 on the right of access of information, which was attached to the Treaty of Maastricht and which emphasized that 'transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration'.[35] This close link was reaffirmed by Advocate General Tesauro in the case *Netherlands v Council* in 1995.[36] Today, the link between transparency and democracy is well established and this is especially evidenced by case-law. For example, in the Opinion of Advocate General Maduro of 18 July 2007 in case *Sweden v. Commission* one can find the following explanation: '[…] transparency aimed at giving the public the widest possible access to documents guarantees "greater legitimacy and is more effective and more accountable to the citizen in a democratic system", because it allows citizens "to carry out genuine and efficient monitoring of the exercise of the powers vested in the Community institutions"'.[37]

Also, as *Vasiliki Karageorgou* points out, certain aspects of the transparency principle are also founded in the rule of law principle. In particular, 'the aspect of transparency which relates to the legal clarity in terms of setting clear, simple and understandable laws, can be founded, even indirectly, on the "rule of law" principle. This is due to its close relationship with the principle of legal certainty, which is recognized as an integral part of the rule of law principle and contributes to the creation of a "foreseeable" legal environment'.[38]

The analysis of the above considerations allows us to make some conclusions regarding the specific aspects or attributes of transparency.

[34] Prechal, de Leeuw, loc. cit. n. 5, at p. 205.

[35] Declaration No. 17 on the right of access to information, available at *http://www.eurotreaties.com/maasrtichtfinalact.pdf.*

[36] Namely, Advocate General was of the opinion that the principle of democracy, which constitutes one of the cornerstones of the Community edifice, is the basis for the right of access to documents. See Opinion of the Advocate General Tesauro of November 1995, Case C-58/94 (Netherland v Council), point 14-16.

[37] Opinion of Advocate General Maduro of 18 July 2007, Case C-64/05 (Sweden v. Commission), point 41. For some further cases, see n. 18.

[38] Karageorgou, loc. cit. n. 27, at p. 4.

The most familiar and most developed aspect of transparency is the openness of the decision-making process, and in particular *access to documents.* In this sense, for example, access to documents is an essential component of the policy of transparency implemented by the European institutions. Under the Treaty on the Functioning of the European Union, all EU citizens and all residents of the EU enjoy this right, which is governed by Regulation (EC) No 1049/2001.[39] In the scope of the relevant Regulation fall 'all documents held by an institution, that is to say, documents drawn up or received by it and its possession, in all areas of activity of the European Union', where a document is defined (broadly) as 'any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere or responsibility'.[40] The Regulation establishes the principle of the 'widest possible access to documents', [41] hence the exceptions to public access are to be interpreted as restrictively as possible. According to the Regulation, there are two categories of exceptions that limit or preclude access: 1) mandatory exceptions [Article 4(1)] – exceptions relating to public security, defense and military matters, international relations, the financial, monetary or economic policy of the Community or a Member State, and 2) discretionary exceptions [Article 4(2)] – exceptions relating to commercial interests of a natural or legal person, including intellectual property, court proceedings and legal advice, the purpose of inspections, investigations and audits. Except the right of public access to documents, transparency in the sense of openness at the EU level includes: openness in the decision-making process, clarity of legislative procedures, clear drafting, and obligation to state reasons.[42]

Furthermore, according to the United Nations Public Administration standards, transparency is reflected in: 1) applications of laws on access to information; 2) transparency of normative procedures; 3)

[39] Regulation (EC) No 1049/2001 of the European Parliament and the Office of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

[40] Art. 3(a) of the Regulation (EC) No 1049/2001.

[41] T. Heremas, *Public Access to Documents: Jurisprudence Between Principle and Practice*, Egmont Papers, no. 50, 2011, p. 16, available at *http://www.egmontinstitute.be/paperegm/ep50.pdf.*

[42] See Prechal, de Leeuw, loc. cit. n. 5, at pp. 206-228.

broadcasting of parliamentary sessions; 4) publishing of auditing reports on parliament's and government's activities. In addition, transparency is endangered by: 1) discretional decisions; 2) untimely publishing of decisions rendered by public bodies; 3) insufficient resources for publishing of information; 4) non-accessibility of information to persons with disability; 5) lack of political culture of civil servants in institutions that are providing public service to citizens.[43]

As we have seen, the principle of transparency is multifaceted, but for the purposes of this paper we shall limit ourselves on transparency as a constituent element of local democracy. Indeed, as we have seen, there are many positive indicators that could be used regarding transparency. As a powerful force, transparency can, *inter alia*, help improve governance, fight corruption, but also strengthen local and regional development; and *vice versa*.

3. Transparency at local and regional level

Transparency at local and regional level does not differ conceptually from other levels. However, there are some *peculiarities* of local and regional transparency, which include, according to *Ivan Koprić*, the following: 1) local and regional authorities are closer, more visible and accessible, even physically; 2) local and regional authorities are much more politicized; 3) the greater interest of the citizens; 4) degree of decentralization (weaker decentralization, more possibilities for hiding through the units of central government).[44]

According to the United Nations Project Office on Governance, local government transparency includes the following dimensions: 1) *openness* – which includes: availability of government documents for the implementation of oversight system for check and balance; a clear guideline for administrative procedural law and rules regarding the right to information and citizens' right to know; media freedom; information and knowledge sharing between sectors and among agencies for economic and social development; various methods for communicating

[43] See S. Barić, 'Principles of good governance and the Republic of Croatia', T. Drinóczi, et al., eds., in *Contemporary legal challenges: EU – Hungary – Croatia* (Pécs – Osijek, Faculty of Law, University of Pécs and Faculty of Law, J. J. Strossmayer University of Osijek 2012) p. 241.

[44] See I. Koprić, *Sustav transparentnosti lokalnih vlasti* (Savjetovanje Instituta za javnu upravu, Zagreb, 16. studenoga 2011), availabe at *http://www.slideshare.net/ijuzagreb/kopri-transparentnost.*

government work and functions to citizens and local community; trust-building efforts to create a culture of community ownership by citizens and a culture of inclusiveness and diversity in local governance; 2) *participation* – which includes: citizen and stakeholder consultation and participation during policy agenda-setting, formulation, implementation, monitoring and evaluation; administrative law and rules regarding citizen participation methods and procedures; promotion and communication of the law and rules regarding citizen participation; citizen participation in oversight system on local government performance; citizen, business, community organizations, and NGO's coalitions for a coordinated voice on corruption and citizens' right to access; citizen, business, community organizations, and NGO's coalitions for volunteerism, civic education, and corporate governance; 3) *integrity* – which includes: control mechanism for corruption and public awareness of integrity; professionalism and code of conduct in government, community organizations, NGO's, media, and business; motivation for public service; recognizing government officials and community leaders who show integrity; shared norms of fair contract and negotiation process.[45]

In order to analyze the main dimensions of transparency at local and regional level in Croatia and Hungary, we shall limit our research to the following dimensions: public sessions of local councils/assemblies; openness of the executive; application of laws on access to information; cooperation with civil society; direct citizens' participation in the decision-making process. In our analysis we first make an overview of the related regulatory background of both states and then proceed with the presentation of the actual implementation of these measures and the principle of transparency, based on available research results.

II. Croatia

1. Regulations of 'local' transparency

The most important legal source on 'local' transparency in general, or transparency on local and regional level in Croatia in particular, is the *Constitution of the Republic of Croatia*.[46] Namely, the new (2010

[45] See Local Transparency&Public Participation, loc. cit. n. at 7, pp. 18-19.

[46] The Constitution of the Republic of Croatia, Official Gazette, Narodne novine, NN 85/2010, consolidated version.

Revision of the Constitution[47]) Article 38(4) of the Constitution (finally) guarantees the right of free access to information. This section reads: The right of access to information in the possession of public authorities shall be guaranteed. Restrictions on the right of access to information must be proportional to the nature of the necessity for restriction in each individual case, as well as be necessary in a free and democratic society, and shall be prescribed by law.[48]

Besides the Constitution, the right of access to information is protected by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Article 10).[49] Furthermore, Croatia has also ratified the *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, which combines access to information and protection of the environment.[50] Here it should be noted that in a following phase should certainly involve the immediate ratification of the Council of Europe Convention on Access to Official Documents.

The 'umbrella act' for the protection of the right of access to information is the new *Free Access to Information Act*, which was adopted in February of this year, following a decade of law amendments, public campaigns, criticisms and public discussions.[51]

[47] Until then, according to the former Article 38(3) of the Constitution, right to freedom of reporting and access to information was only guaranteed to journalist.

[48] In the context of the 2010 Revision of the Constitution, certain important improvements to the right of free access to information have been added. However, as *Branko Smerdel* states, 'an opportunity to strengthen the protective mechanism for assessing whether public interest was strong enough to override the right of access on information has not been used'. B. Smerdel, 'The constitutional order of the Republic of Croatia on the twentieth anniversary of the "Christmas" Constitution. The Constitution as a political and legal act', in *The Constitution of the Republic of Croatia* (Novi informator, Zagreb 2011) p. 94. However, this has been done through new Free Access to Information Act.

[49] Pursuant to the Article 10 of the European Convention, everyone has the right to freedom of expression and this right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

[50] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, NN – International Treaties 1/07.

[51] The former Free Access to Information Act was adopted in 2003, NN 172/03. This Act has suffered numerous critics, which were aimed primarily to inadequately regulated proportionality and public interest test, and to the need to introduce a new oversight body – Information Commissioner. See e.g. Đ Gardašević,

After a decade of implementation problems of the 2003 Act, the new Act brings some positive changes. For example, instead of the inadequate position of the previous oversight body (the Data Protection Agency), there is a new oversight body, the Information Commissioner, dedicated to the promotion and protection of freedom of information. For a better understanding, this Act clearly defines certain terms, such as 'public authorities', which explicitly includes local and regional self-government [Article 5(2)]. Also, very important change relates to the full proportionality and public interest test, conducted by every public body and Information Commissioner, for *all* legal exceptions.[52]

The Act from 2013 is in line with the Constitution in order to achieve the principles of transparency and free access to information. Also, in this Act, Directive 2003/98/EC of the European Parliament and the Council of 17 November 2003 on the re-use of public sector information is incorporated.

Transparency on local and regional level in the sense of openness of council/assembly sessions to the public is explicitly prescribed by Article 37 of the *Act on Local and Regional Self-government*.[53]

According to the *Code of Consultation with the Interested Public in Procedures of Adopting Laws, Other Regulations and Acts*,[54] general principles, standards and measures for conducting consultations with the interested public in the procedures of enacting laws and adopting other

'Transparentnost javne vlasti na lokalnoj i područnoj (regionalnoj) razini [The transparency at local and regional level]', in Kregar, et al., eds., *Decentralizacija* (Centar za demokraciju i pravo Miko Tripalo, Zagreb 2011) pp. 135-158.

[52] Namely, the previous Act prescribed that the Data Protection Agency does not perform a public interest test in cases of refusal of access to classified data, including the business secrets, since those are prescribed within the same act as classified data (Data Secrecy Act). In addition, in cases where access to information has been refused by the highest state institutions, an appeal could only be field directly to the Administrative Court. The Court's practice, however, has shown that the Court, instead of performing the public interest test, simply rules that refusal of access to information was based on legal exceptions. See *New FoIA – A Step towards Open Governmen*t, available at *www.gong.hr*.

[53] Article 37 reads as follows: Sessions of the representative body shall be public. The public may be excluded exceptionally as provided by special law and general act of the unit. The voting at the sessions of the representative body shall be public, unless the representative body decides to vote on a certain issue by a secret ballot, according to the standing orders or other general act. Act on Local and Regional Self-government, NN 18/13, consolidate version.

[54] NN 140/09.

regulations are appropriately applied by the bodies of local and regional self-government units.

Finally, it is worth mentioning that the Government of the Republic of Croatia adopted in April 2012 the Action Plan for the implementation of Open Government Partnership for the period 2012-2013, according to which the Ministry of Public Administration drafted a recommendation for local and regional self-government units in order to support the principle of transparency at local and regional level.[55]

2. Transparency of representative and executive bodies

A general assessment of the current situation regarding transparency at local and regional level can be obtained from the results of research conducted by a very well-known (and respected) NGO in Croatia, GONG, within the framework of project LOTUS (Local, accountable and transparent government and self-government). This research, entitled '*Research findings on transparency and openness of activities of the local and regional self-governments units in the Republic of Croatia'*[56] was conducted in the period September 2011 – February 2012, in cooperation with the Association of Cities of the Republic of Croatia. The research covered each of the 576 units of local and regional self-government (127 cities, 429 municipalities and 20 counties) in order to determine the present situation and, in case of cities and municipalities, assess the progress made since the first round of research (conducted in 2009).[57]

The level of transparency was measured by taking into account *51 indicators* with regard to *five basic dimensions* of transparency. Sources of data used in research were the statutes of cities, municipalities and

[55] This document especially recommends the publishing of agendas, including all materials, of local and regional council/assembly sessions online prior to the session. The recommendation is available (in Croatian) at *http://www.uprava.hr/UserDocsImages/Lokalna_samouprava/191212_PreporukeJLPS*.

[56] The full research report is available (in Croatian) at GONG's Internet pages: *http://www.gong.hr/download.asp.?f=dokumenti/LOTUS2011_ISTRAZIVACKIIZVJESTAJ.pdf.*

[57] In 2009, the research has been conducted in every city and municipality, and in 2011 it has been additionally extended to include the counties. The research was conducted within the project entitled 'CAT against corruption', funded by the IPA EU Funds, and co-funded by the Government's Office for Cooperation with NGO's and the National Foundation for Civil Society Development.

counties and the Rules of Procedures of their representative bodies, official web pages, survey questionnaires that were faxed and e-mailed to all units and telephone calls made to the units' central telephone number. In addition, 'mystery' access to information request was sent to all of the 578 local and regional self-government units.

2.1. According to this research, the dimension '*Openness of Council/Assembly sessions to public*' contains a series of indicators, whose analysis shows the level of compliance with the mentioned Article 37 of the Act on Local and Regional Self-government. The research used the following indicators: 1) publicity of activities elaborated in the Statute or Rules of Procedure; 2) citizens entitled to monitor the council sessions; 3) at least one council session announced online within the past year; 4) agenda available online prior to the session; 5) question time defined by Rules of Procedure or the Statute; 6) Rules of Procedure/Statute prescribing the 'question time' at the beginning of the session; 7) delivery of materials to the council members prior to the session defined by Rules of Procedure/Statute; 8) delivery of materials to other interested parties (media, political parties, local committee councils etc.) prior to the session prescribed by Rules of Procedure; 9) working materials for council session published online; 10) one or more official minutes of council session held within the past year published online; 11) one or more press-releases from the council session held within the past year published online; 12) invitation to the last council session sent to the media; 13) press-release sent out after the last council session; 14) media present on the last council session; 15) official web page containing the full recording of at least one session held within the past year (video or audio).[58]

The analysis has shown that local and regional units achieved 54% of maximum possible points,[59] and only 15% of them met more than 75%. Segmented by units, counties have met 75%, cities 70% and municipalities 48% of indicators (on average). The analysis of this dimension also shows that additional efforts should be made to include

[58] In comparison to the research conducted in 2009 (only cities and municipalities), the greatest progress (20%) has been made in 'delivery of materials to other interested parties prior to the session'.

[59] This percentage is also the highest result achieved in the framework of all dimensions.

systematic announcements, agendas, session materials, minutes and press releases following the session, on the web pages.[60]

2.2. The dimension '*Openness of the Executive Authority Activities to the Public*' also contains a series of indicators: 1) statute published directly on the web page; 2) Rules of Procedure of the council/assembly published directly on the web page; 3) Official Gazettes available on the web page or via link; 4) Official Gazette available to citizens for direct insight, besides online; 5) at least one decision of the mayor/county prefect reached within the past year published directly on the web page; 6) mayor/county prefect has a specified time for reception of citizens; 7) budget for 2011 published directly on the web page in the form of an official document; 8) other ways of informing the citizens on the Budget for 2011 useful to citizens; 9) zoning plan published on the web page; 10) zoning plan available to citizens for direct insight, besides online; 11) public procurement tenders held within the past year published directly on the web page or via the link; 12) list of public procurement contracts signed within the past year published online; 13) website containing a list of business/economic entities whit which local/regional unit cannot sign contracts on public procurement; 14) contact information of the coordinator in charge of consultation with the interested public in accordance with the Code of Consultation With the Interested Public published on the web page; 15) at least one report on the consultation with the interested public, in accordance with the Code of Consultation, published on the web page.[61]

In this dimension, local and regional self-government units achieved 42% of maximum possible points, and only 5% of them met more than 75%. Segmented by units, counties have met 53%, cities 60% and municipalities (only) 36% of indicators (on average). The analysis of this dimension shows that considerably more efforts should be invested in online publishing of official newsletters and the decisions of the executive body within the relevant section of a web page. Also, one of

[60] Let's mention here that the research indicator was '*at least one* announcement published in the past year'. However, had the indicator been 'systematic publishing', the results would have turned out much worse.

[61] In comparison to the research conducted in 2009, cities and municipalities have achieved a higher percentage of points (33% in 2009 – 51% in 2011/12). The greatest progress have been achieved in 'zoning plan published on the web page' (2009 – 29%, 2011/12 – 61% of cities and municipalities). The only regression refers to the indicator 'other ways of informing citizens on the budget' (-8%).

the lowest-ranked indicators, 'web page containing additional information on the budget useful to citizens', could easily be improved. Finally, considerably more effort should be invested in the implementation of the Code of Consultations with the Interested Public.

3. Implementation of the Act on the Right of Access to Information

The dimension '*Implementation of the Act on the Right of Access to Information*' contains seven indicators: 1) name or number of the information officer/person in charge of citizens' inquiries available by calling the central telephone number; 2) local and regional self-government unit's information officer appointed; 3) contact information of the information officer/person in charge of citizens' inquires published directly on the web page; 4) contact form available on the web page; 5) local and regional self-government unit has an information catalogue in accordance with the Act; 6) information catalogue published directly on the web page; 7) information on the citizens' right of access to information – direct mention of the Act on the Right of Access to Information provisions, available online.[62]

In this dimension, local and regional self-government units achieved 47% of maximum possible points. Only 13% of units met more than 75% of maximum possible points. Segmented by units, counties have met 62%, cities 60% and municipalities 41% of indicators (on average). This is certainly not satisfactory result, especially having in mind the fact that this is a legal obligation and that improving of situation requires a simple activity and minimal resources (for example, putting up an online contact form). The analysis of this dimension also shows that considerably more efforts should be invested in educating the local and regional self-government units on the implementation issues.

4. Cooperation with civil society organizations

The dimension '*Cooperation with civil society organizations*' has the lowest score. The relevant indicators for the analysis were: 1) valid document formalizing the cooperation between local authorities and

[62] In comparison to the research conducted in 2009, cities and municipalities have achieved a minimal progress in this dimension (25% in 2009, 32 % in 2011/12). The greatest progress has been achieved in 'contact information of the information officer/person in charge published directly on the web page' (21%). The only regression refers to the indicator 'name or number of the information officer/person in charge available by calling the central telephone number' (-8%).

civil society organizations (hereafter CSOs) signed; 2) at least one call for proposals for CSOs published in 2010 or 2011; 3) information on the CSO call for proposal or text of the call for proposals published in the past two years available on the web page; 4) list of CSOs including the amounts of financial support received from the local and regional self-government unit in the past two years available on the web page; 5) Youth Council at the level of city/municipality established in accordance with the Law; 6) Council representatives held at least one meeting or enabled the Youth Council representatives to take part in at least one council/assembly session held in the past year; 7) the local and regional self-government unit representative body requested and received at least one statement by the Youth Council on issues within the scope of their mandate, during the current mandate; 8) another consultation body composed of CSO and/or business representatives established at city/municipality level.[63]

In this dimension, the average achievement was only 29% of possible points. Only 4% of local and regional self-governments units met more than 75% of maximum possible points. Segmented by units, counties have met 50%, cities 51% and municipalities only 15% of indicators (on average). Generally bad results in this dimension are probably the result, *inter alia*, of the fact that only 14% of local and regional self-government units have a document formalizing the cooperation between local authorities and civil society organizations.

5. Citizen direct participation in decision making

The dimension '*Citizen direct participation in decision making*' includes only cities and municipalities and consists of five indicators: 1) municipality/city statute defines the structure of community level local self-government; 2) community level local self-government elections held over the past four years; 3) currently functional local committees at the city/municipality level; 4) contact information on community level self-government available on the web page; 5) at least one advisory referendum conducted over the past two years.[64]

[63] In comparison to the research conducted in 2009, it can be seen that results are almost unchanged. However, the biggest progress can be seen in the dimension 'at least one call for proposal for CSO's published' (2009 – only 13%, 2011/12 – 33%).

[64] In comparison to the research conducted in 2009, the results are slightly worse (2009 – 65% of possible points, 1011/12 – 60%). The largest regression refers to the indicator 'currently functional local committees at the city/municipality level' (-7%),

In this dimension, units have achieved 48% of possible points. Only 18% of local self-governments units met more than 75% of maximum possible points and segmented by units, cities have met 63% and municipalities 43% of indicators. The analysis of this dimension shows that the criteria which are most satisfied are formal criteria, while in practice the situation is a little different – for example, despite the fact that 97% of cities and municipalities have the statute which defines the structure of community level local self-government, only 65% of those held elections for this community level over the past four years. As expected, the worst indicator is linked to the advisory referendum, which was conducted in only three municipalities and one city over the past two years.

6. Level of transparency?

The results of this research certainly represent a valuable contribution to the evaluation of the level of transparency of local and regional self-governments. Although the situation is a little better when compared to the results from 2009, it still has not reached the satisfactory level. The transparency level still shows a significant improvement potential, especially in municipalities. Namely, the research has shown, *inter alia*, that: 1) as much as 70% of local and regional self-government units are not transparent; 2) only 6% of local and regional self-government units are exceptionally transparent; 3) the highest transparency level has been achieved in cities;[65] 4) the lowest level has been recorded in municipalities;[66] 5) the counties have proven as transparent; 6) the transparency level is primarily the matter of political willingness and understanding of the value and importance of transparency, and not so much the matter of financial or institutional capacity;[67] 7) the majority

while the greatest progress has been achieved in the indicator 'contact information on community level local self-government available on the web page' (+5%).

[65] Twelve the most transparent cities (with the points out of maximun 10), are: Rijeka (9,43), Samobor (9,10), Labin (9,10), Pula (9,00), Opatija (8,99), Crikvenica (8,98), Zaprešić (8,75), Slavonski Brod (8,55), Kutina (8,53), Novi Marof (8,50), Osijek (8,45) and Čakovec (8,45).

[66] The results have shown that 85% of municipalities are not transparent, compared with a significantly lower percentage of not transparent cities (27%) and counties (5%).

[67] Namely, although there are (indirect) correlations between the level of transparency and the budget amount, the research has shown that exceptionally transparent governments can be found among the cities, among the municipalities,

of local and regional self-government units makes almost no effort to include citizens into political decision making, and 8) the criteria which are most satisfied are formal criteria.[68]

So it can be concluded that in the case of the principle of transparency at local and regional level we may also detect two already well-known problems of the Croatian legal system: 1) relatively good and/or acceptable regulations, but significantly problematic practice, and 2) the still prevailing 'culture of administrative and political secrecy', in which the public administration failed to learn that its purpose is to serve the citizens.

III. Hungary

In Hungary the regulation of 'local transparency' is founded on the Fundamental Law of Hungary.[69] This document contains – besides the declaration of the principles of the rule of law and democracy [Article B)] – the most important rules relating to the existence of local governments and the transparency of state organs – including local governments. Apart from the above, mention should be made of the following legal regulations: the Act on the Local Governments of Hungary (hereinafter Local Government Act),[70] the Act on the Right of Informational Self-Determination and on Freedom of Information,[71] the Act on Legislation and the Act on Public Participation in Developing Legislation.[72]

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and among the counties, which points to the conclusion that transparency is primarily related to its benefit for the community, rather than financial and other capacities. For example, the City of Split, despite the second largest budget in the country, has achieved lower result than municipality Krnjak, whose budget amount is only 0,57% of Split's one.

[68] The research has shown that: the most commonly found indicators are the ones related to the formal mechanisms; the less common ones are those related to transparent publishing of relevant decisions and documents, while the least frequent indicators are the ones enabling the truly citizens participations in the decision-making process.

[69] The consolidated version of the text in effect at the time of finishing the paper – incorporating all amendments – was published in the official gazette on 1 April 2013. See *magyarkozlony.hu/pdf/16526*.

[70] Act CLXXXIX of 2011 on the Local Governments of Hungary.

[71] Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information.

[72] Act CXXX of 2010 and Act CXXXI of 2010.

1. Regulation of 'local' transparency

Pursuant to Article 31(1) of the *Fundamental Law*, local governments shall be established in Hungary to administer public affairs and exercise public power at a local level; related rules – as stipulated by paragraph 3 of the abovementioned Article – shall be defined by a cardinal Act. Article 32(6) declares the properties of local governments shall be public properties which shall serve for the performance of their duties.
The Fundamental Law, beyond 'public property', introduces the concept of 'national asset' as well; Article 38(1) stipulates that the properties of the State and local governments shall be national assets. The management and protection of national assets shall aim to serve the public interest, to satisfy common needs and to safeguard natural resources in consideration of the needs of future generations. The requirements for the preservation, protection and responsible management of national assets shall be defined by a cardinal Act.[73]
Article 39(2) is also essential as it states that every organization managing public funds shall be obliged to *account* for its management of public funds *to the general public*. Public funds and national assets shall be managed according to the *principles of transparency* and the elimination of corruption. The data related to public funds and national assets shall be data of public interest.
Pursuant to Article N) of the Fundamental Law, Hungary shall apply the principle of balanced, *transparent* and sustainable budget management; for the application of this principle the Parliament and the Government shall have primary responsibility. However, according to paragraph (3), the Constitutional Court, courts, local governments and other state organs shall be obliged to observe these principles in performing their duties. It has to be also mentioned that in accordance with Article XXVI, the State shall strive to use the latest technical solutions and the achievements of science to make its operation efficient, raise the standard of public services, *improve the transparency of public affairs*, and promote equality of opportunity.
In general, the Local Government Act comprising statutory regulations relating to local governments contains few provisions relating to transparency. At the same time, one may mention Article 2(2), pursuant to which, in local public affairs local governance expresses and realizes the local public will democratically, *creating a wide range of publicity*.

[73] Act CXCVI of 2011 on National Assets.

On the other hand, pursuant to Article 114, local governments shall operate an information system – that may be linked to the state information system – which ensures that financial, management, administrative and other basic tasks are performed based on uniform rules and *transparently*, this system shall also function as a means of continuous financial control by the state. The range of data to be recorded obligatorily in the system shall be defined by legislation.[74]
Following the review of relevant regulations, it may be stated that – from a formal aspect and in general – the principle of transparency is present in the Hungarian legal environment. Concerning the evaluation of specific detailed rules and practical implementation, the following analysis may provide some help.

2. Public meetings of local bodies

2.1. Article 46(1) of the Local Government Act lays down as a general rule that the meetings of the body of representatives shall be open to the public. Exceptions are contained in subsection (2), pursuant to which the body of representatives
a) shall hold a meeting in private when discussing official matters of the municipality, matters relating to conflict of interests, dishonourable conduct, awards of decorations, the imposition of disciplinary punishment, or conducting a procedure relating to asset declarations;
b) shall hold a meeting in private when discussing an election, appointment, dismissal, giving or withdrawing an executive assignment, initiating a disciplinary procedure and when discussing a personal matter which requires the taking of positions if the party concerned does not agree to a public discussion;

[74] When examining publicity implemented in local self-governance, first of all, the notion of public interest must be clarified in order to render possible the interpretation of the need for publicity connected with it. In this relational context the creation and ensuring of publicity means the existence of a local method for direct contact between the local government apparatus and the society of the settlement. The question as to what channel of communication is meant by this method is always decided by the rules of organization and operation of the given body of representatives. Kis Mónika Dorota, *A közmeghallgatás helyi önkormányzati jogintézménye* [The local government institution of public hearing] (Doktori értekezés, PTE ÁJK Doktori Iskolája, Pécs 2012) p. 14., 17., available at *http://doktori-iskola.ajk.pte.hu/files/tiny_mce/File/Vedes/Kiss_M_D/ertekezes_nyilv_kiss_md.pdf.*

c) may decree a meeting to be held in private when discussing the disposition of its property, and defining the conditions of and discussing the tender invited by it, if a public discussion would infringe the business interests of the local government or other persons concerned.
The voters – with the exception of a meeting held in private – may inspect the proposals of the body of representatives and the minutes of their meetings. The possibility of access to information of public interest and public information must be ensured even in the case of meetings held in private. Decisions of the body of representatives taken at a meeting held in private shall also be made public.[75]
2.2. A *recent research* elaborating the practical aspects of the topic with due thoroughness has established that the persons affected are usually involved in the decision-making as external participants, while regional parliamentary representatives, the leaders of minority self-governments, heads of institutions and, in several municipalities, also the leaders of civil organizations and honorary citizens usually participate in the process as permanent guest participants.[76] Based on the *sample examined*,[77] the participants of the research concluded that the conditions relating to the participation of inhabitants in the meetings are laid down everywhere – with two exceptions – in the rules of organization and operation, moreover, they are defined in such a way that inhabitants are also entitled to make comments on the items on the agenda without prior announcement. In this respect, different practices have evolved: in some places the body of representatives must vote on allowing the contribution, in other places a definite period of time is devoted to contributions, and apart from these, permission to speak may also be granted by the mayor at the request of the person wishing to contribute. Otherwise – also with two exceptions – the rules governing the order of speaking at the meetings of the body of representatives and

[75] Art. 52(3) of Local Government Act.
[76] *A helyi önkormányzatok működésének átláthatósága – kérdőíves felmérés tükrében – Esettanulmány*. [Transparency in the Operation of Local Governments – as Reflected in a Survey Based on Questionnaires – a Case Study.] Project № HUSK/0901/1.5.1/0246 (hereinafter referred to as Case Study) p. 7., available at *http://www.transparency.hu/uploads/docs/esettanulmany.pdf*.
[77] The research was carried out in two 'rounds'; in the first stage the questions were addressed to the leaders of thirty settlements, then, later on, to the leaders of further forty settlements, and altogether twenty-one replies were received.

the committees are generally laid down by the rules of organization and operation of the local governments.[78]

It is also worth to note another research based on a *substantial sample*, which subjected the *websites* of Hungarian local governments to a manifold analysis.[79]

The participants of this research have shown that although point II/8 of the Standard Publication List contained in Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information lays down an obligation relating to the publishing of the minutes of meetings, the minutes of local government bodies were accessible only on 35% of the websites examined.[80] One may notice a significant difference between the individual types of municipalities. Minutes of meetings are shared by almost all districts in Budapest and the county seats, but only by slightly more than 20% of the villages.[81] With regard to the minutes of meetings, the researchers also examined 'updating': 25% of the most recently published minutes were recorded at meetings held earlier than 2012 – the year of the research.[82] Pursuant to point II/9 of the Standard Publication List contained in the Freedom of Information Act, local governments are to publish '[…] motions and proposals submitted to public meetings of the councils of municipal governments' following the time of submission with immediate effect. According to the cited research, the agenda of the forthcoming meeting of the local government body can be found only on 6% of the websites examined.

It must also be noted that under Article 60 of the Local Government Act regarding the convening, operation, publicity, quorum and decision-making of a meeting of a committee, the implementation of the decisions thereof, the exclusion of committee members and the contents of the minutes of meetings, the rules applicable to the body of

[78] Case Study, n. 76 at p. 7.

[79] *Korrupciós kockázatok, törvénytisztelet és a világháló. A magyar önkormányzatok törvényszegő magatartásának vizsgálata 417 önkormányzat honlapjának elemzése alapján – 2012. I. Riport* [Corruption Risks, Respect for Law and the World Wide Web. Inquiry into the Offending Behavior of Local Governments in Hungary Based on the Analysis of the Websites of 417 Local Governments – 2012 Report I] (hereinafter Report), available at *http://www.crc.uni-corvinus.hu/download /onk_honlapok_2012_elemzes_130221.pdf.*

[80] Report, n. 79, at p. 25.

[81] Ibid.

[82] Report, n. 79, at p. 26.

representatives shall duly apply. As it has been stated by the authors of the Report, altogether 6 % of all the local governments examined publish at least one of the minutes of the committee meetings.[83] According to their summarizing conclusion, 'regarding the provisions of the Public Procurement Act, the Freedom of Information Act and the 'Glass Pocket' Act, the norm characterising the operation of local governments in Hungary in 2012 was not respect for law, but breach of law'.[84]

3. Publicity of implementation

Concerning the publicity of procedures relating to the implementation of local government decisions, the rules relating to decision-making are duly applicable. It is essential that the full publicity of local government decisions – including the obligation of publishing decisions of the body of representatives taken at a meeting held in private – provides the basis for rendering the monitoring and control of implementation possible. The most important legal institutions of social 'control' are the procedures ensuring the direct participation of citizens discussed in detail in point 3.6 of the present part.

4. Application of the legal material relating to access to information

During their research referred to above, the Corruption Research Centre of the Institute for Sociology and Social Policy of the Corvinus University of Budapest examined the websites of Hungarian local governments from the aspect of what information was available on them about the given local government and its operation, with particular attention to its spending and the documentation of public procurement procedures initiated by it.[85]

[83] Report, n. 79 at p. 28. The Authors state in advance that the Freedom of Information Act does not apply to the committees. However, in spite of referring – rightly – to the section of the Local Government Act cited in the main text, they also carried out the examination with regard to the committee meetings; according to their explanation 'it is in the committees where the professional work is carried out and questions of detail are discussed. From the range of minutes of committee meetings we have taken into account those that – having regard to the committee structure of the given settlement – are most likely to discuss public procurement (financial, economic, public procurement, assets management etc.) procedures'. Report, n. 79, at p. 28.

[84] Report, n. 79, at p. 36.

[85] Report, n. 79, at p. 8.

The websites of the selected local governments were examined based on *86 pre-selected criteria*. The code instruction rendering the regulated examination of websites possible relied mainly on the provisions of three Acts: the Public Procurement Act, the Freedom of Information Act and the 'Glass Pocket' Act. The majority of the analysed questions were formulated based on the above Acts, and the research examined compliance with these Acts. The code instruction also contained some 'soft' questions, by which they meant questions that were not based on any Act of Parliament, but that could reveal a great deal about the transparency of a website and how easy it was for a visitor to find the information they were searching for.[86] At the time of the collecting of information, 60 municipalities had no accessible website (typically very small villages), these settlements were substituted for by other settlements of the same size and geographical situation. In the end, the data of the local governments of *417* municipalities were recorded, that was the amount of observations included in the database, and the analysis was also carried out in this range. In summary, the research *concluded* that local governments had the opportunity to publish differing amounts of information on their websites under the effective legal regulation, and, accordingly, they complied with the requirement of transparency in different ways (and to a different extent).[87]

5. Cooperation with civil society

With regard to social dialogue, Act CXXX of 2010 on Legislation (hereinafter: Legislation Act) lays down that the national or local government or another organization shall be obligatorily entitled to give its opinion on a legal regulation if it is expressly authorised to do so by an Act, and even in this case it may only do so regarding draft legislation relating to its legal status or scope of duties. Detailed rules are contained in Act CXXXI of 2010 on Public Participation in Developing Legislation (hereinafter: Public Participation Act); pursuant to this, the draft, which shall be submitted for concurrent consultation with government agencies, shall – in line with the objective and entry into force of the draft – be published in a way as to allow sufficient time for the substantive appraisal of the draft, as well as for expounding opinions and for those preparing the draft to consider the merits of the

[86] For example, 'is there a website map on the page'?
[87] For a detailed description of the research, see pages 10-11 of the Report, n. 79.

received comments and recommendations.[88] Within the framework of the general consultation procedure, anybody may make comments on the draft and the concept published for public consultation via the e-mail address available on the website of the legislator.

Pursuant to § 53(3) of the Local Government Act, the body of representatives shall specify – in its rules of organization and operation – the self-organizing communities, the representatives of which are entitled, within the scope of their duties, to a right of consultation at the meetings of the body of representatives and its committees. It shall also lay down the order of the forums (village or town policy forum, city-district conference, village meeting etc.) that serve the purpose of directly informing the population and social organizations and involving them in the preparation of the more important decisions. The body of representatives shall be informed about the stand taken by these forums, and the minority opinions that emerged there. There is *no empirical research available* about the implementation of the above rules.

6. The direct participation of citizens in the decision-making process

One of the most significant legal institutions of local government connected to citizen participation is the *public hearing*.[89] The Hungarian legal material relating to the local government institution of public hearing has developed at the levels of the Fundamental Law, Acts of Parliament and local government decrees.[90]

Pursuant to § 54 of the Local Government Act, the body of representatives shall hold, at least once a year, a public hearing, announced in advance, where the local citizens, and the representatives of organizations with interest in the locality may raise questions and make proposals about local public affairs. The submitted questions and

[88] Art. 10(1) of Public Participation Act.

[89] The other institution is the local referendum, but at the time of the writing of the paper (April 2013), there is de facto no effective law relating to it because of the changes in the electoral system and the relating regulations. It is laid down by the old – still applicable – Act on Electoral Procedure, but not contained in the new Act – there is only a reference to it among the closing provisions that there will be new Act regulating local referenda, but until then the old Act on Electoral Procedure is to be applied. Pursuant to the Fundamental Law, a local referendum may be held on any matter within the responsibilities and competences of local governments as defined by law [Art. 31(2)].

[90] For more detail on this, see Kis, op. cit. n. 74.

proposals must be answered at the public hearing or within fifteen days of the hearing at the latest.

With reference to Mónika Dorota Kis's dissertation already cited above,[91] it is to be noted as of interest that the Hungarian local government institution of public hearing was created in 1990. Local governance inherently and also notionally implies an element of direct participation, one form of which is constituted by public hearing. By today, a generally negative attitude has developed toward public hearings. In connection with this, researchers of the topic usually mention the word illusion, which provides a pejorative content to the operation of the legal institution. In their view, public hearings have not fulfilled the democratic hopes connected with them, the turnout rates are too low for public hearings to be considered a form of real participation in local power; moreover, it is not possible to trace back the solution of problems to the active role played by constituents in public affairs. Therefore, the institution of public hearing is a system of forums that has lost its content and function and is unsuitable to meet the requirements of democracy.[92]

[91] Kis, op. cit. n. 74.

[92] Kis, op. cit. n. 74, at p. 30. At the same time, according to Nadezda Chuchelina (public relations manager, Russian Law-Making Society), with regard to the Russian institution of public hearing, two thirds of those asked considered themselves concerned in public hearings. On the other hand, to the question if the result of the public hearing had a genuine influence on the decision-maker, only 9% answered in the affirmative. Some were of the opinion that it was not possible to achieve any results through public hearings. Therefore, individuals do not usually believe that they can exert any influence; on the other hand, Russian state organs consider that public hearing may be an effective instrument. At the same time, there is no separate legal instrument regulating public hearings, there are no financial resources or personnel, and there is only one presidential decree that lays down that a public hearing shall be held concerning drafts of federal legislation relating to fundamental rights. In Russia successful public hearings were organized in the case of drafts of legislation relating to the police, education and amateur fishing, maybe because these topics concern the everyday lives of individuals. However, even in such cases, participants are active only on the first day, later on this activeness ceases. At the same time, it is a disadvantage that not everybody can understand the text of the draft; sometimes even experts have difficulty understanding it. As a proposal for a solution it was mentioned that Russia would need a uniform Act regulating public hearings, which should also contain rules relating to feedback. Promoting internet use could also mean a solution, but internet access and use in Russia is far from being general. Closer cooperation between civil society and local authorities and

Mónika Dorota Kis states that specific regulations relating to the legal institution can be found in local government decrees, at the same time, local government decrees regulating this area may be considered standardized. It may be regarded a typical solution for local legislators to adopt the legal regulations of other municipalities, in many cases without conducting the necessary review procedure. It is without doubt that this solution is chosen by the bodies of representatives for reasons of 'convenience', however, this may also lead to confusion in practice. The consequence of this dogmatic solution is that the regulation of public hearing contained in decrees becomes uniform, and there are very few local government decrees laying down a regulation that is specifically founded on local circumstances. On the other hand, it is also true that this legal institution cannot be regulated in many different ways, because the majority of factual elements are cogent and the number of elements that may be included in the scope of the regulation at the discretion of the bodies of representatives can be considered insignificant.[93]

IV. Summary and conclusion

1. In this paper we tried to overview the implementation and realization of the principle of transparency at the local government level in Croatia and Hungary. For doing so, we have first created a conceptual framework by delineating the varied conceptual elements of transparency, and then we narrowed our research to the principle of transparency and its components to be implemented at local level. The latter comprises of openness, participation, and integrity. These are the bases of our focus (right to access to information, transparency of decision-making processes, participation) to examine the practice of implementation of transparency by local governments. When researching the practical aspects, we relied on available empirical researches, as in the framework of this paper we had neither opportunity nor possibility to conduct our own surveys. Obviously, both in Croatia and Hungary there are available results of divergent researches, in terms

legislators could also be encouraged to render the functioning of the institution of public hearing more effective in the future. Presented at the Tenth Congress of the International Association of Legislation a (IAL, http://www.ial-online.org/) entitled 'Regulatory reform in Russia – Implementation and Compliance', which was held in Veliky Novgorod in Russia between 28-29 June 2012.

[93] Kis, op. cit. n. 74, at p. 31.

of kind as well as methods; notwithstanding we can deduce conclusions therefrom and, from a comparative perspective, judge similarities and differences. This is not affected by the fact that the Hungarian research compared with the Croatian one – that was concentrated (based on indicators), comprehensive (covered all local governments) and recurrent (after 2009 also in 2011-2012) conducted by one organization (GONG) – is fragmented, is not based on a country-sample (geographical location, sample, website-oriented), and the two studies do not share common approaches. However, based on these Hungarian research results, we can still get a clear picture on the realization of Hungarian local transparency. It is inevitable to know the regulatory framework for assessing the realized level of transparency. Therefore, we started the research on transparency by observing relevant legal regulations and proceeded with analysis of the practical implementation according to the following considerations: transparency of representative and executive bodies, cooperation with civil society organizations, citizen direct participation in decision making. As it is apparent, the basis of our research was the more coherent and comprehensive Croatian research, Hungarian results were available after 'adjusting' the Hungarian research to the Croatian one. That is why it could happen that there is no reliable empirical data available concerning the implementation of certain legal regulations, such as for example the Hungarian rule that representatives of self-organizing communities shall be involved in the preparation of the more important decisions and that the local representative body shall be informed of the stand taken by these forums, and the minority opinions that emerged there.

2. Comparing the *legal regulation* on local transparency, we have observed that it is – with different emphasis though – adequately regulated at constitutional level by both countries. Whereas the overall right to information only recently became part of the Croatian constitution, it has been a component of Hungarian constitutional regulation since the change of regime.[94] Besides, the Hungarian Fundamental Law contains more rules on transparency in financial as well as economic (management) matters that did not form part of the former Constitution. As for Hungary, it can be stated that the economy (management) of local governments is more strongly controlled by the

[94] This was not changed by the Fundamental Law.

central administration than before, however, at the same time the scope is more economical rather than focusing more on transparent management in economy. State organs, agencies can more easily receive information on the economy (management) of local governments but the 'status' of the public is unchanged, and there is still a lack of rules advocating more transparency (there is an exception: some data shall be provided on a yearly basis).

The Croatian state regulates the abovementioned subject matter similarly. In both states there are Acts on the freedom of information and there exists some kind of authority/agency (Hungary) or commissioner (Croatian) monitoring the realization of this right. Divergent changes in status are remarkable: the Hungarian ombudsman became an agency, whereas the Croatian agency became an information commissioner (having no ombudsman status though) elected by the Sabor. Consultation is also regulated in both countries; however its proper implementation is still doubtful.[95] It seems that at least at the level of political communication there is a commitment towards open governance/legislation.

3. We can conclude that among state organs, transparency is realized by representative and executive bodies of municipalities the least, and online availability of reports and materials of sessions as well as the realization of rules on consultation is problematic. As for the right to information – an issue strictly connected to the above issue – we could also conclude that it is the municipalities that could not perform properly, and more attention should be paid to the training and education on freedom of information (Croatia); also the Hungarian regulation could be more coherent and clear: see for instance: 'local governments had the opportunity to publish differing amounts of information on their websites under the effective legal regulation, and accordingly, they complied with the requirement of transparency in different ways (and to a different extent)'. It is a related question whether transparency and access to information is adequately guaranteed to those interested in order to allow citizens to form an informed opinion about the work of the local representative body. Importance of training and education as well as raising awareness could also be mentioned in the context of the Hungarian regulation. Both Croatia and Hungary are quite bad at

[95] There are general implementation problem: often there is no feedback, citizens do not feel interested, draft to be consulted is not available at the website, etc.

cooperation with civil society; there are no related Hungarian data available but this can be deducted from the general implementation of the Act on consultation. As for the direct participation of citizens, available data are the most divergent, because we used Croatian research results on local election and plebiscite/referendum, and Hungarian results and opinions appeared in literatures on public hearings. Our reason for this choice is to be found in the Hungarian legal phenomenon that led us to opt out of the research on local plebiscite/referendum.[96] However, we can certainly conclude that neither of the states takes the direct involvement of citizens very seriously (local elections are excluded here).

4. *As a summary* we can establish that formal criteria, such as existence of statutory and other legal measures are realized in both states, but their practical implementation gives rise to some doubts; local governments of larger territorial units are more transparent, however there are no special efforts to make a better involvement of citizens into the decision-making processes; there is a lack of political culture that could promote a realization of transparency and access to information to a greater extent. In Croatia, probably also due to the GONG research conducted in 2009, substantive changes have started; these changes can be detected not only in the amendments of legal regulations but in the results of research conducted in 2011 and 2012 as well. This research method could mutatis mutandis be an adaptable best practice indeed.

[96] See footnote nr. 89.

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‘Borderless’ municipal cooperation in Croatia and Hungary

I. Possible cooperation of local governments in the EU

Based on Article 32(1) point (k) of the Fundamental Law of Hungary, the Hungarian local government may cooperate with the local governments of other countries in matters falling within its competence, and become a member of international organizations of local governments.

Hungarian local governments play an active role in two of many European organizations of local governments (which have similar aims, attributes, situated in similar macro regions, etc., rally round local governments). One of them is the Congress of Local and Regional Authorities of Europe (CLRAE), established by the Council of Europe’s Committee of Ministers in 1994, which aims at monitoring the success of local governance, local democracy and human rights connected to local democracy in the Member States of the Council of Europe.[1]

The other similarly important organization is the Committee of the Regions established by the EU in 1991 in the Maastricht Summit. The Committee of the Regions is an advisory body assisting the work of the European Parliament, the European Council and the European Commission. The Committee of the Regions comprises members of regional and local bodies who have a mandate as elected representatives of regional or local bodies or have political responsibility towards an elected body. In cases defined by the Treaties and in every other cases, when – especially in cases affected by cross-border cooperation – any of

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[1] Csalótzky György, ‘Az Európa Tanáccsal megvalósuló kapcsolatok szerepe a magyar önkormányzatiság kialakulásában és működésében [The role of realizing relations with the Council of Europe in the development and operation of the Hungarian local governing]’, in Csikor Ottó, szerk., *A magyar önkormányzatok tizenöt éve. 1990-2005* [Fifteen years of Hungarian local governments. 1990-2005] (Budapest, BM 2005) p. 74.

the institutions finds reasonable, the European Parliament, the European Council or the European Commission consults the Committee of the Regions.[2]

The EU wanted to promote and support territorial cooperation between the regions along the borders of the EU and between the neighboring countries' regions first by the INTERREG programmes (1991-1994, 1994-1999, 2000-2006). Beside the Euroregions – established also in Hungary – cross-border cooperation takes varied forms. A 'Euroregion' is a formal cooperation which has an independent organization. Its aim is to develop regions and to promote cross-border relations.

Besides there are several means of cooperation along the border, such as the Alps-Adriatic Working Community (1978), the members of which are, among others, Croatia and four Hungarian county governments. This cooperation is less formal; it is an information forum without legal entity.

The variety of cooperation along the border adds a certain flexibility to the realization of cooperation – however, problems originating from the lack of single legal regulations also manifest themselves as the operation of these organizations are often (partly or fully) regulated by various international legal agreements.[3]

As a step for the sake of the promotion, facilitation and unified regulation of cooperation between local governments, Regulation (EC) No 1082/2006 of the European Parliament and of the Council (hereinafter EGTC Regulation) of 5 July 2006 *on a European grouping of territorial cooperation (European Grouping of Territorial Cooperation, EGTC)* was passed.

The aim (that is, the harmonious development of the entire Community territory and greater economic, social and territorial cohesion) implies the strengthening of territorial cooperation. To this end, it is appropriate to adopt the measures necessary to improve the implementation conditions for actions of territorial cooperation. The main characteristics of groupings of territorial cooperation are the following:

[2] Official Journal 2010/C 83/01; Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Art. 300(1) and (3) and Art. 307.

[3] Soós Edit, Fejes Zsuzsanna, 'A határon átnyúló együttműködések intézményesültsége Magyarországon. I. [The institutionalization of cross-border cooperation in Hungary I.]', 8 *Európai Tükör* (2007).

- it has a legal personality, it has in each Member State the most extensive legal capacity accorded to legal persons under that Member State's national law;
- recourse to an EGTC should be optional;
- it realizes its activity with or without the financial contribution of the Community;
- it is necessary for an EGTC to establish its statutes and equip itself with its own organs, as well as rules for its budget and for the exercise of its financial responsibility;
- the adoption of a Community measure allowing the creation of an EGTC should not, however, exclude the possibility of entities from third countries participating in an EGTC formed in accordance with the regulation where the legislation of a third country or agreements between Member States and third countries so allow,
- the EGTC should be established within the borders of the EU;
- the objective of an EGTC shall be to facilitate and promote cross-border, transnational and/or interregional cooperation, between its members, with the exclusive aim of strengthening economic and social cohesion.
- members can be: the member states; regional authorities; local authorities; bodies governed by public law within the meaning of the second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts;
- an EGTC shall be made up of members located on the territory of at least two Member States.

  The decision to establish an EGTC shall be taken at the initiative of its prospective members. Each prospective member shall:
- notify the Member State under whose law it has been formed of its intention to participate in an EGTC; and
- send that Member State a copy of the proposed convention and statutes referred to in Articles 8 and 9.

  Following notification by a prospective member, the Member State concerned shall, taking into account its constitutional structure, approve the prospective member's participation in the EGTC, unless it considers that such participation is not in

> conformity with this Regulation or national law, including the prospective member's powers and duties, or that such participation is not justified for reasons of public interest or of public policy of that Member State. In such a case, the Member State shall give a statement of its reasons for withholding approval. The Member State shall, as a general rule, reach its decision within a deadline of three months from the date of receipt of an admissible application.

The statutes of the EGTC and any subsequent amendments thereto are to be registered and/or published in accordance with the applicable national law in the Member State where the EGTC concerned has its registered office. The EGTC acquires legal personality on the day of registration or publication, whichever occurs first. The members are to inform the Member States concerned and the Committee of the Regions of the convention and the registration and/or publication of the statutes.

An EGTC shall carry out the tasks given to it by its members in accordance with the Regulation. Its tasks shall be defined by the convention agreed by its members. An EGTC shall act within the confines of the tasks given to it, which shall be limited to the facilitation and promotion of territorial cooperation to strengthen economic and social cohesion and be determined by its members on the basis that they all fall within the competence of every member under its national law.

Specifically, the tasks of an EGTC shall be limited primarily to the implementation of territorial cooperation programmes or projects co-financed by the Community through the European Regional Development Fund, the European Social Fund and/or the Cohesion Fund.

Member States may limit the tasks that EGTCs may carry out without a Community financial contribution. However, those tasks shall include at least the cooperation actions listed under Article 6 of Regulation (EC) No 1080/2006.

The tasks given to an EGTC by its members shall not concern the exercise of powers conferred by public law or of duties whose object is to safeguard the general interests of the State or of other public authorities, such as police and regulatory powers, justice and foreign policy.

An EGTC shall be governed by a convention concluded unanimously by its members. The statutes of an EGTC shall be adopted on the basis of

the convention by its members acting unanimously. An EGTC shall be liable for its debts whatever their nature.

Where an EGTC carries out any activity in contravention of a Member State's provisions on public policy, public security, public health or public morality, or in contravention of the public interest of a Member State, a competent body of that Member State may prohibit that activity on its territory or require those members which have been formed under its law to withdraw from the EGTC unless the EGTC ceases the activity in question.

Notwithstanding the provisions on dissolution contained in the convention, on an application by any competent authority with a legitimate interest, the competent court (authority) of the Member State where an EGTC has its registered office shall order the EGTC to be wound up if it finds that the EGTC no longer complies with the requirements laid down in this Regulation or, in particular, that the EGTC is acting outside the confines of the tasks laid down in Article 7.

The EGTC Regulation is binding in its entirety and directly applicable in all Member States, however the Regulation binds the Member States to make such provisions that are appropriate to ensure its effective application.[4]

The EGTC Regulation does not circumvent the already existing institutions and organizations and does not abolish them, and ensures appropriate independence for cross border cooperation (of local governments).[5]

The regulations necessary for the implementation of the EGTC Regulation in Hungary are defined by Act XCIX of 2007 on the European grouping of territorial cooperation. Based on this act the European territorial association (the Hungarian name for EGTC) cannot be established to perform economic activity, and it cannot practice public authority.

In the European territorial association, the liability of a local government, the local government's partnership with a legal entity and a local government's organization may not exceed the extent of its material contribution (limited liability).

[4] The EGTC Regulation shall apply by 1 August 2007, with the exception of Article 16, which shall apply from 1 August 2006.

[5] Soós Edit, Fejes Zsuzsanna, 'A határon átnyúló együttműködések intézményesültsége Magyarországon. II [The institutionalization of cross-border cooperation in Hungary II.]', 9 *Európai Tükör* 2007.

A grouping shall come to exist by registration by a court. The registration procedure is a non-litigation procedure that falls under the exclusive jurisdiction of the Metropolitan Court. Legal representation is mandatory in the proceeding. Registration may not be refused if the agreement and the bylaws comply with the stipulations of the EGTC Regulation and this Act, and all members have approvals pursuant to Article 4(3) of the EGTC Regulation.

The grouping shall manage its finances independently with a view to implementing the aim identified in the agreement. The grouping may perform business activities for the sake of promoting the competitiveness of the territory in line with the stipulations of its bylaws, provided that it does not jeopardize the aim of the grouping.

A member whose right or just interest is violated by a resolution adopted by the grouping or an organizational unit thereof may contest such resolution at the Metropolitan Court within a deadline of thirty days reckoned from its adoption, subject to a lapse of right.

If the State Audit Office detects any unlawful act by the grouping within the scope of its financial management, it then requests the restoration of the lawful situation. In case of a severe violation of the law or if the grouping fails to fulfill such request, the attorney may file a case before the Metropolitan Court for the termination of the grouping upon a request from the President of the State Audit Office.

European comparison shows that *until May 2012 twenty-eight associations were registered in the EU, most of them in France and in Hungary (11).* (The Hungarian members are almost exclusively local governments and in half of the associations they cooperate with Slovakian partners, besides Romanian and Slovenian partners.) The majority of the EGTCs are based on bilateral conventions, and it is typical that the basis of the EGTC cooperation is cooperation of local governments, generally based on more than one task (e.g. regional development, economic development, education, tourism, environmental protection, etc.); furthermore, the members establish their EGTC for indefinite time without exception.[6]

In February, 2012, the Committee of the Regions, based on the European Commission's proposal of modification of the EGTC Regulation, drafted recommendations regarding the revision of the Regulation. The Committee of the Regions requested the Commission,

[6] *http://egtc.kormany.hu/egtc.kormany.hu/download/e/49/50000/Presentation_The_EGTC_and_EGTC_Roadmap_INTERACT_December_2012.pdf*

among others, to take the EGTC more into consideration as the selected tool for the implementation of the European Territorial Cooperation policy and to incorporate the EGTC into the legislative measures regarding the cohesion policy of 2014-2020.[7]

II. Council of Europe and transfrontier (trans-border) cooperation

Within its efforts to promote and foster cooperation among European countries, the Council of Europe adopted the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (CETS No. 106) in Madrid on 21st May 1980. The Convention entered into force on 22nd December 1981. Since that time, Europe has witnessed enormous political changes and today, out of 47 countries members of Council of Europe, this Convention has been ratified by 37 countries. Cyprus, Iceland and Malta have only signed, but never ratified this Convention, while 7 countries (Andorra, Estonia, Greece, Macedonia, San Marino, Serbia, and United Kingdom) haven't even signed it. For Hungary, it entered into force on 22nd June 1994, while for Croatia on 18th December 2003. The Convention is intended to encourage and facilitate the conclusion of trans-border agreements between local and regional authorities within the scope of their respective powers. Such agreements may cover regional development, environmental protection, the improvement of public services, etc., and may include the setting up of transfrontier associations or consortia of local authorities. To allow for variations in the legal and constitutional systems in the Council of Europe's member states, the Convention sets out a range of model agreements to enable both local and regional authorities as well as States to place transfrontier cooperation in the context best suited to their needs. Under the Convention, States undertake to seek ways of eliminating obstacles to possible cooperation and to grant authorities engaging in international cooperation the facilities they would enjoy in purely national context. The Convention contains a mere 11 Articles, plus the lists of model inter-state agreements and outline agreements, statutes and contracts between local authorities.

Model inter-state agreements cover a wide range of fields: promotion of transfrontier cooperation; regional transfrontier consultation; local transfrontier consultation; contractual transfrontier cooperation between

[7] Opinion of the Committee of the Regions, COTER-V-022.

local authorities; organs of transfrontier cooperation between local authorities; interregional and/or inter-municipal economic and social cooperation; intergovernmental cooperation in the field of spatial planning; interregional and/or intermunicipal transfrontier cooperation in the field of spatial planning; creation and management of transfrontier parks; creation and management of transfrontier rural parks; transfrontier cooperation in matters concerning lifelong training, information, employment and working conditions; promotion of transfrontier and transnational school cooperation; transfrontier or interterritorial cooperation concerning land use along transfrontier rivers; transfrontier cooperation groupings having legal personality.

Outline agreements (hereinafter OA), statutes and contracts between local authorities concern the following: OA on the setting up of a consultation group between local authorities; OA on the coordination in the management of transfrontier local public affairs; OA on the setting up of a private law transfrontier associations; outline contract (OC) for the provision of supplies or services between local authorities in frontier areas (private-law type); OC for the provision of supplies or services between local authorities in frontier areas (public-law type); OA on the setting up of organs of transfrontier cooperation between local authorities; model agreement (hereinafter MA) in interregional and/or intermunicipal economic and social cooperation; MA in interregional and/or intermunicipal transfrontier cooperation in the field of spatial planning; MA on the creation and management of transfrontier parks; MA on the creation and management of transfrontier rural parks; MA on the creation and management of transfrontier parks between private law associations; MA between local and regional authorities on the development of transfrontier cooperation in civil protection and mutual aid in the event of disasters occurring in frontier areas; MA on transnational cooperation between schools and local communities; MA on the institution of a transfrontier school curriculum; MA on transfrontier interterritorial cooperation concerning land use along transfrontier rivers; MA on transfrontier cooperation establishing the statutes of a transfrontier cooperation grouping having legal personality.

As opposed to the European Union regulation, which is binding for its members, Council of Europe documents are more flexible, not just in accepting them, but also in their fulfillment. Therefore, it is possible, according to two paragraphs – Article 2(2) and Article 3(5) – for signatory countries to express their reservations as to authorities or

bodies to which the expression 'territorial communities or authorities' shall apply and which authorities are competent under its domestic law to exercise control or supervision regarding territorial communities and authorities concerned. While Croatia has not used that right, 16 members, including Hungary, have done some. Hungary declared that territorial communities or authorities will imply the communal, urban, capital and its district and county self-governments, and the Metropolitan Public Administration Office or County Public Administration Offices. The latter two have also been specified as those competent to exercise control or supervision.

The additional Protocol to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (CETS No. 159) was opened for signature in Strasbourg on 9th November 1995 and entered into force on 1st December 1998. Until today, 23 countries have signed and ratified the Additional Protocol, while 6 countries have only signed it. Croatia and Hungary are among 18 countries that have not shown any activity concerning the Additional Protocol. The Additional Protocol aims to strengthen the Outline Convention by expressly recognizing, under certain conditions, the right of territorial communities to conclude transfrontier cooperation agreements, the validity in domestic law of the acts and decisions made in the framework of a transfrontier cooperation agreement, and the legal corporate capacity ('legal personality') of any cooperation body set up under such an agreement.

Protocol No. 2 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning interterritorial co-operation (CETS No. 169) was opened for signatures in Strasbourg on 5th May 1998 and entered into force on 1st February 2001. Until now, 22 countries have signed and ratified it, while 5 countries have only signed it. Croatia and Hungary are among the 20 countries that have neither signed nor ratified it. Protocol No. 2 aims to strengthen inter-territorial cooperation between European countries, following Council of Europe's declaration at the Vienna 1993 summit to build a tolerant and prosperous Europe through transfrontier cooperation. Two previous legal documents were concerned with relations between adjacent communities that share common borders. They were successful and twinning agreements have begun to spring up between areas that are located further apart. Protocol No. 2 will act as a legal text to cover these new arrangements, recognizing authorities'

right to make such agreements, and setting up a legal framework to do so.

Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Co-operation Groupings (ECGs) (CETS No.: 206) was opened for signatures in Utrecht on 16th November 2009 and has entered into force on 1st March 2013. So far, only five countries (France, Germany, Slovenia, Switzerland, and Ukraine) have both signed and ratified it, further 8 countries have only signed it, while Croatia and Hungary are among 34 countries that have neither signed or ratified it. Its aim is to provide for the legal status, establishment and operation of 'Euroregional Cooperation Groupings'. The aim of the grouping, composed of local authorities and other public bodies from the Contracting Parties, is for transfrontier and interterritorial cooperation to be put into practice for its members, within the scope of their competences and prerogatives. Under this Protocol it is possible for the Council of Europe to draw up model national laws in order to facilitate the adoption s of appropriate national legislation by the Contracting Parties for enabling Euroregional Cooperation Groupings to operate effectively.

The Danube – Drava – Sava Euroregional Cooperation was established in Pécs on 28th November 1998. Founding members are Osijek-Baranja County, City of Osijek, and Croatian Chamber of Commerce – County Chamber in Osijek (Croatia), Baranya County, County seat of Pécs, and Pécs-Baranya County Chamber of Commerce and Industry (Hungary), Tuzla-Podrinje Canton, Municipality of Tuzla, and Chamber of Commerce of the Tuzla Region (Bosnia-Herzegovina). Up till now further members from Croatian side are: Virovitica-Podravina County, Koprivnica-Križevci County, City of Koprivnica, Požega-Slavonija County, City of Požega, Croatian Chamber of Commerce – County Chamber in Požega, Vukovar-Srijem County, City of Vukovar, Croatian Chamber of Commerce – County Chamber in Vukovar, and Brod-Posavina County. Additional Hungarian members are: Somogy County, City of Barcs, County seat of Szekszárd, and Bosnia-Herzegovina's are: Brčko District and County Posavina. For municipalities from Serbia since 2002 (Apatin, Bač, Sombor, and Subotica) have observer's status. This Euroregional cooperation covers 26,257 km2 with approximately 2,300,000 inhabitants. The members govern the Euroregion via its bodies: the Assembly (comprised of all member representatives), the

President and three Vice-Presidents (one for each country) that comprise a coordination body called the Presidency, the Assembly-elected Executive Committee and the working bodies established by the Executive Committee. The Euroregional Statute governs the operation of all those bodies in detail.

Although significant achievements and results were expected when the Danube – Drava – Sava Euroregional Cooperation was established, it is fair to say that its potential was not fulfilled. It is possible to expect that better cooperation, not only in this Euroregion, but in overall, will be achieved from 1st July 2013 when Croatia joins the European Union.

Another Euroregion that comprises some Croatian territorial units is the Adriatic Ionian Euroregion established on 30th June 2006 in Pula. This Euroregion represents transnational, transfrontier, and interregional cooperation including 26 members – local and regional units from Albania, Bosnia-Herzegovina, Croatia, Greece, Italy, Montenegro, and Slovenia. The idea is to transform this Euroregion into a Macroregion that will cover around 450.000 km^2 with a population of 60.000.000 inhabitants.

The Croatian Act on Local and Regional Self-Government (Official Gazette 19/03), in Articles 14-17, regulates the possible cooperation of municipalities, towns, and counties with units of local and regional self-government of other countries. The decision to set up cooperation with a foreign unit is made by the Croatian unit's representative body. The legality of this decision and all pertaining documents will be controlled by the Ministry of Administration of the Republic of Croatia. If the Ministry of Administration finds that the decision or other documents do not comply with the law, it will propose to the Croatian Government to annul the decision. If the Government doesn't decide within 30 days it will be considered that the decision was made in accordance with law. If the Government finds that decision is contrary to law, the territorial unit can submit a constitutional complaint against Government's decision to the Constitutional Court of the Republic of Croatia. The Croatian Constitution doesn't contain provisions concerning the possible cooperation of Croatian local and regional self-government units with other units from foreign countries.

III. Conclusion

The system of relations of the EU, the member states and their organizations is extremely differentiated. These relations are visible at

the initiation of a decision, in decision-making, in the creation of community law, in the implementation of the decision and in the international coordination of EU law.[8]

The most important challenge for the Hungarian local governments since the change of regime has been the integration of Hungary into the European Union. *Integration affects the operation of local authorities in great many ways.* 'It is very important for local governments to properly know and adopt EU law. During the official work of various fields of public administration, knowing and applying EU law integrated into the national law is a principal requirement.'[9]

This however does not exclude the general possibility of local governments for certain individual actions concerning the decision making affecting EU law. As the EU Court of Justice stated for example: Article 49 EC must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, which confers on local authorities a broad discretion in enabling them to refuse authorization to open a casino, amusement arcade or bingo hall on grounds of 'substantial impairment of the interests of the State and of the residents of the administrative area concerned', provided that that legislation is genuinely intended to reduce opportunities for gambling and to limit activities in that domain in a consistent and systematic manner or to ensure the maintenance of public order and in so far as the competent authorities exercise their powers of discretion in a transparent manner, so that the impartiality of the authorization procedures can be monitored.[10]

Besides advancing and applying the law, there are several areas where local governments are connected or can connect to the institutional system of the EU. Today, after legal harmonization, we find that *local governments can primarily rely on the EU's institutions regarding the financing of their development.*

After many turbulent centuries characterized by constant wars and by trying to hold or even expand the authority over certain territories, the countries of Europe are in a peaceful period. State borders have very

[8] Ágnes Bátory, 'The National Coordination of EU Policy in Hungary: Patterns of Continuity and Change', *Public Administration* Vol. 90, No. 4 (2012) p. 922.

[9] Orova Márta, 'Felkészülés az Európai Unióhoz való csatlakozásra önkormányzati szemszögből [Preparing for accession to the EU from the viewpoint of local governments]', *Magyar Közigazgatás* 1999/1-2. p. 55.

[10] Judgment of the Court (Fourth Chamber) of 19 July 2012, Case C-470/11.

often divided members of certain nations. It was one of main reasons that during the middle of 20th century, the project of transfrontier cooperation evolved. Transfrontier cooperation tried to connect inhabitants from various sides of borders in order to cooperate and resolve everyday problems that they face, and which problems were very difficult to solve within the borders of the individual states. The other very important factor was the fact that bordering regions in each country are under-developed. Every country tried to evade investments into regions possibly affected by foreign invasion. Those reasons were key factors in the promotion of transfrontier cooperation.

The Republic of Croatia joins the European Union on 1st July 2013. Although the Croatian legal system is almost completely harmonized with EU requirements, there will still be many surprises after the official accession. Most of the key players at regional and especially local level will have to face a lot of challenges, but let us not forget that there will be a lot of advantages and possibilities to explore and use. Although systems of local and regional levels are within Member States' authority and jurisdiction, every unit will definitely need to adapt to the enormous possibilities of cooperation. Newly elected local and regional governments (May-June 2013) will have to realize that their way of functioning will be very different and challenging in many ways.

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The finances of local and regional self-government units

I. Introduction

The goal of state decentralization is to recognize and please the public needs, furthermore to encourage local and regional development. Only by achieving those goals of decentralization can the state motivate and satisfy its citizens for contributing to the accomplishment of public affairs.

The idea of local self-government dates back to a tradition of centuries in Europe. Local self-determination and exercise of power, although to different extends, appeared both in the concept of the Scandinavian '*tingsted*' (i.e., locality, the materialized expression of local autonomy in the early Middle Ages[1]) and the British 'devolution' (i.e., decentralization of central authority). Marked differences and delimiting characteristics can be observed in both the horizontal and vertical structures of existing local self-governments of individual European countries, which developed with different characteristics. The systems having unique traits, despite the small and large differences, however, can be categorized according to the local government development path: they can be classified as per their formation, history, and related traits.

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[1] See Kecskés András, 'John Austin félig megélt élete és félig megírt jogbölcselete [Half lived life and half written theory of jurisprudence of John Austin]', 6-7 *Jogtudományi Közlöny* (2007) pp. 345-351. See more in Kecskés András, 'John Austin gondolatai a jogról, a jogon kívüli tényezőkről és a szankciókról [Thoughts about law, terms out of the law and sancitons of John Austin]', in Gál István lászló – Hornyák Szabolcs, szerk., *Tanulmányok Dr. Földvári József 80. születésnapja tiszteletére* [Studies on the occasion of 80's birthday of Dr. József Földvári] (Pécs, PTE ÁJK 2006) pp. 113-127.

Accordingly, European development path of local authorities draws up three main self-government models: the northern, the Napoleonic (Latin), as well as the intermediate model.[2]

The models can be separated according to the level of autonomy. In the north, the Nordic model is the type of public administration based on stronger local self-governments, which fulfills traditionally a higher number and more significant public tasks, exercises wider powers providing considerable autonomy and allows greater flexibility (including, *inter alia*, Sweden, Denmark, Finland, Norway, Belgium, the Netherlands, Great Britain and Ireland).[3] The Napoleonic (or Latin) model compared to this grants a limited degree of autonomy to local governments (e.g., France, Spain, Italy, Greece and Portugal). The intermediate model is between these two types, by achieving local governments of medium level of power (such as Germany, Austria, Switzerland and Belgium).

The Hungarian and Croatian self-government systems belong to the intermediate model of the three basic types of self-governments according to economic autonomy and funding aspects. Both the Hungarian and Croatian model follow the European trends, since the types move toward each other, and, as a result of European unification, the elements, which could be separated earlier, converge due to the unifying principles.

The local government models show a number of differences, however, certain similarities, some traditional values occur in all countries. Certain values are specified by the legal regulation of every EU Member State, and are also declared by the European Charter of Local Self-government (hereinafter Charter) accepted by the Council of Europe.
Article 9 – which includes eight sections – (Financial resources of local authorities), the longest part of the Charter, regulates the finances of local governments. It provides detailed guidelines on local self-

[2] Kusztosné Nyitrai Edit, szerk., *Helyi önkormányzatok és pénzügyeik* [Local Governments and Their Finances] (Budapest, Municipium Magyarország Alapítvány 2003) pp. 3-6.
[3] Torma András, *Edited version of habilitation lecture held in the University of Miskolc on 2 May, 2002,* http://www.uni-miskolc.hu/~wwwallin/kozig/hirek/eukozig/onk_reform.pdf (24/06/2010)

governments, and contains the following financial and economic management principles:

- principle of income: the local authorities are entitled to their own financial resources, of which they may dispose freely within the framework of their powers;
- local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the corresponding law (the principle of entitlement to the financial resources adequate to the responsibilities);
- the principle of local taxation powers (local taxation rights, and the right to introduce other local payment obligations; part at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate);
- reduction of financial disparities between the local self-government units (so-called equalization principle);
- the use of funds as per the statutory limits (the principle of expenditure);
- as far as possible, grants to local authorities shall not be earmarked for the financing of specific projects (the limitation of earmarked funds);
- the autonomy of management decisions within their own jurisdiction (principle of discretionary powers);
- participation in the central decision-making concerning local self-government finances (principle of participation).

The most important principle, in our opinion, is the entitlement to appropriate financial resources, which means, on one hand that the volume of municipal funds shall be commensurate with the extent of local government responsibilities set forth in the corresponding law in the legislation,[4] and, on the other hand, the amount of funds allocated at the local self-governments can be considered as appropriate, if they keep pace with the cost of carrying out their tasks (Article 9(4) of the Charter).

It is in accordance with the single European principles and unifying trends, that the Hungary developed its tax system in compliance with the requirements of the European Union, by fulfilling the related

[4] Art. 9(2) of the Charter.

harmonization tasks, and that the Republic of Croatia has adopted solutions that are used by the majority of European countries. The current Hungarian tax system can be examined through two, and the Croatian through three fiscal levels. This paper deals especially with tax revenue of local and regional self-government units, by presenting the way of realizing tax revenue, levying and collecting taxes, furthermore satisfying public needs on state, county and city levels.

The establishment of the tax system of the Hungary and the tax reform starting in 1988 faced, similarly to the changes in Croatia, problems and difficulties during the peaceful political transition into a constitutional state ready to introduce parliamentary democracy,[5] and promote conversion to a socially alert market economy, and took similar examples as a basis. Furthermore, the harmonization need and tax legislation modified accordingly show several solutions that were used in the Republic of Croatia as well.

Since the declaration of its independence, the Republic of Croatia has commenced thorough reconstruction of its tax system as well, since it had to meet the requirements of the new political system terminating the war period, as well as the challenges of market economy closing the socialist character.[6] Essential tax reforms have brought the system closer to systems of the EU Member States, through its harmonization with taxation systems of developed European countries.

II. Scope of authority of local and regional self-government units and their revenue

The local self-government is the local level of public finances, which performs specified public duties based on its revenue. The public duties, on which the revenue of the local self-government rests and has to be spent, are the following.

[5] Cf. Halász Vendel, Kecskés András, 'La Porta Magyarországra látogat? – Rafael La Porta professzor és munkaközössége kutatásai és értékelési szempontjai a magyar jog tükrében [Does La Porta visit Hungary? – researches and criteria for the evaluation Prof. Rafael La Porta and his working community in related to the Hungarian law]', 7 *Európai jog* (2013) pp. 18-31.

[6] Cf. Kecskés András, *Felelős társaságirányítás (Corporate Governance)* (Budapest, HvgOrac 2011) pp. 59-67.

1. Hungary

The system of local self-government units, which is the local level of public finance and was established as a result of the political changes, has gone through several amendments and reforms in the last twenty-three years. Among these, one of the most important is that the model based on four sub-systems according to Act XXXVIIII of 1992 was changed in 2011, but the local self-government units still form the local level of the public finance as per the new regulation. Significant change was brought, however, regarding the operation of the self-government units by restoring the system of districts,[7] the debt takeover,[8] and the transformation of the school system.

In Hungary, the operation level of the local self-government units performing state functions play an important role in the life of the state and the citizens thereof. The approximately 3,200 self-government units employ significant proportion of public servants and government officers, thus the self-government system is one of the biggest employer of the country. Therefore the opinion on the Hungarian administrative system is fundamentally determined by the quality of work of the self-government units, the services and the connection thereof with the clients and the local communities. One of the characteristics of the Hungarian self-government system from the financial point of view is that it forms the local level of public finances, therefore a strong separating boundary cannot be established between the local and central level in connection with the tasks and responsibilities, these levels complete each other, perform their duties and carry out their activities relying on each other from the financial and informational point of view in the new system of task financing.

A few basic questions can be raised, however, relating to the operation of the financial management of the self-government. The first, is how the self-governance, the representation of local interests, local taxation, and the execution of the tasks specified by the state comply with each other. The Hungarian self-government units are provided with own revenues from 1990, but the freedom of spending them is influenced by

[7] Act XCIII of 2012 on the modification of the act on the establishment of the administrative districts and the attached acts.
[8] Art. 8 of Act CXIII of 2012.

the necessary finance of the mandatory tasks, the subsidies provided by the state, and the calculation obligation of local tax power.[9]

The former system of normative finance, which was in force until 2012, made the self-government units vulnerable, since the normative funds were not assigned according the financial needs. The new type of task-related finance, introduced on 1 January 2013, relies on the own revenues of the self-government unit. A process started in 1998 with the increased utilization of local taxation, pressurizing the local self-government units to introduce, almost compulsorily, the local taxes effectively and almost totally. Local taxation indeed provides one of the most important part of the own revenue, but it must be admitted that this revenue structure affects the poor and the rich local self-government units different ways. Local taxes form a significant element of the revenue of the local self-government units that have great economic potential, but mean only theoretical revenue for many self-government units, on the territory of which there is no industry, no real estate market, and the level of employment is low. These matters should be taken into account, and should be endorsed differently regarding the funding of local self-governments, since there might be significant differences even between the municipalities of similar number of population. For instance, the annual budget of the city of Szeged with 170,000 inhabitants is approximately one third bigger than the budget of Pécs with 165,000 inhabitants. Even more extreme differences can be pointed out in relation to the comparison between the budget of Pécs with Budaörs or Tiszaújváros. Besides, the situation of the capital, Budapest, is completely different regarding taxation as well, due to, for instance, the high proportion of the tax on vehicles.

We do believe that self-governance cannot be applied without the absolute and calculable disposition over the means necessary for the operation.[10] The self-determination is possible only if the financial

[9] Similar system was built in Slovakia in the field of independence of local governments' management. Regarding this, see more in Bencsik András, 'A szlovák önkormányzati rendszer [The Slovak local self-government system]', in Fábián Adrián, szerk., *Válogatott európai önkormányzati modellek* [Selected European local self-local government systems] (Budapest – Pécs, Dialóg Campus Kiadó 2012) pp. 91-92.

[10] It is confirmed by the regulation of Act on Local Governments and the Act on Amendments of the Act on Local Governments, which connect the definition of local public affairs with the condition of provision of resident population with public service, furthermore it define that an activity, which is connected to the creation of

autonomy is provided, the condition of which is the creation of a calculable budget based on the own decision of the self-government unit in accordance with the available funds, and the disposition right over the income items. The economic autonomy of the local self-governments is declared by the Hungarian constitution. According to Section 32, the local self-government may dispose over the property thereof, which may be used to fulfill the local tasks. The self-government is entitled to create its own budget, and to decide on local taxes, but may decide on the expenditure the way that does not jeopardize the tasks thereof specified by the state in the applicable act. This approach, however, may be deemed as an important restriction, since the obligatory fulfillment order of the different tasks is set up by the legal regulation. Therefore the self-government unit is forced and even obliged to complete the possibly insufficient state subsidies by using its own revenue for the referred tasks, and the right to dispose over the own revenues is reduced accordingly. Thus the hierarchy of the public aims is established unintentionally by this approach. The self-government unit is entitled to state subsidies and other financial support proportionate with the mandatory powers and responsibilities, according to Section 34 of the Hungarian constitution.

Similar provisions are included the Austrian constitution,[11] and the Estonian constitution declares[12] that the tasks specified by state acts shall be financed by the central state budget. Similar measures are taken by the French constitution,[13] and it is stated by the German Grundgesetz[14] that if a task is prescribed for the self-government, the related funds shall also be provided thereto. Contrary, the Portuguese and the Italian Constitution establish a balancing (compensatory) mechanism due to the economic differences between the self-government units.

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systemic, financial and personal conditions of collaboration between local governments and resident population. Cf. Bencsik András, 'A helyi önkormányzatok helye, szerepe a fogyasztóvédelem igazgatásában [The place and role of local governments in the field of administration of consumer protection]', in Fábián Adrián, szerk., *20 éves a magyar önkormányzati rendszer* [The local government system is 20 years old] (Pécs, A Jövő Közigazgatásáért Alapítvány 2011) pp. 243-244.

[11] Arts 116(1) and 116(2) of the Austrian constitution.

[12] Art. 154(2) of the Estonian constitution.

[13] Art. 72(2) of the French constitution.

[14] Art. 104/A(2) of the German constitution.

The Charter referred above (European Charter of Local Self-government) was accepted in Strasbourg in 1985 and implemented by Act XV of 1997 in Hungary is important for the Hungarian local self-government system. Theoretical conditions are set forth for the European self-government units by the Charter,[15] and the establishment of the financial opportunities of the self-governments is in focus.

2. Croatia

In the Republic of Croatia, the decentralization presents itself through three levels of government. The highest level is the state, the middle (regional) level is formed by 20 counties, and the third, local level consists of 556 cities and municipalities. Each of the fiscal levels has its own powers and responsibilities.
Act on Local and Regional Self-Government[16] regulates the scope of functions of municipality and city separated from the scope of functions of county. Pursuant to the provision of Article 19 of the Law, local and regional self-government units in their self-governing scope perform the tasks of local importance, and especially see to jobs that are not constitutionally or legally assigned to government bodies, relating to the planning of settlements and housing, spatial and urban planning, social welfare, primary health care, education, etc.

2.1. The powers and responsibilities of counties

According to the Croatian provisions, the county conducts services of regional importance, not assigned to the national authorities by the Constitution and laws. Thus, the scope of functions of a county can be original (self-governing, for instance the traditional self-governing tasks) and delegated (services of state administration).
County in its self-management scope performs services relating to

- education,
- health care system,
- spatial and urban planning,
- economic development,
- transport and transport infrastructure,
- maintenance of public roads,

[15] Art. 9 of the Charter.
[16] Law on Financing of Local and Regional Self-Government Units, Official Gazette, Narodne novine, NN 117/93, 33/00, 73/00, 59/01, 107/01, 117/01-correction 150/02, 147/03, 132/06, 73/08.

- planning and development of a network of educational, health, social and cultural institutions,
- issuing construction and location permits and other documents related to construction and implementation of spatial planning documents for the county outside the big city,
- other activities in accordance with special laws.

By the decision of the representative body of a local self-government unit in accordance with its statute and the statute of the county, some functions and tasks of self-government scope of the municipality or city can be transferred to the county. Entrusted services relate to services of state administration which are carried out by a county and are defined by law. The costs of these services shall be paid from the state budget.

2.2. The powers and responsibilities of the cities and municipalities

Municipalities and cities in their self-governing domain (scope) perform the services of local importance which directly actualize the needs of the citizens, which are not assigned by the Constitution and laws to the national authorities and in particular services related to:

- planning of settlements and housing,
- spatial and urban planning,
- utility services,
- childcare,
- social care,
- primary health care,
- education and primary education,
- culture, physical culture and sport,
- consumer protection,
- protection and enhancement of natural environment,
- fire and civil protection,
- traffic in their area,
- other activities in accordance with special laws.

In order to meet its duties, counties, cities and municipalities have to find means of finance- mostly deriving from public revenue. When we talk about financing local and regional self-government units most often we talk about fiscal capacity and its strength. Fiscal strength of these units varies a lot, especially when it comes to municipalities and cities.

III. The revenue of local and regional self-government units

Financing of local and regional self-government units in decentralized countries is of great importance, both for the development of the overall economy, as well as for the development of local and regional self-government units which carry out the logic of polycentric development. To satisfy this postulate it is necessary to find the optimal method of financing.

The local and regional self-government units, in order to have the tasks performed, have to ensure revenues in their budgets, which are proportionate to expenditures, from their own sources, of shared (assigned) taxes and grants from state and, in the Republic of Croatia, county budgets.

1. Hungary

1.1. The property of the local government units

If we deem the property of local government as the condition of the authority of local self-government,[17] it can be declared that there are significant differences within the subsystem of local self-governments. The reconsideration of the management of local governments and budget financing are also part of the self-government reform. Within this, the following issues should be reconsidered, and regulated accordingly.

First is the normative financing, the major problem of which is that it is not sufficient enough to carry out the task. The experts' opinions are divided about the rate of percentage of normative financing,[18] which are provided the needs. The normative financing does not make any

[17] Cf. Ercsey Zsombor, *Az Szja- és az Áfa-szabályozás igazságossága a magyar adórendszerben* [Fairness of personal income tax and value added tax in the Hungarian tax system] (Pécs, PhD Thesis 2013) pp. 69-72, available at *http://doktori-iskola.ajk.pte.hu/files/tiny_mce/File/Vedes/Ercsey/ercsey_nyilv_ertekezes.pdf* (08.07.2013).

[18] Imre Ivancsics states that normative support covers 40% of costs from state budget. Ivancsics Imre, *Önkormányzati közigazgatás* [Management of municipal] (PTE ÁJK, Pécs 1995).

difference between the different economic forces, because it is connected to task indicators objectively.[19]

The second problem is that the local self-government units should deal with tasks, which depend on the central funding, and could be operated more efficiently solely from central subsidies (e.g. education, health care, internal security policy).[20] This has been initiated by 1023/1995 (III. 22.) decree of the Government that helps the stability of the management of the local government.

The third issue is reconsideration of local taxation, which should be placed into a new tax structure, with a higher status. It would be more effective if the local governments had more power in this area, and also in connection with the actual central taxes, because the context and the interdependence between the taxpayer and the local self-government unit could be demonstrated.

The fourth matter is connected to the undertaking model of local self-government units, so to the opportunity of the local government units to manage their own assets independently. The legislative framework of this economic involvement and participation should be clarified, the balance of the local and the central sources has to be established, and the suitable level of the income proportion has to be determined, with which it is possible to realize revenue, but also does not encumber local governments to force them to venture. The most important principal is that the sources, which were provided this way, must be used only for additional expenses, and for improving the quality of operation, but not for funding the primary tasks.

Whereas the status of the capital city and some city of county rank (Debrecen, Szeged, Győr, Székesfehérvár) are outstanding in many ways, it can be declared that the asset management for hundreds of small towns is confined to managing of some assets in absence of significant assets. As long as some towns have significant assets, municipal firms, property for undertaking, for other towns asset management is hardly applicable. The property of local government

[19] See also Varga Sándor, 'Stabilizáció a helyi önkormányzatok költségvetésében [Stabilization in related to the Budget of Local Governments]', 3 *Pénzügyi Szemle* (1996) p. 184.

[20] László Mária, 'Az ökormányzatok feladatai és finanszírozás' [Assets of the Local Governments and Financing]', in Csefkó Ferenc and Pálné Kovács Ilona, szerk., *Tények és vélemények a helyi önkormányzatokról* [Facts and Opininons about the Local Governments] (Pécs, MTA RKK 1993) p. 215.

consists of real estate (urban properties, rural lands, and buildings), movable properties (machines, vehicles, hardware) and valuable rights and interests (tenancy, security, ownerships). The property of local government has been established after the regime change, and based on transfer of state property. This process happened in legal framework (act on the transfer of property), and in this process could be organically fit the local government reform steps of 2012.[21]

Theoretically the property of local government can be divided into two parts. The first one is the so-called capital property, which serves the management, and carries out the basic tasks of the local government. Regarding that function, these assets are not alienable, chargeable, or deliverable for utilization. Thus, because of these economic constraints, they are called unmarketable, or limited marketable, which is a more limited range within. In this group the public roads, and their (art)works (overpasses, bridges, roadsides), public lands and most of the buildings used by local governments could be rated. As long as the unmarketable parts of property are not alienable, chargeable and their value cannot be reduced with any legal device, the limited marketable elements form a temporary group with a kind of management protection. Their status is determined by law, or local regulation. These parts of property belong to the group, which is not directly protected in relation to the basic functions by the local government, and which has this status by the law, or local regulation. This classification means legally that these parts of property could be got out of the group of protected property by external initiatives or municipal decision, and could became marketable by means of a detailed procedure, which is laid down by local government. It is really important that the local government has to establish rules covering all aspects of the process in the provision about these parts of property. In the absence of such a regulatory system, the acts related to the part of property could be invalid. Thus the limited marketable parts of property could be transported to the category of the undertaking property of local government.

The part of property of local government, which cannot be classified into the two mentioned category can be managed or realized independently, so it is qualified as business or venture property. The local governments can use, charge, alienate these kinds of property with their own decision, but just on a controlled way. It is important to note

[21] See for instance school center transformation, debt takeover.

that for these activities the principles of public finance shall be applied as well, notably the principle of publicity and controllability.

The actors of the Hungarian local government system realized many venture activities in the last twenty-two years, e.g. they established and operated industrial parks, airports and harbors, founded public service companies for the local population, or did property leasing. It can be concluded that the range of undertaking activities is wide, but their efficiency and market productivity are different by places, ages and local governments. Some barriers of these local government activities may be established. The first to be confined, which is determined by law too, is that the local governments can only carry out their venture activities for the community on the one hand, [22] but on the other hand it is difficult to be controlled. The second barrier is that the undertaking activity cannot endanger the compliance of the basic tasks of the local government. The third is that the local governments can take risk limited in their concern, so they cannot participate in any form of company where they should take unlimited liability. This rule is necessary, because there is no exemption or allowance provided by the law for the local governments for their venture activities, so they have equal position with other economic actors. The local governments shall bear the consequences of their decisions or their management, so that is the reason why the type and level of the venture activity of the local governments should be limited in many ways.[23] There are many examples from the last twenty-two years for the bad or hasty decisions and unsubstantiated developments, which caused significant damages for the local governments. Such cases, like the case of Sopron Local Government's investment, hotel investment in Globex Holding, and also in Budapest the investment of underground line number four, sewage farm, or the CET exhibition centre, furthermore in Pécs the investments in the airport building, or the Expo Centre, all of these projects caused significant burden, debt for these local governments. These bad, reckless decisions often restrict the potential and economic possibilities of municipal leaderships, city and its residents for decades, because of the four-year election cycle in the local government system. However, the management of bankruptcy is regulated by a special law, neither the

[22] Art. 80(3) of Act LXV of 1990; Art. 111(2) of Act CLXXXIX of 2011.

[23] Cf. Király Lilla, *Polgári Eljárásjog* [Civil Procedure Law] (Budapest – Pécs, Dialóg Campus Kiadó 2006) p. 382.

local government firms enjoy any exemption against the market failure.[24]
Finally, it must be pointed out that the model of the undertaking local government was applicable for only a small group of local governments. It can be stated that the demand from the local governments to venture is acceptable, but their basic task is not the venture activity, because just a few local governments have the necessary economic, human or market knowledge for this. Actually, the model of an undertaking local government that has been supported for a long time exists only a limited way due to the shrinking market and absence of competence, but anyway for most of the local governments, the category of an undertaking local government never was a real, applicable possibility.

1.2. The budget of the local governments

These principles (unity, commitment of annual budget, transparency) are also valid in relation to the system of the budget of local governments. Despite the insignificant differences, many similarities can be noticed between the process of preparation, adoption, and implementation of the local government's budget and the same procedure of the state budget. Naturally some fundamental differences can be defined in the budget of the local governments compared to the state budget regarding the magnitude of the budget, the time structure of acceptance, and the name of the actors.
The annual budget of the local government is the central element of the local government's operation and foundation, and also the framework of local governments' funding, which is accepted by the Body of Representatives in form of municipal decree. The municipal decree of budget chronologically follows the acceptance of the state budget, because the state budget determines the elements of local government's operation, such as the entitlement, rate of tasks support in relation to the group, and the proportion of income shared. It can be stated that the conditions of the operation of the local government is fundamentally determined by the framework of the state budget subsidies.[25] For instance, the specific amount and type of normative subsidies was

[24] Act XXV of 1996 on Procedure of debts settlement of local governments.
[25] This depends mainly on the actual status of state budget and the volume of tax income. See Király Lilla, 'Jövedéki módosítások [Amendments of excises]', 9 *Tájoló* (2000) pp. 6-7.

determined by annexes no. 3 and 4 of the state budget until 2013. After 2013, appendix 2 of the state budget determines the legal ground and appropriations of support provided for the local governments.
Article 11 of the Act on Hungarian Local Governments declares that the operation of the local governments is based on the annual budget. However, it adds that the budgets of the local governments are parts of the state budget. It defines the budget as the connection between the local and central level, and by that the financial and operational task of the state can be realized. The proof for this connection is Article 112(3) of the Act on Hungarian Local Governments that declared that the budget of the local government is also regulated by the state budget and the related applicable implementing regulations. The municipality clerk is liable for publishing the details of the operation of the local government for the resident population at least once a year the usual way. The obligation to establish the budget of the local government is one of the most important obligations thereof, since it cannot get state aid otherwise. Therefore the state budget has to be adopted before the establishment of the local government budget, but at the same time the planning and preparation of the local government budget starts already, and the local regulation may be adopted in February and March based on the new appropriations of the effective state budget entered into force on the first day of fiscal year. In the local government budget the independent budgetary authorities compose budget articles, so budgetary authorities performing the same activities can compose one budget article. The local government budget is based on plans, so appropriations may be mentioned, like as in relation to the state budget. The local government has to set aside a reserve until the establishment of the local budget, and the similar legal instruments like cancellation and wirement are applicable for the implementation of the budget of the local self-government units as well. The local budget contains income and expenditure appropriations, furthermore operation and accumulate income may be distinguished. The budgetary balance also has to be defined the way that operation deficit cannot be planned in the budget decree. The operator of budget preparation and adoption is the municipality clerk. In relation to this task the municipality clerk's most important obligation is to prepare the conception of the budget until 30 November of the fiscal year, and to show the draft to the committee of the local government and the local minority government, furthermore to get the opinions of these bodies. The mayor shall submit to the body of

representatives the prepared document (draft decree), which shall be adopted after their discussion. The body of representatives is liable for the operation of the local government, the Mayor is accountable for the regularity of management, and the municipality clerk is responsible for the legality.

On the local level of the preparation of the budget the obligation of preparing the budget according to the established economic studies has also appeared, furthermore the body of representatives is bound to subsume their long-term conception in the development plan. A managing program or development plan shall be established for the term of office of the body of representatives or the period exceeding this term. This local development plan fits in the county development plan, and contains the initiatives for the improvement of the level of public services. This financial program, development plan shall be accepted by the body of representatives within six months reckoned from the formation thereof, and the existing plans may be reviewed and even revised.

The Mayor shall submit the prepared draft and the related documents to the body of representatives forty-five days after the day of publication of the state budget. It the body of representatives does not accept it, the local government shall have elaborate and adopt a temporary budget. The local government also has the permanent report and control obligations. The corresponding law sets forth that the major is obliged to inform the local representatives of the situation of the budget several times a year. It is a basic obligation of the major to draft the budget report as well. Accordingly, similarly to the annual accounts of the central budget, the major is obliged to draft reports during and at the end of the year on the significant processes and the actual figures achieved.[26] The local self-government also drafts annual accounts on the execution

[26] In connection with public interest related to the appropriate management of local governments, it should be noticed that the control of Court of Auditors is part of the supervision over local governments in the UK. Cf. Bencsik András, 'Az angol önkormányzati rendszer [The English local self-government system]' in Fábián Adrián, szerk., *Válogatott európai önkormányzati modellek* [Selected European local government systems] (Budapest – Pécs, Dialóg Campus Kiadó 2012) p. 56.

of the local budget, which may be submitted to the representatives by the major until the last day of April following the budget year.[27]

1.3. Handling the debts of the local self-government units

The debts of the local self-government units became one of the most significant problems of the Hungarian local government system at the end of the first decade of the 21st century.

The municipality financial approach changed after 2011, since the corresponding law burdens the losses on the local government. It is declared clearly that the central budget is not responsible for the losses of the local management. This approach is reflected by the provision, in which it is declared that the local self-government units cannot plan deficit in their budgets.[28] From the budgetary point of view this means that the revenue of most local government units did not reach the level of expenditure therefore deficit was fond. Thus it shows that the municipalities could not provide the funds necessary for financing the tasks performed thereof whit regard to their three major revenue categories in scope of their normal operation.

The increase of debts was caused by several reasons. First the local self-governments cannot rely continually on collecting the own revenue within their everyday operation since local taxes are collected twice a year (in March, and in September) by most of the municipalities according to the Act on local taxes. These taxes provided the highest proportion of the revenue but the expenditures (paying salaries, purchasing operating assets) shall be financed continuously therefore the local government units are forced to pick up liquidity loans, in order to eliminate the temporary lack of funds. The lack of self-contribution for launching bigger investments may be mentioned as the second reason. Furthermore the subsidies provided by the states are frozen, and this is third reason accordingly the local self-government units involved external financing and funds, in order to finance the operation, function, and to make investment projects and development. Therefore bonds were issued, and or bank loans were obtained. The use of these financial measures may cause the growth of debts. The level of debts became critical when the municipalities consumed, and or sold those properties which were marketable, and it became clear that the direct profit of the launched investments and developments cannot equalize the related

[27] Arts 23-29 of new act on the State Budget.

[28] Art. 111(4) of Act CXXXIX of 2011 on Act on Local Governments.

loans. The situation became even more serious when local taxation possibilities narrowed in 2008 due to the economic crises, and the level of shared revenue decreased simultaneously in nominal value, furthermore the normative subsidies were not increased either. As a result of these factors, many local self-government units could not spend 10-40% of their budgets on the mandatory tasks and or development, but this proportion was solely spent on loan repayment. This financial trap narrowed the financial leeway of the municipalities. The recognition of the problem made the Hungarian self-government launch a program for taking over the debts of the local government as a result of which 100% of the amount of debts of the municipalities caused this thing less than 5000 persons was over taken, and based on individual agreements, 50-60% of the debts of the bigger local self-government units were taken over. These measures decreased significantly the financial burdens and debts of the municipalities, however, the system of scope and mandatory thus as well as the government subsidies and state aids were transformed simultaneously by the government. Taking all of these into account it can be stated that all of the elements of the financial operation of the local self-government units cannot be seen clearly at the beginning of 2013 and the exact balance of the introduced measures is still missing.

1.4. The financial resources of the local self-government units

The units of the Hungarian local government system have three major revenue categories basically, irrespectively of the economic strength, population number and location. The first and most important category is the own revenue, the second is the state subsidies, and the third is the shared or assigned revenues. This is set forth by the new act on local governments the way that the local government provides the funds for fulfilling the obligations thereof from its own revenues, the revenue received from other economic organizations, furthermore central state subsidies. The proportion of the free sources of revenue defer significantly by each local government unit. It is a general principal that the less economic strength has the local government, the more important rule is played by the state subsidy.

1.4.1. State subsidies

The state subsidies are the sources of revenue which determine the function of the local government system mostly. The subsidies are provided on the grand that local governments, as the local level of the state and national budget, fulfill and perform state functions and tasks the way specified by the central budget in the specified cases, therefore they are entitled to government subsidies in proportion of the tasks. The title, the proportion and the method of financing are determined and defined by the budget act, the public finance act, and new local government act together. The concrete annual amounts of the subsidies are not affected directly by the local government units. Many changes and amendments have been introduced in this area of subsidies in 2013. The government terminated the system of normative financing, which was used before 2013 this former way of financing was based on the practice that the tasks specified by the appendix of the budget act were subsided by an annual amount, the expenditure of this which was free or bound by the central budget for the local government unit. Therefore the amounts were linked to the tasks based on an objective index number (number of recipients, population-based amounts). This system was terminated in 2012, when the method of addressed and targeted subsidies was dismissed as well. These two forms of subsidies were related to certain large investments specified by the state and linked to tenders from the beginning from the 90's. Accordingly, these resources could be obtained by the local governments according to tenders by a certain proportion of self-contribution. Besides, under certain conditions, the central budget provided ad hoc aid as well, for instance in order to help those local governments develop that ended up in disadvantageous financial situation due to factors outside their control. The new system was introduced in 2013, the tasks and functions of the local governments were modified, and thus the financing of the local governments was totally transformed. The state introduced the task-based support, thus tasks to be performed by the local government associations and the nationality municipalities were provided by funds bound for the task itself. According to the new provisions, the minister responsible for local governments publishes the form and amount of the subsidies for the local governments, national municipalities and local governmental associations by 5 January of the budget year. The amount is paid for the local governments by the Hungarian State Treasury in each month with net financing. A very important element of the new

provision is that the Mayor is liable for the management of the local government units, and the subsidies which are obtained without proper authorization (illegitimate) are sanctioned and the related procedure has been put in place as well.

1.4.2. Own revenues

The most important revenue source from the point of view of self-governments is the category of own revenues, which derive on the jurisdiction of the local government based on its own decision and related to the local economic events, therefore this type of revenue is levied and collected by the local government unit. The most important elements of the self-own revenue are the local taxes, regulated by the Act C of 1999 uniformly in the last twenty-three years with minor amendments. The major characteristic of the local tax is that the local government may decide up on it within the framework of the referred act. The significant and proportion of the own revenues is different by each municipality. It is obvious that those local self-government units are in advantages situation in this regard as well, the territory of which has high level of economic activity. Unfortunately many local self-government units in Hungary cannot realize high proportion of local taxes, many underprivileged self-governments work in Hungary, to which have no or negligible income from the local taxation.

The *local taxes*, since its introduction in 1991, played an important role in a significant number of local self-government units. Sixty percent of the local self-government units apply this, while more than 95% of cities use some form of local tax. The proportion of revenue from local taxes increase continue at the financial management of local governments, in Hungary this was 1,8% in 1994, while in OECD countries it was 12% in 1985. These numbers show that in this area for the self-government units reside in the new tax structure potential reserves.

The other big group of the own incomes consists of the *penalties* coming from the local governments territories. The types of these penalties and the local government's interest quota are determined by Article 33 of Act CCIV of 2012 on the 2013 Central Budget of Hungary. The self-government units receive the 100% of environmental fines imposed by the municipality clerk of the self-government, over and above the 30% of the amount of environmental fines imposed by the Environment, Nature Conservation and Water Management Inspectorate. The self-government is entitled to receive the total amount

of income deriving from administrative offences and on-the-spot fines imposed according to Act II of 2012 on administrative offences. The self-government receives furthermore 40% of the penalty to be paid in the event of a breach of the Road Traffic Act, if the municipality clerk of the self-government implemented the implementation of tax authority in. This also includes 100% of the fine imposed by the public land inspectors of the local self-government.
The whole of income from sale of *hunting rights* concern the local self-government, together with the financing framework – from the medical care aid by OEP – can appear at the budget of the local self-government units. Among the self-government's own revenues the *loan* and the other incomes from *emissions of securities* should be mentioned. The *benefaction, heritage and gift* offered by individuals, firms, and enterprises could mean significant income for the self-government units.

1.4.3. Shared taxes

The least source of local government's management was so-called transferred or shared revenues. Those items belong here, which the budget assigned for the local governments, but the Parliament laid down the rate of financial elements, the way of transference connected with the budget act in every years. The self-government got these incomes from the central budget and had not direct influence at the extent thereof. The local governments got two from the three major transferred revenues, the personal income tax and duty from the budget, while the third, the motor vehicle tax collected themselves. The local governments had disposal of incomes like these.

1.4.4. Revenue deriving from the personal income tax

The first and the most significant item was the transferred part of the personal income tax until 2013. This meant that a certain proportion specified by the corresponding law of the personal income tax collected in the area of the local government units was returned by the state budget to the local government. In the last decades, this proportion varied between 8% ((for example in 2012) and 100%. The redistribution system of personal income tax operated in such a way since 1996 that the local government units did not receive the full amount of personal income tax collected thereby, but the state budget applied a balancing mechanism in favor of the poorer self-governments. Basically, the allotted amount appears in three groups in the budget of the self-

governments. The first group (10-15%) stayed where it was generated, while the second group was distributed normatively, and the third group, according to positive discrimination, favored the self-governments of smaller economic strength. In 2012, this distribution rate of personal income tax was only 8%, out of which 4.1% was assigned for sector tasks, and 3.9% was distributed as general aid between the local governments. The rate of such redistribution was decreased to 0% in 2013, so the retransfer of a certain percentage of the personal income tax was taken out of the system. The 3.9% of personal income tax was changed to state aid. The system for reducing the income gaps between the local self-governments was terminated by the government in 2013, and the related aid was integrated into the general operating subsidies.

1.4.5. Tax on vehicles

The vehicle tax is at the second group, which is not a local tax, because the budget and the Parliament defined its rate. Misunderstanding is a reason that it was collected and used by the local governments. The vehicle tax, which was initially known as the weight tax, stayed by local governments only 50% like real transferred income. From 2003 the total amount was entitled to the local self-government units and in recent years was imposed on the basis of engine power and not the weight of vehicles. Its extent was about 45 milliard forint refer to whole of the system of local governments in 2012. The 2013 changes also meant connected to vehicle tax that the percentage of the collected amount reduced. The Act of 2012 is determined at 40%, which represents a nominal amount to 29.4 billion in 2013, of which given back as a general government source to the local self-governments.

1.4.6. Revenue from transfer taxes

The third, previously substantial transferred revenue stemmed from the related assets to charges levied by National Tax Authority, so the governments shared in levies of traffic or barter of motor-vehicles and properties, initially at rate of 50%. It should be noted, however, that the payback system was modified regarding the transfer taxes as well by various compensation components, in order to distribute this type of revenue not only among the local governments, but also between the counties and the capital self-government. The whole of these types of taxes (duties), namely 12.3 billion Hungarian forints, was part of the income of the local government system in 2012. Thus the revenue from

transfer taxes formed an important part of the income of the county towns and the capital, but this form of redistribution was also dismissed in 2013.

1.4.7. Assigned revenue deriving from the personal income tax levied on the rental of arable land

The smallest item among the shared revenues is the personal income tax levied on the income deriving from land rental, the 100% of which remains at the local self-government that collected it related to the lands located in the area thereof.[29] In this regard it should be noted that this type of revenue could not mean significant income for the local self-governments, since a tax exemption is provided for the contracts lasting for a term longer than 5 years by the Act on Personal Income Tax.[30]

2. Croatia

Revenue of local and regional self-government units:

- income from movable and immovable objects in their possession;
- income from companies and other entities owned and revenue from concessions granted by local self-government units;
- revenue from the sale of movable and immovable objects in their possession;
- gifts, inheritances and legacies;
- municipal, town and county taxes and fees and duties, whose rates, within the limits specified by law, are determined independently;
- government assistance and grants provided by the state budget or a special law;
- compensation from the state budget for performing services of the state administration, which were conveyed to them;
- other revenue determined by law.[31]

Act on Financing of Local and Regional Self-Government Units determines the resources of funds and financing services from the scope of the counties, municipalities and cities.

[29] Art. 32(2).

[30] 9.4.1. point about tax exemptions of Appendix 1 to Act CXVII of 1995 on Personal Income Tax.

[31] S. Vladimir and R. Perić, *Javne financije-knjiga* [Public finance book] (Osijek, Pravni Facultet, Sveučilište J.J. Stossmayer Universitet u Osijeku 2004) p. 91.

2.1. County revenue[32]

- Revenue from own property:
  - income from movable and immovable objects in the possession of the county,
  - income from companies and other entities owned by the county,
  - revenue from the sale of movable and immovable objects in the possession of the county,
  - gifts, inheritances and legacies.
- County taxes:
  - inheritance tax,
  - tax on motor vehicles,
  - tax on boats,
  - tax on gaming machines.
- Fines and confiscated assets for the offenses that are prescribed by the county itself.
- Other revenue determined by special law.

2.2. Municipal and city revenue[33]

- Revenue from own property:
  - income from movable and immovable objects in the possession of the municipality or town,
  - income from companies and other entities owned by the municipality or town,
  - revenue from concessions granted by local self-government units,
  - revenue from the sale of movable and immovable objects in the possession of the municipality or town,
  - gifts, inheritances and legacies.
- Municipal and city taxes:
  - surtax to income tax,
  - tax on consumption,
  - tax on holiday homes,
  - tax on corporate title,
  - tax on public land use.

[32] See Act on Financing of Local and Regional Self-Government Units, NN 117/93, 33/00, 73/00, 59/01, 107/01, 117/01-correction 150/02, 147/03, 132/06, 73/08.
[33] See n. 32.

- Fines and confiscated assets for the offenses that are prescribed by the municipality or town themselves.
- Administrative fees in accordance with a special law.
- Residence fees in accordance with a special law.
- Utility charges for the use of municipal or city facilities and institutions.
- Utility charges for the use of public or municipal urban areas.
- Other revenue determined by special law.

2.3. Shared taxes

There is one very important category of public revenue that we must emphasize: shared taxes. Shared taxes are personal income tax and tax on sales of real estate. The most important remark dealing with shared taxes is revenue belonging, so which unit of the public administration the revenue belongs to. When it comes to tax on sales of real estate the division is as follows: state-40%, city-60%. However, personal income tax is the most significant revenue especially when it come s to cities and municipalities. Revenue from income tax is divided between municipality/city-55%, county-15,5%; part for decentralized functions-12%; part for position for aid of accommodation for decentralized functions-17,5%.[34]

Decentralized functions are social care, education, health care and fire department. But it is very important to emphasize that the operational side of these functions is financed through Personal income tax. When it comes to personal income of people employed or taking care of these functions, their income derives from state budget. Operational side includes mostly material costs (buildings, equipment, furniture etc.) in connection to performing these functions.

2.4. Unpaid revenue and the state of local finances

On 31 December 2011 units of local self-government had 8,6 billion HRK of unpaid debts. With 5,4 billion HRK dominant are debts for business transactions revenue, and the other part of unpaid debt refers to debts for sales of nonfinancial asset. Biggest part of 5,4 billion HRK refers to administrative fees (about 60%), followed by debt derived from

[34] See the abovementioned Act on Financing of Local and Regional Self-Government Units (n. 32).

revenue from own property (24%). When it comes to revenue collected from taxes, the debt is the smallest: only 16%.[35]

Problems concerning payment are related to weak cooperation regarding information exchange between tax office and units of local self-government. Units of local self-government have empowered tax office to collect revenue for them and tax office charges provision in the amount of 5% of collected revenue. The problem is that tax office delivers monthly reports about paid taxes but does not deliver information about tax payers who have not paid their debt, issuing resolutions and about measures of collecting revenue. This is because tax office is obliged to do so because of the Article 8 of Public Tax Act that concerns tax secrecy.

Furthermore, data concerning public and local revenue are not as pubic and transparent as it should be. Units of local self-government do not inform citizens about efficiency of revenue collecting or its purpose and influence on economic development and improvement of life conditions. This information should be available to every citizen simply by publishing them on city or county web pages.

Big part of the self-government units has their debt written off, which is not reasonable behavior especially in these times of economic crisis. Besides, it has been established that 49% of 556 local self-government units did not impose all the revenue they could have by existing legal regulation and 29% of local self-government units did not undertake all the measures of ensuring the payment of existing debt.[36] The problem is more serious when we look at the big picture. Dealing with the fact that many of the self-government units have had the debt written off, they come to the state and demand help in the form of donations, financial support and grants and subventions.

IV. Concluding remarks

The autonomy of self-governments, from the conceptual point of view and particularly from the practical approach is the assessment of the economic opportunities, the amount and structure of resources, and the freedom of use of the resource. The actual operating conditions of each

[35] A. Bajo and T. Primorac, *Neučinkovitost naplate prihoda lokalnih jedinica* [Inefficiency in revenue collection of local units] (Aktualan osvrt br. 52, Institut za javne financije Zagreb 2013).

[36] Ibid.

system depend not on the legal regulation, but instead on the local economic circumstances of the self-government and their involvement of local economic development, furthermore, on the economic and fiscal policy of the state. The self-government systems are categorized accordingly to the clientist (e.g. France, Italy, Spain and the Greek and Turkish self-government systems), economic development (USA), and the welfare system (e.g. Germany, Great Britain, the Nordic countries).[37]
The local self-governments of the two countries in focus of this study have similar income structure; they manage their finances from the same sources and cover the obligatory and optional functions specified in Chapter III above with similar types of funds. The types of income are the same; the self-governments provide the funds covering their budgetary expenses from their own revenues, assigned (shared) central taxes, furthermore, different grants and subsidies received from the central budget.
As current tax systems of the European countries show many similarities and much less differences, the principles of taxation and the trends are quite similar. In recent decades, one of the most important European taxation tendencies has been tax cuts, so reducing the tax burden, one element of which is the introduction of flat tax systems. Another important trend is the shift towards cooperative tax administration, and the increase of the role of local and regional taxation. In our views, both the Croatian and Hungarian legislation is in line with the EU efforts and regulatory trends. The determining concepts (tax base, tax subject, car), and the method of calculating the tax rates accordingly are defined by the Hungarian and Croatian legislature. Similarity, in both states the tax (in Hungary the municipal, in Croatia the county governments) are collected and used by local authorities.
The noticeable differences between the Hungarian and Croatian local and regional levels of taxation derive from the significant difference between the two states regarding the regional involvement and the position in the system of redistribution. The Hungarian structure of local self-government units are closer to the clientist model – so there is a remarkable centralizing tendency of the state, most of the local resources come from the state, often by determining the way and aim of use –, thus the level of economic development activity of the self-governments is lower. Contrary, the Croatian model, due to the

[37] M. Goldsmith, 'Local autonomy. Theory and practice', in D. King and J. Pierre, eds., *Challenges to Local Government* (London, Sage 1990) pp. 18-32.

important county and municipality taxes, is closer to the welfare and economic development models[38] of self-governments, in which, besides the central dependence, a structure was established with more active self-governments providing notable services.

In the European Union, the tax on motor vehicles was considered as a potential obstacle for the creation of the Common Market already in the sixties. The Commission, in order to eliminate the discrimination and the factors that distort competition, already made a proposal to harmonize the taxation of commercial vehicles in 1968, but till the early nineties, the harmonization of this direct tax did not happen. Although the EU has achieved considerable success in harmonization on the field of the commercial vehicle taxation, the harmonization of taxation of private cars is still to be done. The current tax rules largely leave the issue of taxation of passenger cars to Member States, and as a result, except for some Member States (e.g. France), annual tax is due in all Member States after the passengers car. According to the Commission's current proposal for harmonization taxes on the car registration should be paid in the form of sales tax in all Member States by gradually reducing the annual registration fees.

The harmonization of taxation of personal motor vehicles is still a significant issue. Basically, the matter of type and level of taxation on motor vehicles belongs to the powers and responsibilities of the Member States. The registration tax is prevalent in many countries, which because of the nature of one-time (setup charge) has not implemented the requirement of fairness and proportionality, as there is significant difference in the rate defined by Member States.[39]

The Hungarian regulation entitles the local self-governments to introduce property tax and building tax as wealth tax. The self-government may choose how to determine the tax base of these types of taxes: either according to the net floor space of the real estate expressed in square meters, or the adjusted market value thereof. The decision,

[38] In the welfare model, the self-government units fulfill their obligations within strong central dependence, they focus on providing the services, and they deal less with the development of the local economy, which is undertaken mostly by the central state. The self-governments act as undertakings in local economy, their local need of resources is higher than the central one; therefore, they establish a more intense relationship with the local actors of the economy.

[39] Őry Tamás, szerk., *Az Európai Unió adójoga* [The Tax Law of the European Union] (Budapest, Osiris Kiadó 2003) pp. 403-405.

however, shall be made uniformly together for both types of tax. Both of them are annual taxes, therefore the taxpayer shall remain the same, even in case of change of ownership during the tax year, that is connected to the title and ownership as per the first day of the tax year. Tourism tax is a community tax in the Hungarian system, one form of which – tax levied on holiday building located at the territory of the self-government – shows conformity with the tax on Croatian holiday homes.

Thus the regulation of tax on holiday homes is part of the tax system of both countries, although with different names, but with the same content. The object and subject of tax, as well as the tax base are completely the same in both statutes. The only difference is that the Hungarian provisions determine the upper limit on the one hand, and the Croatian act determines a frame including a lower limit as well on the other hand, also includes broad exemptions, which are entirely lacking from the Hungarian system.

The inheritance and gift tax differ in the two states basically due to the local or central nature of the type of these taxes (duties) and because of the related characteristics thereof. Accordingly, these form entirely the revenue of county self-government units in the Republic of Croatia, while in Hungary they are shared between the central government budget and the local authorities. The Croatian county may decide, in relation to these types of taxes, on the introduction, the rate within the statutory ceiling, and the scope of exemptions, whereas no such opportunity is provided for the local governments in Hungary.

The Croatian inheritance and gift tax, however, differ not only because of the local characteristics unlike the central type of the Hungarian one, but also because these local taxes do not extend to the free acquisition of real estates, whereas inheritance and gift duties are levied on those transactions in Hungary. Further difference is that a wider range of exemption is provided by Croatian system, and the exemptions are primarily of personal nature, much less exemptions are related to certain types of transaction. The collateral kin as beneficiary for the second group is not exempt from tax at all in Hungary. It is a common element of the two systems though, that gifts provided for certain purposes are exempt from tax.

In our opinion, in order to guarantee the four freedoms of the Single Market[40] and to ensure the optimal level of completion[41] of the internal market, the system of local taxation should be standardized in the territory of the European Union: an itemized list of local taxes should be established, and clearly unified rates, or at least minimum and maximum rates shall be declared, furthermore the tax allowances should be harmonized. The various methods of levying taxes, the different determination of the tax base, and the significant diversity regarding the tax rates distorts competition between the Member States, and hinders the free movement of persons and the free flow of capital, since unpredictable tax environment is set up accordingly. Therefore, the European Union may take measures regarding the harmonization of this field of law, and could at least provide a unified frame for the taxation rights of the self-government units.[42]

Nevertheless, the normative distribution is a mutual requirement of the financing systems, in which the state declares the aims and priorities to be supported thereby, as well as those parameters and conditions, which determine the decision of redistribution with normative power, taking into account that state distribution is always based on political decisions and preferences of value.[43]

It is a fundamental problem of both the Hungarian and the Croatian central, regional, and local taxation, which is also a tendency all around the world, that despite the continually expanding scope of central and local activities, new types of public revenue cannot be found neither in the central, nor within local taxation, which could improve the increasing revenue that covers the government services, therefore there

[40] Cf. Szalayné Sándor Ezsébet, 'A belső piac fogalma, kialakulása. Jogalkotás – dereguláció a belső piacon' [The concept and emergence of the internal market. Legislation and deregulation regarding the internal market.], in Mohay Ágoston, Szalayné Sándor Ezsébet, szerk., *Az Európai Unió joga* [The law of the European Union] (Budapest – Pécs, Dialóg Campus Kiadó 2011) p. 229

[41] Meaning the free flow of working people, goods, services and capital in a borderless Europe.

[42] Should such a legal measure be adopted, attention will have to be paid to selecting the proper legal basis of the harmonization measure, as an erroneous legal basis could lead to a future challenge against the legal act in question. Mohay Ágoston, 'Az Európai Parlament részvétele az uniós jogalap-vitákban' [Participation of European Parliament in the debates in related to the legal basis of European Union]', 6 *Európa Jog* (2012) pp. 1-14.

[43] C.G. Hockley, *Fiscal Policy* (London, Routledge 1992) p. 19.

is no other option, but to tune these systems carefully, and to harmonize their operational reserves, furthermore to improve tax compliance. For this work, it is essential to understand the theoretical and practical problems of the functioning of the tax system.

Regional governance: historical approach

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Manors in Baranja County in the 18th and 19th centuries[1]

I. Introduction

Once the area between the rivers Drava and Sava had been liberated from the Ottomans in the war of 1683 to 1699, it was obvious that the continuity of the socio-historical currents of the feudal system was not preserved, and that the establishment and functioning of late feudal manors had to be based on new foundations. To a large extent this was also true for the Hungarian liberated area between Lake Balaton and the Danube (Transdanubia), and also in the Baranja region (within the wider area of Transdanubia), located at the southeast end of the Danube – Drava interfluve, where one could notice congruence with the events in neighboring Slavonia.[2] The local late feudal manors showed many similar features until the collapse of the Habsburg Monarchy in 1918, for example, the impact of a common national framework, substantially equal administrative-political organization, etc., but also corresponding differences in the period of 18th to 20th century.

At the end of the 17th century virtually the entire Hungarian national territory was liberated from the Turks and it came to the establishment of a new system and the reviving of the local governments.[3] After the reoccupation of the country's territory the necessity of administrative reorganization emerged. This necessity brought up the idea of the

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[2] I. Karaman, *Osnovna obilježja imanja Bilje I Darda u sastavu kasnofeudalnih/kapitalističkih zempljoposjeda na baranjsko-slavonskom tlu do 1918, Tri stoljeća Belja* [Basic features of the estates Bilje and Darda among the late feudal/capitalist manors on the territory of Baranja and Slavonia until 1918, Three centuries of Bilje], (JAZU, Osijek 1986) p. 82.

[3] Parts that were freed were considered 'newly acquired' properties *(neoaquisticum)*.

reestablishment of the previous noble county system, too. According to the royal order of Leopold I issued on 10th June 1688, a committee under the chairmanship of Prince Ferdinand Dietrichstein was set up whose task was to prepare a plan on the administrative reorganization of the reoccupied territories. The committee with Leopold Kollonich, Archbishop of Esztergom, as a member and leader of the Hungarian side prepared in 15 months a draft of more than 500 pages with the title '*Einrichtungswerk des Königreichs Ungarn*'[4] to which in 1699 Balthasar Patachich the counselor of the Hungarian Chancery wrote a memorandum at the request of Croatian Ban and also Transdanubian Captain Adam Batthyány.[5] Although Kollonich sought to enforce the absolutist and centralist policies of the Viennese court, he also brought certain benefits by reducing military pressure and providing a civil administration which resulted in the construction of the modern state.[6] The Royal Decree of 11th August 1690 included the establishment of commissions for the determination of so-called 'rights on newly acquired property' or estates.[7] Besides the Einrichtungswerk, a new draft entitled 'Hungarian Einrichtungswerk' was written by a new committee led by then Palatine Paul Esterházy and Archbishop of Esztergom George Széchenyi.[8] The freedom war led by Francis Rákóczi II temporarily suspended the reorganizational work, which went on after the signing of the Szatmár peace treaty of 1711. On the general assembly of 1712-1715 so-named 'Systematic commissions' were set up to make new drafts on the reforms of the administration and justice system. The result of their work was the establishment of the Hungarian

[4] János Kalmár and Varga J. János: *Einrichtungswerk des Königreichs Hungarn (1688-1690)* (Stuttgart, Franz Steiner Verlag 2000) p. 9, pp. 23-27.

[5] Varga J. János, 'Államhatalmi és rendi kísérletek a közigazgatás és az igazságszolgáltatás reformjára a török kiűzésének időszakában (1688-1723) [State and feudal attempts at the reform of the administration and justice system in the period of the expulsion of the Turks (1688-1723)]', in Font Márta and Kajtár István, eds., *A magyar államiság első ezer éve* [The first thousand years of the Hungarian State] (Pécs, 2000) p. 148, 154; Kalmár and Varga J., op. cit. n. 4, at pp. 44-47.

[6] Rajczi Péter, *Pravno ustrojstvo i funkcioniranje Darđanskog i Beljskog vlastelinstva od nastanka do 1918, Tri stoljeća Belja* [Legal structure and functioning of the manors Darda and Bilje from their foundation until 1918, Three centuries of Bilje] (JAZU, Osijek 1986) p. 172; Varga J., loc. cit. n. 5, at p. 156.

[7] Act 10 of 1715 envisages the setting up of three such commissions: in Pressburg, Kosice and Zagreb.

[8] Varga J., op. cit. n. 5, p. 150, Kalmár and Varga J., op. cit. n. 4. at pp. 33-44.

Royal Locumtenant's Council (Consilium Regium Locumtenentiale Hungaricum) as the new central administrative organ in 1723. Nevertheless, Act 20 of 1741 abolished these commissions, and assigned the resolution of the current property-rights disputes to the jurisdiction of ordinary courts.[9]

During the reorganization those noble families who previously owned landed property on the reoccupied territories were called upon to present their written documents to prove their former ownership, but only few families could regain their property this way. The reason for this was that most of the noble families had either died out during the war against the Turks, or lost their family documents. The royal donation letters preserved in the royal books were not available either, because the ships transporting them had sunk when near Esztergom bandits had ambushed the ships of Queen Mary of Habsburg – the widow of Louis II deceased in the battle of Mohács – as she was travelling from the castle of Buda to Vienna. The ruins of this ship presumably containing immense treasures were announced to be found a few years ago, but no exact data have become available on the relics found among the ruins until now.[10] This unfortunate fact made it almost impossible for some noble families to prove their former ownership, so the King had the opportunity to donate these estates freely to whosoever he wanted to. This way the entire land of Hungary was at the king's disposal and he, under the law of the Holy Crown, had the duty to donate it[11] to worthy Hungarians, who would thus become members of the Hungarian nobility, regardless of their origin. Some of the nobles who were given royal donations for their merits were of foreign origin and they had to become Hungarian nobles first in order to acquire nobiliary landed property. So first they were nationalized through the joint process of the King and the Hungarian national assembly called *indigenatio sollemnis*, for which they paid huge taxes to the Hungarian Royal Chamber and received the title of a Hungarian noble. E.g. the members of the Veterani family could obtain a royal donation only this way on the territory of the Hungarian Kingdom.

[9] Rajczi op. cit. n. 6, at p. 169, 170.

[10] http://hvg.hu/tudomany/20080812_dunakanyar_elsullyedt_hajo_kincs_maria (21.06.2013).

[11] There was also the practice of the king to donate land for a certain sum of money paid by the donee partly as the price of the land.

The new landowners usually did not live on their estates, and the mentioned donations were depopulated villages or uninhabited places.
The basic characteristics of the manorial estates of the 18th century were the small number of landowners and vast *latifundia* which included a large number of rural farms. As for the structure of proprietary rights, manors differed depending on whether they were Treasury, Church or secular (nobility) properties. The available data are related to the regulation of urbarial relations at the time of Maria Theresa, and in accordance with this regulation to the characteristics of late feudal properties in Baranja in 1767.[12]According to the situation in Baranja at the time of Maria Theresa's regulations Bilje estate was under the management of the Chamber (Treasury), Darda estate was recorded as the property of Count Károly Esterhazy's heirs, and the greatest part of the property of today's Hungarian area of Baranja was owned by Princes Károly Batthyány and Miklós Esterházy. The most significant ecclesiastical possessions were held by Pécsvárad Abbey, the Diocese of Pécs, the Chapter of Pécs and the Cathedral of Pécs.[13] After the reoccupation of the territory of Baranya county during the reign of Maria Theresa, the city of Pécs became a royal free town (1780), but only after the death of George Klimó,[14] the bishop of Pécs who was highly respected in the royal court. For this reason the Empress did not want to remove the city from the bishop's jurisdiction and allowed him to keep the city under his patronage until his death in 1777.
Since the landowners in the Baranja region were mainly wealthy foreign families, the manors, immediately after having been reorganized, would begin intensive production in order to achieve financial gain. With the introduction of new methods of tillage and production, manors indirectly improved the quality of life of the surrounding population, and what is even more significant is the impact that the new methods had on the area of Baranja helping it to catch up with the Central European cultural and economic standard.

[12] Karaman, op. cit. n. 2, at p. 85.
[13] Felhő Ibolya, szerk., *Az úrbéres birtokviszonyok Magyarországon Mária Terézia korában. I. kötet Dunántúl* [Urbarial relations in Hungary under the reign of Maria Theresa – Volume I. Transdanubia] (Budapest, Akadémiai Kiadó 1970)
[14] See more details about the life of Bishop Klimo in Schmelczer-Pohánka, Éva, *A pécsi püspöki könyvtár története (1774-1945)* [The history of the library of the bishopric of Pécs (1774-1945)] (Pécs 2012).

The Revolution of 1848/49 resulted in the abolition of feudalism in the whole of the Habsburg monarchy, but the actual process of the liquidation of feudalism in some federal provinces continued for several decades. The old rules still regulated most social relationships, although normative acts, which were aimed at releasing the peasantry from their feudal obligations toward the landowners, were adopted during the revolutionary period and during Bach's absolutism (imperial patents of 1853 and 1857). The fight between the former feudal lords and their dependents, which was partly an attempt by landowners to force their former serfs to perform some forms of feudal duties, and partly their effort to appropriate arable land for the construction of new capitalist property, continued for a long time even after the legal basis for the resolution of these issues had already been set by the patents and other laws.[15]

The history of the manors can be divided into three stages:[16]

- From their foundation until 1848 when the *urbarium* was canceled.
- From 1848 until 1918. Formation of inalienable estates.
- Period from 1918 until 1945.

II. Darda Manor

The first feudal landowners of Darda manor, which was situated along the left bank of the river Drava, were John and Frederick Veterani, who came into possession of the estate partly due to their services in the Viennese Court, and partly by cash purchase.

In southern Baranja Darda with the corresponding area was donated to John and Frederick Veterani and their heirs, and Prince Eugene of Savoy had Bellye (Bilje) with the corresponding area in his possession. Charles VI donated Darda with its surroundings to Frederick Veterani and his successors through the male line; and after Veterani had been killed in the battle of Lugoş in 1695, his widow and son Julius requested the registration of the property, which was carried out by an order of the Chapter of Pécs on 7th October 1717.[17] It seems that the whole possession of the deceased Frederick Veterani became ruined at the

[15] Karaman, op. cit. n. 2, at p. 87.
[16] Rajczi, op. cit. n. 6, at p. 172.
[17] The King's order which was given to the Chapter after the death of Fridrich Veterani says that the fiscal debts were 7000 forints and on behalf of that the family gets Darda and its surroundings.

beginning of the 18th century, because a document can be found in the Royal Books issued on 8th of May 1713 by Charles III in which he orders the successors of Frederick Veterani to repair and maintain the buildings and bridges that had become ruined earlier.[18]

With the Charter of Empress Maria Theresa the members of the Hungarian aristocratic Esterházy family took over the manor in 1749 and had it in their possession for about a hundred years.[19] According to a document preserved in the Royal Books, the whole property of Darda with all its belongings was sold once again to Count Charles Esterházy of Galántha by Count John-Julius Veterani Mallenthein in 1798 for the sum of 165000 Rhenish florins (*florenorum Rhenensium)*.[20] In 1844 it was sold by Count Cassimere Esterházy of Galántha to George-William, Prince of Schaumburg-Lippe for 1.5 million '*gulden konventions münze*'.[21]

Besides Darda with the corresponding area, the Veterani family also obtained the estates of Monyorósd, Drávaszentmárton and Görösgal for the price of 5000 forints. The donations came into their possession under '*jure Armor et Neoaquistici titulo*'. (By different documents this

[18] MOL (Hungarian National Archive) A 57, Magyar Kancellériai Levéltár (Archives of the Hungarian Chancery), Libri regii, vol. 30. pp. 35-36.

[19] Document issued by Lord Chief Justice George Erdődy de Monyorókerék on 29th July 1749 in which Julius Veterani-Mallenthein sold his property Dárda for 165.000 florins to John Esterházy of Galántha. MOL *(*Hungarian National Archives) A 57, Magyar Kancellériai Levéltár (Archives of the Hungarian Chancery), Libri regii, vol. 59. pp. 565-567.

[20] '[…] totale et integrum Dominium et Castellum meum Dárda cum universis eo spectantibus possessionibus, praediis item et appertinetiis signanter vero possessionibus Dárda, Láskafalu Karancs; Benge; Iványi; Bezedek; Marok; Pócsa; Illocska; Magyarboja; Beremend; Kapad; Gordicsa; Haraszti; Matty; Dravaszentmartony; Ujtóó alias Ispitál; Torjáncz; Petarda; Bolmány et Kácsfalu; praediis item Arky; Rév; Venecsen; Csat; Lapancsa; Ráczboja; Fehérfalu; Balo; Bejke; Telek; Magyaros; Györös; Old; Odnoga; Bisztricze; Eltsén-Hencse; Kispetarda; Mais; Letnek; Csemén; Szurok et Szemitra omnia in praedeclarato Comitatu de Baranya existens […]'. MOL (Hungarian National Archives) A 57, Magyar Kancellériai Levéltár (Archives of the Hungarian Chancery), Libri regii, vol. 59. pp. 564-569.

[21] The royal assent given to it was issued by Ferdinand V on 18th January 1844. MOL (Hungarian National Archives) A 57, Magyar Kancellériai Levéltár (Archives of the Hungarian Chancery), Libri regii, vol. 67. pp. 390-395.

legal title is called '*jus Turcicum*').[22] The origin of royal donations given under this title of acquisition was quite new at that time, only few donations were given with reference to this title. The legal terminology used by the King in these cases made it clear that he gives the royal donation not under the title of *jus regium* but under the title of *jus armorum* ('*placuit non juris regi […] verum jus armorum adoptare*').[23] This new title was adopted by Leopold I, who relied on the ideology of Grotius' immense work '*De iure belli ac pacis*', in which he claimed that all territories occupied by arms became the exclusive property of the person who had occupied them. Among the contemporary Hungarian legal works we can hardly find an author who recognized this '*jus armorum*' title as an existing title of acquisition. Neither Stephanus Huszty,[24] nor Joannes Szegedy,[25] recognized legal experts of that time, mentioned it in their works written in the 18th century, the expression appeared only later in a few written works, such as the works by Emericus Kelemen[26] and Ignatius Frank.[27]

A manorial patronage applied to the mentioned donations, which means that beneficiaries of the donations were obliged to build a church and school on their manors, and to provide a salary for the priest and the teacher. This right is analogous to the royal patronage of Hungarian kings, which was based on the conviction that providing materially for St. Stephen's Church is the king's concern, and it was also his right to choose the ecclesiastical dignitaries.[28] Since the masters of the manors

[22] Protocollum Venerabilis Capituli Chatedralis Eccelesiae Quinque Ecclesiensis Tom. III., pp. 27-30. (abbreviated CAB – DD of Kapitol), (County archives of Baranja – Documentation Department).

[23] This expression was used in the donation letter issued for Paul Kraj de Topolya regarding a manor called Topolya in Bács County on 8th April 1800. See Kelemen, Emericus, *Institutiones Juris Privati Hungarici* [The institutions of Hungarian Private Law] Libri II. de Rebus Vol. I. (Pest, Joannes Trattner 1814) p. 625; Kalmár and Varga J., op. cit. n. 4, at p. 44.

[24] S. Huszty, *Jurisprudentia Practica seu commentarius Novus in Jus Hungaricum* (Agriae, Typis Francisci Antonii Royer, Episcopalis Typographi 1758).

[25] Joannes Szegedi, *Tripartitum Juris Hungarici Tyrocinium juxta Ordinem Titulorum Operis Tripartiti, Sacris Canonibus Accomodatum* (Tyrnaviae 1751).

[26] E. Kelemen, *Institutiones Juris Privati Hungarici,* Libri II. de Rebus Vol. I. (Pest, Joannes Trattner 1814).

[27] I. Frank, *Specimen elaborandum institutionum Juris Civilis Hungarici* (Cassoviae, Otto Vigand 1825).

[28] Patronage included the right of the owner of the manor to make a proposal to the Bishop about the person of the priest to be appointed e.g. for the position of pastor in

were not present during the formation of the manors, the parishes were formed relatively slowly and late, and so it was the case with Darda parish, which was founded in 1717. Not only did Darda manor have a patronage over the schools and parishes in Darda, Beremend and Németmárok, but it also took on such obligations towards the Orthodox Church on its territory. The founder of the parish was Count Vinko Veterani. In 1715 a church was built and the parish was established and led by the Osijek Capuchins until 1722. The parish remained in its original state until 1790, when the branches Čeminac, Jagodnjak, Kozarac and Karanac were separated, and a new royal parish was established in Čeminac, to which all other branches were attached. The right of patronage was exercised by Count Cassemere Esterházy de Galantha, who dwelt in Pressburg. The majority of the population was of the Catholic religion, but there was also a whole settlement of non-united (Orthodox) Greek religion with a separate church, school and a priest. Members of the Reformed religion did not have any related officials, the Calvinists attended religious services in neighboring Bilje,[29] and the Jews had their own synagogue, rabbi and school.[30]

Once the villages and settlements had been formed, a serf[31] was required to perform his urbarial duties towards his landlord, and if he lived on his landlord's estate, he fell under the jurisdiction of the manorial court of his landlord. Peasants-serfs had to surrender one-ninth of their harvest to compensate for the land they lived on, they were obliged to do corvee on the manor field, pay state taxes, and they had to surrender one-tenth of their crop to the Church. Artisans, merchants and people without land paid a certain amount of money as their contribution to the maintenance of the estate. Settlements in Baranja which belonged to the Veterani manor such as Hrastina, Karanac, Darda, Jagodnjak, etc., also belonged under the jurisdiction of a manorial court, which means they had serf-like obligations.

The period prior to 1848 was characterized by the operation of a manorial court, a legal institution which was created in Hungary, and which, in its original form, was a criminal law institution. However,

Darda Barbara Esterházy proposed József Papanek. See Pécsi Püspöki Levéltár Tribunáliai iratok (1803) p. 217.

[29] Ibid., p. 10.

[30] S. Sršan, *Visitationes Canonice – Baranja*, Liber II (1829-1845) p. 43.

[31] The concept of peasant and serf are not identical. A peasant is a serf who works on the land. A serf is a term of legal status.

after the establishment of the counties, which wanted more responsibilities for themselves in the field of justice, and of county courts, Maria Theresa issued a decree in which she transferred urbarial disputes to the jurisdiction of county courts. Counties had a reporting obligation toward the Locumtenant's Council on inmates who were sentenced to death by the manorial court vested with the right to impose the death penalty[32], and also on ongoing criminal and civil litigation. The jurisdiction of the manorial court invested with the right to impose the death penalty also extended to cases initiated against noblemen who temporarily resided in the territory. Presiding over the manorial court was a duty fulfilled by the district judge and on very rare occasions it was fulfilled by the landlord himself. As a defender of the landlord's interests, the legal representative of the manor was present in any criminal proceedings, while the citizens of the town were represented by the representative of the city government. The right of appeal to the county court referred only to property disputes.[33] In a certain process files were handed to the present mayor who would forward them[34] to the county, and the county would forward them to the county court.[35] Besides the manorial and county courts, a judicial function was exercised by the Episcopal Holy See, which was responsible for the resolving of marital disputes.

Being a small town Darda had the right to hold fairs and the right to elect the Council (magistrates) from its own circles, through which the population maintained relations with the landowner. Since the municipality was the basic political community and institution of public administration (which could be either a town or a serfdom village), there were county authorities which acted as senior superior bodies of administration, which firstly means districts led by district judges and

[32] The Savoy estate (Bellye estate) had the so called right to the sword (*jus gladii* – the right to impose and execute the death penalty) which represents the criminal jurisdiction of the manorial court.

[33] In Bellye manor, which had the right to impose the death penalty, convicts were kept imprisoned, while in Darda manor, which did not have that right, the sentence was executed on the spot, because it was nothing else but physical punishment.

[34] CAB – the county court minutes of 1812 (which were mostly written between 1790 and 1797 during the formal supervision of the landlord's court).

[35] At the end of the 18th century the function of the institution of the right to impose the death penalty and that of the manorial court changed, while Darda estate, which had no right to impose the death penalty, was characterized by the growing the influence of the county and Locumtenant's Council.

secondly, the administrative apparatus of the general assembly of the County, which was composed mainly of the representatives of the manor. This way, in the period prior to 1848, the administrative bodies of the manor and public administration of the county were connected. Although the county bodies of public administration carried out the management of the estate, and municipal executives were the executive bodies of the manor, as the highest body of administration there was a family council, since the donation belonged to a family, not to an individual. Within the framework of this administration the estate belonged to the district of Mohács-Branjin Vrh which evolved into Darda district around 1850. In order to comprehend the essence of the legal life of the manor it is necessary to analyze the internal organization of the lowest bodies of municipal public administration (villages).[36] In the village nothing could be done without the landlord's knowledge and against his will, therefore it all resulted in the fact that the village administration became an instrument for the realization and execution of the landlord's interests.[37] The urbarial order of 1767 confirmed the aforementioned situation, because it was determined that the first instance authority in the village (municipality) was the landowner, and the appellate authority was the county in cases when the landowner failed to perform his duties.[38]

A village governor, as the main person of the administration (municipality) was elected on the proposal of the landlord, who suggested three candidates, one of which would be the governor. Suffrage was given to all grown-up men, and the elections were supervised by the property manager, who would also supervise the election of the village governor. However, it often happened that the landlord himself appointed the governor. The mandate lasted a year, and the governor had to be a respectable person and a man of authority. He was in charge of the village seal, and together with another juror he would sign acts and documents which were drafted and prepared by the village notary.

[36] Wenzel Gusztáv, *Magyarország mezőgazdaságának története* [The history of Hungary's agriculture] (Budapest 1887).

[37] Ruzsás Lajos, *A baranyai parasztsag élete es küzdelme a nagybirtokkal 1711-1848* [The life of the peasantry living in County Baranja and their struggle with the latifundia 1711-1848] (Budapest 1969).

[38] Regulations on the village and local administration are contained in Act IX of 1836.

The village also elected, without previous nominations, jurors (jurors or village judges), whose election was confirmed by the estate authorities. In addition to being the executive authority in the rural (municipal) administration, the village governor and the leaders (members of the municipal council) also collected taxes and other levies, as well as rents for the landlord, which he later surrendered to the village and thus enabled it to obtain funds for public expenditure. With regard to common public works the village administration had autonomy and managed funds with the help of the governor, while the administration of the manor had the right to supervise shops, markets and fairs which were held periodically. The first merchants who appeared on the manor were Jews. This manor was the only one that had allowed Jews to settle down before they earned equal rights with other religions in the second half of 19th century. (In 1746 in a statute Baranja County forbid Jews to settle down in its territory).[39,40] The largest Jewish congregation in the Darda manor was in the period of the Esterhazy family, and already in 1788 there were 21 Jewish families registered as taxpayers in Darda[41]. The administration of the estate also took on some responsibilities in the field of public health, since there were frequent outbreaks of plague. Consequently, it came to the establishment of a sanitary cordon, and if it was necessary, landowner's doctors from Mohács and Darda were also engaged.

In this period the feudal manorial system experienced virtually no change. The events that followed in 1848 marked the beginning of radical changes because it came to the abolishment of urbarial and similar contracts, and also manorial legal authority was temporarily abolished until the establishment of a new general jurisdiction. So, in a legal sense, the already ex-serf villages and towns were forming their public administration independently of the manor. The estate started to become managed internally and the state public administrative and judicial functions were getting separated.[42] In the second half of the 18th

[39] CAB – Minutes of the General Assembly, 1750, No. 79.

[40] Z. Šimončić-Bobetko, *Agrarna reforma i kolonizacija u Hrvatskoj 1918.*-1941. [Agrarian reform and colonization in Croatia from 1918-1941] (Zagreb 2000) p. 105.

[41] See Schweitzer József, *A pécsi izraelita hitközség története*. [The history of the Jewish Church in Pécs] (Budapest 1966). At the same time there are only 20 in Bellye.

[42] Rajczi, op. cit. n. 6, at p. 178

century began the process of the separation of the estates, so it was necessary to determine the exact boundaries of the manors and to establish land registry[43] records.[44] Some aspects of serf-landowner relations that had been preserved to some extent were obstacles in the way of capitalist production. In the period immediately after the abolition of feudalism, it was necessary to separate manorial property from the peasants' property in order to avoid the formation of civic land-owning. It was with suspicion that the rural population accepted the inventory and measurement of the land performed by the municipal committees, suspecting they would be cheated in the amount of land. Despite the reluctance of the peasantry, the census was finally concluded in 1852. The reason for the inventory was the aspiration of the former landowners to determine, as soon as possible and based on accurate data, the amount of compensations which they were to be paid upon termination of feudal levies. The Darda manor counted a total of 883 ¼ plots of feudal land and 795 plots of the so called *inquilini*[45] in 22 districts. The average number of parcels in the municipalities of Darda manor was 40. That is somewhat less than the average relating to Bilje but it exceeds the average of parcels in the Baranja County.[46] The imperial patent of 1853 on feudal land laid down that the land of feudal character in the hands of serfs and *inquilini* shall become their property. Therefore it was in their best interest not to suffer damage in the number of plots, thus they tried to have all the land, known and used, entered in a list of their assets. For the emergence of civil society relations the laws and commands which abolished the feudal arrangements were insufficient. It was necessary to gradually abolish the remnants of the feudal system in everyday practice. The owners of the manors soon

[43] On the basis of archival documents of 1749, as a royal grant Darda estate was given to the Esterhazy family, which was entered in the ownership register on 7th August 1798.

[44] A. Rosz, *Veleposjed I seljačko privređivanje u nekadašnjim općinama Beljskog I Darđanskog gazdinstva od oslobođenja kmetova do 1914, Tri stoljeća Belja* [The manor and the livelihood of the peasants in the former municipalities of Bilje and Darda farms from the liberation of serfs until 1914, Three centuries of Bilje] (JAZU, Osijek 1986) p. 212. In 1850 the imperial and royal head of Baranja County ordered that in municipalities a list should be made of manors and smaller houses.

[45] *Inquilin* was a category of feudal dependents who, unlike the peasants, did not work on their homesteads (garden, fields, meadows, woods), but they were landless, or they used very small plots.

[46] Rosz, op. cit. n. 44, at pp. 212-213.

submitted their claims related to the lost benefits that they had had before. The manor landowners tried to recover for their loss of the levies they had collected from former feudal estates. In 1853 an order was issued which regulated the amount per parcel serving as the basis for determining the amount of compensations.[47] So Archduke Albrecht requested compensation 'according to the law' from the district administration in Mohács for the plots and small households in the area of the Bilje manor, and he did the same in other districts in whose municipalities he had previously possessed something. Although data related to compensation for the municipalities within the Bilje manor estate are scarce, there are more data relating to the Darda manor.[48]
During the application of the laws passed in 1848, Darda manor stretched westward from the borders of the Bellye manor, approximately to the line Magyarbóly-Beremend (its southern border was the River Drava). Since the Darda manor, with its seat in Darda, was owned by foreigners, it was always under lease and it often changed landlords, so that in the end Prince Schaumburg-Lippe decided to sell the manor in 1916 to the Hungarian Agrarian Bank in Budapest. This bank managed the estate in accordance with generally accepted practices, but soon on 22nd August 1917 it also decided to sell the estate to the so called 'Farm in Magyarbóly' and 'the Forest Estate in Magyarbóly' to the Bilje manor.[49] This way it came to the merging of the Bilje and Darda estates and as such they became part of a new Yugoslav state as a single estate. The estate of Darda, which went into liquidation before the war, consisted of: Bezedek (went to Hungary), Kolman, Darda, Ilocska (Iloča-went to Hungary), IvánDárda (to Hungary), Jagodnjak, Karanac Tvrđavica, Lippó (Lapanča-went to Hungary), Čeminac Magyarbóly (to Hungary), Németmárok (to Hungary), Pocsa (to Hungary), Beremend

[47] Rosz, op. cit. n. 44, at p. 212. The plots were divided into three classes according to their quality, which means, according to the income from the land. In Baranja County the 1st class plot cost 600 forints, the 2nd class was 550 forints and the 3rd class was 500 forints.
[48] Ibid. Prince Schaumburg-Lippe was entitled to a compensation of a total of 553,575 forints: for 883 ¼ plots in 22 municipalities and 795 small household plots and for the plots for inquilines he got 39,750 forints.
[49] CAB – Documents of the feudal representation. Purchase agreement dated 22nd August 1917. (To this was attached a full-power authorization for the estate's governor Emil Maier).

(to Hungary), Alsószentmárton (to Hungary), Old (to Hungary), Baranjsko Petrovo Selo, Torjanci and Novi Bezdan.[50]

III. The 'Bilje' estate

From the legal point of view in the period from its formation until 1941, the 'Bilje' estate can be divided in two major periods: The first period starts with the formation of the estate and lasts until 1918, during which the estate 'Bilje' was arranged as a manor and owned by the House of Habsburg-Teschen. In 1848 it came to the formation of a large agricultural plant, and inalienable property, the so called Fideicommissum, was created. The second period is between 1918 and 1941. It brought many changes, the most important ones being those regulating the legal position of 'Bilje'. Primarily, they are the result of the demarcation formed by the Trianon treaty, and also of the policy which sought to use the property to achieve the highest possible state revenue.

1. 'Bilje' manor from its formation until 1918

After a heavy defeat at Nagyharsány on 12th September 1687, the Austrian Imperial Army liberated Baranja from the Ottoman rule.[51] The liberated areas came under the administration of the court in Vienna and the Chamber (the Treasury). The same was true for the southern regions of Baranja, which, at that time, did not have a living owner. The Chamber prepared an inventory, determined the amount of tax for the population and reorganized the administration of the liberated territory.
With the donation (Donation Leopoldiana) of 1698, Leopold I (Croatian-Hungarian king 1640-1705) gave into the possession of Eugene Francis of Savoy (principes de Eugenius Sabauda)[52] 13 villages, 22 abandoned estates, 109,000 acres of arable land, meadows, pastures,

[50] K. Merey, *Razvoj industrije I trgovine na teritoriju beljsko-darđanskog gospodarstva od polovine 19. stoljeća do Prvog svjetskog rata* [Development of industry and commerce on the territory of Bilje-Darda estates from the second half of the 19th century until World War I. Three centuries of Bilje] (JAZU, Osijek 1986) p. 119.
[51] Kalmár and Varga J., op. cit. n. 4, at p. 23.
[52] He distinguished himself in the Battle of Senta in 1697 when Turkey was made to make peace with Austria and to acknowledge the River Sava as the borderline with Slavonia, while in Sriem the borderline ran from the mouth of the Rivers Bosut and Sava to the mouth of the Rivers Danube and Tisza. These were the terms laid down by the peace agreement in Karlovci in 1699.

forests, vineyards, orchards, ponds, mills, customs duties, and the right of patronage and the right to impose the death penalty.[53] The value of the granted property was estimated at the amount of 80000 forints. After the liberation from Turkish rule, Bilje manor was neglected and undeveloped. Great forests, marshland, a small population and poor economic development were the basic features of the estate until the end of 17th century, and there were no major improvements until the 18th century. In 1707 the Prince built a castle in Bilje – Bellye, so the whole estate was governed under that name, and for more than a century Bilje would be the administrative center of the manor, more precisely until 1827 when the seat was moved to Lak (Herceglak), today known as Kneževo.[54] From the death of Eugene of Savoy in 1736 (who was not married, nor did he have any descendants) until the end of 1780 the estate belonged to the Royal Hungarian Chamber, which means, to the family of the Archduke of Habsburg, in whose possession, direct or indirect, it remained until the dissolution of Austro-Hungary. By the Royal Chamber it was leased to Lazar Lukeš and Izak Kiš for an annual rent of 62,000 forints. This lease lasted until 1780.[55]

In the recorded data, which according to the urbarial regulation of 1767 applied to Baranja County, it is stated that the manor 'Bilje' consisted of 28 villages, 2544 households, 1066.07 homesteads and 38 640 acres of urbarial land. Thus, the 'Bilje' manor is at the top of the list of the feudal manors in Baranja according to its size.[56]

Having purchased it in 1784, Archduchess Maria Christine became the owner of the estate.[57] According to the testamentary provisions of the owner and her husband the Duke of Sachsen-Teschen the property was

[53] D. Getz, 'Zaštita prirode Beljskog lovišta [Protection of the environment on the Bilje hunting ground]', *Šumarski list* No. 5-6 (1988) p. 245.

[54] Bilje archives in Kneževo, Indicators – general data for Bilje, 1923 p. 4. In 1827 Archduke Karl Ludvig built a manor house in Kneževo as the headquarters of the manor, which at the same time became the administrative headquarters of this late feudal manor.

[55] CAB – Minutes of the General Assembly, 1750, No. 79.

[56] Karaman, op. cit. n. 2, at p. 85.

[57] The ownership of the 'Bilje' estate was transferred in the land registry onto the couple Maria Christina and Albrecht-Saxon-Teschen. At the same time as the estate was being converted into a family business, economic management was raised to the higher level, which can be inferred from the measurements performed on the land, the duly kept land-possessory books, hunting statistics and other documents. Official take-over of the estate followed in 1784.

transferred to Archduke Karl Ludwig in 1822, who established a feudal fiefdom there in 1822. The Archduke moved the seat from Bilje to Kneževo, which thus became the administrative center of this late feudal and, later, even capitalist manor. Archduke Charles Louis merged Bilje estate with the estate in Magyaróvár, thus making these two properties one organizational unit. [58]

Following Carlo's death in 1847 the estate was inherited by his eldest son, Archduke Albrecht, who held the property in his possession until his death in 1895. The estate, then, went to Archduke Frederick and it remained in his hands until 1918, when the Serbian army and its allies entered Baranja and occupied the whole county including Pécs.

Until 1918 the manor of 'Bilje' was administered by numerous members of the Habsburg-Teschen family.[59] Under their administration 'Bilje' became one of the biggest manors in Europe. What contributed to the economic boom of the manor, besides the aforementioned human factors, were the natural resources of the property itself. The estate had a good climate, favorable geographical position and good soil for almost all types of crops, developed orcharding, livestock, fisheries and forestry. In the early 19th century human factors refined and developed the natural resources of Bilje estate. Having once been established at the beginning of 19th century, the good and prosperous economic organization continued to grow and was profitable for the whole century until 1918.

2. 'Bilje' after 1918

By 1918 it came to the merging of Bilje and Darda estates (in 1917 Bilje bought land from Darda's landowner Prince Schaumburg-Lippe which was put on sale in 1916). Such a merged property became part of the

[58] Rajczi, op. cit. n. 6, at p. 174. One of the features of Hungarian inheritance rights is the institution of aviticity. After the Turks, according to the Western model majorats *(fideicommissa)* appeared. They were inalienable estates subjected to certain rules of inheritance. These rules arose from the donor's will, and not from traditional inheritance rights. A royal donation is a family donation and it is shared and inherited within the family. The institution of aviticitas significantly hindered the capitalist development of the properties because family estates were divided among the heirs according to the caste system, which led to the fragmentation of the estates and the purpose of majorats was to prevent it.

[59] Bilje archives in Kneževo, Indicators – general data for Bilje (1923) p. 4

new Yugoslav state except for the western part of the Bilje property which belonged to the Hungarian state (Trianon Agreement).[60]
The end of the First World War and the dissolution of the Austro-Hungarian Empire directly influenced the change in the legal position of 'Bilje'. On the basis of Article 208 of the Saintgermain agreement, signed on 19th September 1919, the entire royal property of the Habsburg dynasty, and so 'Bilje', was supposed to go into the hands of the state in the same form as it was after the delimitation of the borders. On the territory that belonged to the Kingdom of SCS (Kingdom of Serbs, Croats and Slovenians) remained three fifths of 'Bilje' estate, while the other two fifths remained within the Hungarian borders.[61] The status of 'Bilje' was regulated in more details by the Trianon Agreement, signed on 4th June 1920. With this agreement the final delimitation between the Kingdom of SCS and Hungary was determined. Ante Trumbić participated in the negotiations with Apponyi, trying to get the bigger part of Bilje for the new Yugoslav state. Just before the final delimitation, the whole property of Bilje totaled 110,385 cadastral acres, out of which 24,108 went to Hungary after the final delimitation. Therefore, the size of 'Bilje', after the Trianon Agreement, was 86,227 cadastral acres, or about 590 square kilometers. This made up 30% of former Baranja County, and now it was an integral part of the Kingdom of SCS. Baranja lost almost all

[60] Z. Simončič-Bobetko, *Agrarna reforma I kolonizacija u Hrvatskoj II* [Agrarian reform and colonization in Croatia II] (Zagreb 2000) p. 106. Bilje estate according to the nomenclature of 1910 consisted of the following places: Grabovac, Popovac, Branjih Vrh, Šumarina, Suza, Vardarac, Eugenovo, Hercegszentmarton (went to Hungary), Kneževi vinogradi, Kozarac, Batina, Kamenac, Lug, Lipova (went to Hungary), Nagyyarad and Szabar (went to Hungary) and Udvar. Darda estate, which entered into liquidation before the war, consisted of: Bezedek (went to Hungary), Kolman, Darda, Ilocska (Iloča-went to Hungary), IvanDarda (Hungary), Jagodnjak, Karanac Tvrđavica, Lippo (Lapanča-went to Hungary), Čeminac, Magyarbóly (Hungary), Németmárok (Hungary), Pocsa (Hungary), Beremend (Hungary), Alsószentmárton (Hungary), Old (Hungary), Baranjsko Petrovo Selo, Torjanci and Novi Bezdan.

[61] With the peace treaty in Saint-Germain (France), the Habsburg-Teschen Family lost, according to Article 208, 86.277 cadastral acres, practically the southern part of Baranja, a famous and well-known hunting ground and birds habitat, today's Nature Park and Special Zoological Reserve 'Kopački rit'.

factories to the new Yugoslavia, as well as certain parts of the arable land and pastures.[62]

Besides the administrative reforms in the public sector and the state administration, the new territorial arrangement also required the restructuring of 'Bilje'. Since based on the clauses on royal properties sequestration was abolished, at the end of 1920 'Bilje' fell under the jurisdiction of the Directorate General for State Properties within the Ministry of the Kingdom of SCS. Regulation on the organization of the state property 'Bilje'[63] was replaced on 31st December 1921 by a law in which 'Bilje' was proclaimed state property, and it continued operating under the name of 'Bilje State Property'. This regulation laid down that the state property 'Bilje' in Baranja and Šecerana in Branjin Vrh, as an inseparable part of the estate, became state property to be cultivated and exploited by the state in their own way. The main goal of this state property was to achieve the best possible results and revenue for the state.[64]

Delimitation created by the Trianon peace treaty resulted in the placement of numerous requests for distribution of the 'Bilje' area to the interested agrarians and optants who in 1921 came to Baranja from the area that went to Hungary. However Article 28 of the Saint-Germain agreement clearly laid down that all properties of the former ruling houses were to belong to the state in which they were found after the delimitation.[65] Another consequence of the Trianon Agreement was a dispute started in 1928, which was supposed to resolve the property issue of 'Bilje'. Namely, the former owner of 'Bilje', Archduke Frederick sued the State of Yugoslavia for seizing Bilje and Topolovac,[66] claiming that both properties belonged to him, that the Saint-Germain Agreement could not have been applied to those

[62] M. Kolar-Dimitrijević, *Bilje između dva svjetska rata. Uloga politike u organizaciji beljskog gospodarstva 1918.-1941*. *Časopis za hrvatsku povijest* 3/30 (Zagreb, 1998) p. 510

[63] Službene novine [Official Gazette] 195/1921, 03.06.1921.

[64] S. Novaković, *Državno dobro 'Bilje' od 1918.-1941., Tri stoljeća Belja* [The state property Bilje from 1918 until 1941, Three centuries of Bilje] (JAZU Osijek 1986) p. 246.

[65] Šimončić-Bobetko, op. cit. n. 40, at p. 107.

[66] Kolar-Dimitrijevic, op.cit. n. 62, at p. 513. According to the Act of 1921 Bilje became state property, administratively united with the estate of Friedrich von Habsburg, Topolovac near Sisak.

properties and that according to the Trianon Agreement (Article 250) the property was to be returned and the loss compensated.
Following these events, in 1941, immediately after the capitulation of the Kingdom of Yugoslavia in World War II, the Hungarian army occupied Baranja. Bilje, then, came under the jurisdiction of Archduke Albrecht, the son of Frederick von Habsburg, who arbitrarily annexed the state property 'Bilje' to his own estate which was located in Hungary. Hoping for restitution, Albrecht submitted a request to the Ministry of Justice in Bárdossy, which in 1942 passed a decision that the Kingdom of Yugoslavia was to hand over the State Property 'Bilje' to the Kingdom of Hungary. This decision resulted in a property-rights dispute with Albrecht which was not resolved even by the end of the Second World War.[67]
In the period of 1941 to 1944, during the time of occupation, 'Bilje' was exploited to the maximum with no further investments and renovations. Much of the property was taken to the estate of Albrecht von Habsburg in Hungary, especially at the end of the war. Livestock was completely destroyed, and the land was used to the limit. In such circumstances, at the end of World War II 'Bilje' once again became part of the Socialist Federal Republic of Yugoslavia. It should be noted that during the Hungarian occupation the Main Directorate for the Hungarian State Property 'Bilje' operated in Belgrade.

3. Characteristics of Bilje manor

In the period prior to 1848 the structure of Bellye manor – in terms of administrative and judicial authority – greatly resembled the legal structure of Darda manor shown in the preceding pages of this work. This was the reason for the re-invocation in certain parts of the structure of Darda manor, and this also serves the better understanding of the importance of Bellye manor, which will be illustrated in the continuation of this work.
A characteristic institution of justice in the period prior to 1848 was the manorial court, which was created in Hungary in the 14th century. It reached its height during the times of allodial economy between the 16th and 18th centuries. At that time the landowner was almost like a king on his estate. Most legal processes were conducted in oral form, while recording them in writing was neglected. The consequence was a large

[67] Today, in the archives of Bilje there is a study about that agreement of 1932 in the Hungarian language.

number of court trials, particularly during the reign of Maria Theresa and Joseph, in which the parties required written evidence of their rights, nonetheless they did not exist. 'As the proceedings before the manorial courts were managed very slowly, the prisoners wasted their time in prisons waiting for the completion of the process, and often they were also exposed to victimization by the aristocratic officials. Therefore it was often required that the proceedings which had not been resolved within a certain period be handed over to the jurisdiction of County Courts.'[68] After the appearance of the Counties the disputes on Bilje estate (as well as on Darda estate) were mostly handled by the County Courts. It was particularly so during the reign of Maria Theresa, who transferred all the disputes which fell under urbarial jurisdiction to the jurisdiction of the County. The manors which had the right to impose the death penalty were also in charge of the cases initiated against the nobles who resided temporarily in this area.

An important feature of the Bellye estate in this period was the royal patronage right.[69] This right obliged the estates to the construction and maintenance of schools and churches. Although the parish, due to the absence of the master from Bellye manor, developed relatively late, only after 1758, the very need to maintain that part of social relations became the burden of the estate.[70] This estate had a patronage right over ten villages[71], in which it maintained schools and churches and also paid salaries to teachers and pastors. The first chapel for worship services was built in 1720 by Eugene of Savoy in order to reconcile the local population, who were primarily Calvinists, with the Roman Catholics. It was only in 1775 that the High Chamber of the Hungarian Kingdom built the church and the parsonage there. The parish was divided into

[68] M. Gardaš, *Ustrojstvo sudova u Austrijskoj Carevini i Austro-Ugarskoj Monarhiji od 1687. do 1918. godine. S osobitim osvrtom na područje srednjovjekovne Slavonije* [Organization of courts in the Austrian Empire and Austro-Hungarian Monarchy from 1687 until 1918. With particular reference to the area of medieval Slavonia] (Osijek 1999) p.166.

[69] It is derived from the royal grace of St. Stephen, and it proceeds from the assumption that material care of the Church is the king's obligation, and it is his right to choose and appoint the Church dignitaries. This right applies mainly in order to enable the State to have control over the estates.

[70] Karaman op. cit. n. 2, at p. 85.

[71] Bar, Branjin Vrh, Batina, Bellye, Topolje, Gajić, Luč, Nagynyarad, Villany, Zmajevac.

four branches.[72] The right of patronage was a privilege of the Royal Prince and Archduke Charles, who exercised this right through Anton de Vittman a Denglatz, who was a chief plenipotentiary manager of the royal property. As for the Church revenues the following is significant: the Church in Bilje received donations from an honorable estate.[73] As far as the school was concerned there was an elementary school built in 1791 which was attached to the teacher's house. The school was built at the expense of the estate and it was supported by the municipality. There was only one class, and based on the sources that are available it can be concluded that it was attended only by the members of the Roman Catholic religion, while the members of the Calvinist religion had a separate school in Bilje and its branches.[74]

In order to understand the organization of administrative bodies, and thus the jurisdiction in legal matters of the estate, further in the text we will show a strong correlation in the relationship between the administration of the estate and the county public administration as well as the internal organization of the public administration. The lowest unit in the administrative structure of the estate was the village, and higher authorities were the county administrative bodies. They were primarily the districts represented by the district judges and then the administrative apparatus of the general assembly of the County, which was elected by the General Assembly and had the function of government. The General Assembly was mainly composed of the representatives of the estate, and the basic competence of its administrative bodies was related to the management of the estate.[75]

In the period prior to 1848 the estate was divided into several districts,[76] each headed by a clerical office, while for the tasks of managing the entire estate there was a central clerical office established. Based on the

[72] Those were branches Lug, Mece, Vardarac, Kopačevo.

[73] Sršan, op. cit. n. 30, at pp. 14-15. Three acres of land without reservation. To erect or repair the church, parishioners provided craftsmanship and horses and carriages. The church had the equity of 127 forints and 67 pennies invested at High Royal Chambers (long-term interest on the income was 2 forints and 33 kreutzers). After each toll with three bells a church received 10 Kreutzers, with two bells 6 kr. For candles at mass it obtained 15 Kreutzers, from charity, which was collected on Sundays and holidays, it made up around 100 forints annually. From the venerable manor it received 26 forints for oil.

[74] Sršan, op. cit. n. 30, at p. 11.

[75] Karaman, op. cit. n. 2, at p. 85.

[76] Districts of Bilje, Branjin Vrh, Zmajevac and Nagynyarad.

known material it could be concluded that the jobs related to the management of the estate were handled by the landowner himself, and the competence of the clerical office was restricted exclusively to the affairs related to the economic records of the estate. Up to 1848 rural administration was mainly a means for achieving the landowner's interests. At the end of the 18th century an ordinance was passed under which the landowner was the first instance authority in the village, while the County as the appellate authority was in charge only in cases where the landowner failed to make a decision in a legal matter. In the 18th century the holder of the administrative authority in the village was the village governor, elected on the proposal of the landowner.[77] The newly elected governor was obliged to take an oath in front of the manorial court or before the manager. He kept a village seal and signed documents that were prepared by the village notary.

Bellye and Darda manors did not change their structure or legal framework during the feudal system. The beginning of 1848 is marked with radical changes which were the consequence of the abolition of feudalism, and according to Paragraph 4 manorial legal authority was also abolished, only temporarily though, until a general jurisdiction was established. Until then, general and ordinary civil disputes were handled by the district judges and criminal proceedings by the county court. During this period it also came to a change of manorial jurisdiction in legal matters, since the estate started to be managed internally, and public administration and the judicial function became separated. What was previously mentioned in the case of Darda estate and also refers to Bilje is the process of separation of serfs' estates from the manorial estates. The process was carried out through litigation that regulated land matters between the Archduke Albrecht and the municipalities of Bilje manor after 1848. In these proceedings there was an obvious intention and aspiration of the landowners to assert their economic interests, which were obviously detrimental to the peasants. They also sought to acquire better land to increase the profitability and income of Bilje estate. In the period of 1853 to October 1854 Bilje estate began litigations for regulating land matters in 34 municipalities in total. In the case of a friendly settlement a procedure lasted shorter, while in some cases litigation lasted up to several decades.[78]

[77] Karaman op. cit. n. 2, at p. 85. He was elected for a term of one year among adult men in the village. Handover of duties was performed every year on All Saints' Day.
[78] See Karaman op. cit. n. 2, at p. 3.

At the time when the estate became a royal estate as well as the estate of the Archduke, legal management was identical to the legal administration of the fiscal estates. In the period of 1848 legal administration was led by the landowners' and fiscal jurists and lawyers. At the head of the entire administrative organization was the royal legal administration *(Causarum regalium directoratus)*. This kind of organization was also maintained in the absolutist regime until 1854.
In 1867 there was a legal representation organized in the manorial administration whose task was to deal with legal affairs of the estate.[79] This representation was in charge of dealing with those legal issues which interfered with the life of the manor: representing the estate in litigations and non-contentious affairs, billing claims in court, property rights disputes, etc. The legal representative was completely independent within the scope of his authority. The only competent authority above the lawyer of Bilje estate was the head office in Vienna, later in Pressburg.[80]
Bilje estate was a Royal-Ducal estate so in 1909 there was a new organ appearing in its judicial system and that being the Chamberlain Court of Hungary in Budapest. Before the establishment of the General Court of Hungary, appellate proceedings had been handled by the royal curia-royal appellate court, while in other litigations proceedings were instituted before the Mohacs or Darda district courts. In appellate cases the Royal Court in Pecs had jurisdiction, which means the Appellate Court. Territorial division between the Kingdom of SCS and Hungary in 1918 conditioned the new administrative organization of the state. For all legal disputes of the Bilje manor that started prior to the delimitation, which means before the signing of the Treaty of Trianon, the competent courts were the district courts in Darda and Mohács. The Court of Appeal was in Pecs. Since a Decree was passed on the distribution of land in the area, the whole area of the country was divided into 33 districts, and the Baranja area was allocated to the area of Bačka. The areas comprised districts, and in the area of Baranja there were two districts: Darda and Batina.[81] According to the decree, the administrative

[79] Rajczi, op. cit. n. 6, at p. 178.
[80] Rajczi, op. cit. n. 6, at p. 180.
[81] J. Vrbošić, 'Reintegracija istočne Hrvatske (Srijema i Baranje) u hrvatski državnopravni sustav tijekom 19. i 20. st. [Reintegration of eastern Croatia (Sriem and Baranja) into the Croatian political and legal system during the 19th and 20th centuries]', 6 *Zbornik Pravnog fakulteta Zagreb* (2000) p. 930.

and legal headquarters of the area of Bačka were in Sombor. Therefore, the Court in Sombor became eventually responsible for all disputes involving 'Bilje'. In 1929 the Kingdom of SCS was divided into regions called '*banovine*'. After Baranja had become a part of the Danube '*banovina*' based in Novi Sad, the new administrative and legal headquarters became Novi Sad.

IV. Summary

Using the example of the estates of Darda and Bilje we tried to show the development of the late feudal estates originating in the territory of Baranja County in the aftermath of the liberation of the area of the Habsburg monarchy from the Turkish authorities. As the estates were based mainly on the grants to commendable individuals for their role in the liberation war, as such they represent a new category of possessory relations. Considering the significant role of the feudal landowner in the regulation of legal relations on the estate, we assumed that the differences in the administrative system of the manors would be significant. However, having followed the legal regulation of the manors during the three different periods of late feudal history, we can conclude that both manors were formed at the same time, on the same legal basis and with negligible differences in the functioning of the system of government.

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The genesis and evolution of local governments in Croatia and Hungary during the time of the dualism

I. Introduction – The historical roots of the administrative system of Croatia and the Hungarian Kingdom

Being defined as a part of the overall administrative system, local units in Croatia came into being with the establishment of state organization in this area. [1]Since local government had existed historically and it had necessarily been linked to the local community as organized in a societal sense, the local communities based on the state-tribal organization and territorial allocation could be considered the prototypes of local units in Croatia. Consequently, according to Constantine Porphyrogenetus, the early feudal Croatian state was divided into 11 counties, which had originated in early Croatian parishes as the first organizations for territorial allocation which were later developed further by the Croats. From that time on it was possible to follow the development of the counties forming the basis of the political-territorial organization and the changes which lent them different features. This way it is possible to discern three types of counties[2] with regard to their development: Royal

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[1] D. Brunčić, *Sustavni pristup županijskom ustrojstvu u Republici Hrvatskoj s primjenom na županiju Osječko-Baranjsku* [Systematical approach to the county organization in the Republic of Croatia applied to Osijek-Baranja County] (Osijek, 1995) p. 14
[2] B. Babac, 'O nekim općim problemima uobličavanja političko-upravnog ustrojstva u svezi s ostvarivanjem nacionalnih strategija razvoja Hrvatske i hrvatskog građanskog društva – Teorijske i istraživačke osnove [On some general problems of shaping the political-administrative structure in relation to the exercise of national strategies of the development of Croatia and Croatian civil society – Theoretical and research basis]', 2 *Zbornik Pravnog fakulteta u Zagrebu* (1992) p. 205.

Counties of the mid-tenth[3] century, aristocratic counties with highly developed self-government organized under royal authority, and counties forming part of modern administrative structures in the period between 1886 and 1918. In the second half of the 14th century, old Croatian Counties were merged into larger territorial units with the same name, and within these units districts came to be established that covered the area of the former counties. Then, parallel to the counties, urban and rural municipalities and cities appeared, mostly outside the control of the county government, under the direct rule of the king.

Hence, what particularly characterized Croatia was a relatively strong tradition of regional self-administration from the earliest feudal times in the form of so called counties, which, however, operated not only as regional administrative units but also as territorial self-administrative corporations in the capacity of public-legal bodies.[4]

With the destruction of feudalism, in 1848 Croatia saw significant changes also in local self-administration. The administrative reforms of the Joseph II, based on the principles of centralization, abolished the self-governing character of the counties and reduced them to administrative significance. The emperor turned the counties into areas called '*okruzi*' which were divided into smaller districts called '*distrikti*', which, in turn, were further divided into areas called '*kotarevi*', within which main municipalities and sub-municipalities were organized. Simultaneously, a Military Frontier was set up, which was divided into the areas of divisions, regiments and companies.[5] These administrative reforms resulted in the disappearance of territorial and administrative integrity in Croatia. More specifically, by the administrative organization of 1850, Croatia and Slavonia were divided into 6 counties (Zagreb, Varaždin, Križevac, Rijeka, Osijek and Požega) and 20 districts (*kotari*), while the reform of 1854 reduced the number of counties in Croatia to 5 (the county of Križevci was abolished), and

[3] I. Perko-Šeparović, 'Faktori i razvoj administrativno-teritorijalne podjele u Jugoslaviji [Factors and development of administrative-territorial division of Yugoslavia]', in I. Perko-Šeparović and J. Hrženjak, ur., *Organizacija teritorija i samoupravljanje* [Organization of the territories and self-government] (Zagreb, Informator 1982), p. 57

[4] B. Babac, Z. Lauc, *Regija i regionalizacija u Hrvatskoj – ustavnopravne i političko upravni aspekti* [Region and regionalization in Croatia – constitutional and political administrative aspects] (Osijek, Pravni Facultet u Osijeku 1989) pp. 23-24.

[5] Perko-Šeparović, op. cit. n. 3, at p. 58.

the number of districts was increased from 20 to 54.[6] This administrative organization of Croatia and Slavonia remained in effect until the end of the absolutist period and it was replaced only at the beginning of 1861. With the reinstitution of the Constitution, the same year territorial units regained self-administrative (municipal character), which had been lost in the previous reforms. Based on the 'Decree on the temporary organization of counties, free districts, free and royal cities, and privileged market towns and rural municipalities' in the Kingdom of Croatia, Slavonia and Dalmatia 7 counties were established (the Counties of Zagreb, Križevci, Varždin, Rijeka, Požega, Virovitica and Srijem), which were divided into regions, the regions into districts and the districts into municipalities.[7] The Decree enabled restoration of the old historic counties as the basis for renewed Croatian constitutionality, and left political and judicial administration in Croatia united.[8]

The organization of the Hungarian administrative system was concurrent with the establishment of the Hungarian state, just as it happened in Croatia and Slavonia. During the time of the patrimonial kingdom our first King, Saint Stephen created the royal county system in order to maintain his strong royal rule and appointed *comes* (lord-lieutenants or prefects) to lead the counties. The counties used to be territories that fell under the authority of the comes, their territory could be separated from the territory of other counties and consisted of lands belonging to the King or his royal stewards living in the royal court, a royal castle-system with the lands belonging to it, lands held by Hungarian freemen and lands possessed by the church.[9] In this system there was no trace of self-governance, all the leading officers of the castles and the counties were designated by the King. They were the representatives of the King's will and the territorial executives of the

[6] M. Smrekar, *Priručnik za političku upravnu službu u kraljevinah Hrvatskoj i Slavoniji Vol. I* [Handbook of political administrative service in the Kingdom of Croatia and Slavonia] (Zagreb, 1899) pp. 14, 19.

[7] Smrekar, op. cit. n. 6, at p. 21

[8] H. Sirotković, 'Organizacija uprave u Hrvatskoj i Slavoniji u njenom građanskom razdoblju (1848-1918) [The organization of government in Croatia and Slavonia in its civil period (1848-1918)', in S. Vranjican, ur., *Hrestomatija povijesti hrvatskog prava i države* [Chrestomathy of the history of Croatian law and state] (Zagreb, Pravni Fakultet 1998) pp. 293-307.

[9] Béli Gábor, 'Az ún. királyi vármegye és várszervezet – vázlat [The so-named royal county and castle organization – a draft]', manuscript, p. 3.

Kings orders. In the second third of the 13th century the system of royal castles and royal counties started to split up and a self-governing system started to develop within the frames of the feudal state by the establishment of the county courts' jurisdiction.[10] The self-governing noble county grew out of the autonomously functioning county court system, and later got the title 'bastion of constitutionalism' during the times of the feudal state.[11] The relation of the noble county to the central government was based on the passive resistance the county put up against the implementation of the unlawful orders and letters patent of the King. The deputies of the noble counties made up the bulk of the Hungarian general assembly's lower house, so the nobles of the counties could exercise political pressure through legislation.[12] The most effective means of exerting pressure on the central government was by way of taxes and the army, because only the general assembly could vote on taxes and only the counties could impose and collect these taxes and it was also the counties that provided soldiers for the army. If the county found that the order of the King was in conflict with the laws and customs of the country, they could deny the implementation of the order based on their rights provided by Act 33 of 1545 (*vis inertiae*).[13]

The defeat at Mohács affected also the system of the noble counties in Hungary, because the noble counties ceased to exist on the territories occupied by the Turks. The existence of the noble counties was restricted to the remaining territory of the Hungarian Kingdom. A special administration based on Turkish pattern was introduced in the territories occupied by the Turks, while in the territory of the newly

[10] See more in Béli Gábor, *A nemesek négy bírója, a szolgabírók működésének első korszaka 1268-1351* [The four judges of the nobles, the first period of the operation of judices nobelium 1268-1351] (Budapest – Pécs, Dialóg Campus Kiadó 2009).

[11] The naming appeared in Act XVI of 1848, which called the county 'the fastness of constitutionalism of Hungary and its partner states'. Stipta István: 'Az első polgári kori vármegyetörvény (1848:XVI. tc.) [The first bourgeois county act. Act XVI of 1848]', in *Acta Universitatis Szegediensis de Attila József Nominatae , Acta Juridica et Politica* Tomus XLII. Fasc. 5 (Szeged, 1992) p. 3; Magyary Zoltán, *Magyar közigazgatás* [Hungarian public administration] ˙(Budapest, Királyi Magyar Egyetemi nyomda 1942) p. 65.

[12] Szijártó M. István, 'A vármegye és a jómódú birtokos köznemesség a 18. században [The county and the wealthy nobility in the 18th century]', 2-3 *Aetas* 1998, available at *http://epa.oszk.hu/00800/00861/00009/98_2-3-05.html* (12.06.2013); Ferdinándy Géza, *A magyar alkotmányjog tankönyve* [Textbook of Hungarian constitutional law] ˙(Budapest, Franklin Társulat 1911) p. 174.

[13] Ferdinándy, op. cit. n. 12, at pp. 252-253.

established Principality of Transylvania the Hungarians, Seklers and Saxons living there maintained their previous administrative system. After the reconquest of the country's territory there was a need for administrative reorganization and the idea of the reestablishment of the previous noble county system was brought up, too. In compliance with the royal order of Leopold I issued on 10th June 1688 a committee was set up whose task was to prepare a plan on the administrative reorganization of the reconquered territories. Within 15 months the committee headed by Archbishop of Esztergom Leopold Kollonich prepared a draft of more than 500 pages with the title 'Einrichtungswerk des Königreichs Ungarn', on which in 1699 Balthasar Patachich, the counselor of the Hungarian Chancery, wrote a memorandum on the request of Croatian Ban and Transdanubian Captain-General Adam Batthyány.[14] Besides the Einrichtungswerk a new committee led by Palatine Paul Esterházy and Archbishop of Esztergom George Széchenyi elaborated a new draft, which was given the title 'Hungarian Einrichtungswerk'.[15] The freedom war led by Francis Rákóczi II temporarily suspended the reorganizational work, but it went on after the signing of the Szatmár peace treaty of 1711. At the general assembly of 1712-1715 several committees named 'Systematica commissio' were set up to prepare new drafts on the reforms of the administration and justice system. The result of this work was the establishment of the Hungarian Royal Locumtenant's Council (Consilium Regium Locumtenentiale Hungaricum) as a new central administrative organ in 1723.[16]

The lord-lieutenant (or prefect) appointed by the King used to be the head of the noble county but the vice-prefect elected by the county assembly was the real administrative leader. The vice-prefect had to be elected by the county assembly from the four candidates set out by the lord-lieutenant according to Act 59 of 1723. The collegial organ embodying the county's self-governance used to be the county

[14] Varga J. János, 'Államhatalmi és rendi kísérletek a közigazgatás és az igazságszolgáltatás reformjára a török kiűzésének időszakában (1688-1723) [State and feudal attempts to the reform of the administration and justice system in the period of the expulsion of the Turks (1688-1723)]', in Font Márta and Kajtár István, szerk., *A magyar államiság első ezer éve [The first thousand years of the Hungarian State]* (Pécs 2000) p. 148, 154.

[15] Varga J., loc. cit. n. 14, at p. 150.

[16] Varga J., loc. cit. n. 14, at p. 156.

assembly, which was delegated the power to make statutes. The county assembly used to elect among others the officers of the county along with the county deputies to the general assembly and it had power to instruct the deputies how to vote. It was also entitled to deal with other state tasks and conduct correspondence concerning these tasks with other counties.[17]

The mentioned noble county system existed until 1848. As a consequence of the bourgeois political transition and the creation of the constitutional monarchy, the administrative system had to be modernized, too. Some of the Acts of April 1848 dealt with the administration, too. As a consequence of the new Acts (Acts 16, 23, 25, 26 and 27 of 1848) the county ceased to exist as a 'noble county' and based on the Act 5 of 1848 on general suffrage, it could not send deputies to the general assembly anymore.[18] The reorganization and modernization of the county administration was interrupted as a result of the war of freedom and it continued only after the Compromise with Austria (1867) from 1870. The emperor liquidated the self-governing system during the time of the neo-absolutism and built up a centralized administration based on German-speaking state officers.[19] Only the Diploma of October issued on 20th October 1860 brought some temporary relaxation in the administration by allowing the reestablishment of the pre- 1848 county system.

II. Counties and towns with municipal rights in Croatia and Hungary after the Compromise

During the period of the Compromise, the Act on which the Croatian-Hungarian Compromise was grounded established the division of common and autonomous powers and affairs between Croatia and Hungary. The affairs which were not determined as the joint responsibility of the two countries were managed separately by each state. The 'common tasks' of the Lands of the Crown of St. Stephen included financial-economic issues, patents, product protection, mining and maritime law, post and rail, ports, shipping, public roads and rivers

[17] Ferdinándy, op. cit. n. 12, at p. 253; Béli, loc. cit. n. 9.
[18] Ferdinándy, op. cit. n. 12, at p. 254; Stipta, loc. cit. n. 11, at pp. 5-6.
[19] Silvester Patent of 31st December 1851.

and the questions of national defense.[20] Finances were regulated by the Act on the Compromise as the subject of common legislation, which had a severe impact on Croatian autonomy.[21] The most important common bodies were the Croatian-Hungarian Parliament (Joint parliament) and the joint government, which also included a Croatian-Slavonian minister. The Compromise enabled Croatia to have a special autonomy in internal affairs (except for citizenship matters), justice, religion and public education. Questions of human rights were not included in the Compromise Act, because according to the division of powers they were questions that belonged to the internal affairs of Croatia.[22] The autonomous affairs were run autonomously by the autonomous Croatian-Slavonian Autonomous (Land) Government (*zemaljska vlada*), the Ban and the Parliament.

After the Croatian-Hungarian Compromise had been accepted, it was necessary to carry out reforms in order to reconcile Croatia's internal organization with the provisions of the Agreement, thus, in 1868, the parliament session was resumed, at which many questions were discussed (election of the Royal Committee for resolution of the Rijeka issues; election of the representatives to the Joint Council and the Croatian Minister of the Hungarian government; the appointment of the Ban etc.) After a short break the Parliament of the Triune Kingdom met again in March 1869 and continued the debate about the Bill on the legal basis of the Croatian-Slavonian autonomous government, which received Royal Assent in August 1869 as *Act II/1869 on* Croatian autonomy. *[23]* According to the Act on the Autonomous Government, the supreme administrative organ is headed by the Ban.

[20] Mentioned in the paragraphs 6-10 of the Compromise. Legal act I (1868). *Zakoni o Ugarsko-hrvatskoj nagodbi* [The laws of the Hungarian-Croatian Settlement] (Zagreb, Naklada Knjižare Mirka Breyera 1911) pp. 9-13

[21] The conclusion of Rački is notable that the settlement brought Croatia revenues that were higher than the income of the Principality of Serbia – and from economic, social, cultural and political aspects Serbia was immeasurably slower, but more independent. Serbia freely implemented a modernization of her institutions modeled on Western constitutions. J. Šidak, *Studije iz hrvatske povijesti XIX. stoljeća* [Studies from the Croatian history of the 19th century] (Zagreb, 1973) p. 302

[22] D. Čepulo, 'Hrvatsko – ugarska nagodba i reforme institucija vlasti [Croatian – Hungarian compromise and reform of government institutions]', 22 *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* (2001) pp. 117-148.

[23] Act II of 1869 on the organization of the autonomous Croatian-Slavonian-Dalmatian Land government. *Sbornik zakonah i naredabah valjanih za kraljevinu*

After the Autonomous Government had been established, it was also necessary to organize a new administrative and territorial structure; hence in 1870 the parliament adopted the new *Act on the organization of counties*, which endorsed the existing number of the counties.[24] The counties remained independent *municipia* and were entitled to their own self-administration and to discuss all issues relevant to the population of their area. They also had the right to file complaints with the autonomous government and to send petitions to the parliament. The county's competence extended to the adoption of the county budget, the administration of justice within the county, transport, the building of churches and schools etc. The county administration consisted of the county assembly as the central body and the county magistrate as the executive body. At the head of the county stood a prefect, who was appointed by the king on the ban's proposal. Likewise, the county magistrate was also subordinated to the prefect. The vice-prefect directed the administration of the county and he was the head of the county assembly. Each county was divided into districts (*kotari*) which were led by a district judge who was responsible to the prefect and vice prefect for all administrative affairs.[25] Nevertheless, this Act represented an attempt to modernize counties by organizing them on a municipal basis and it was based on a compromise between modern principles and the existing county administration. It was based on the traditional municipal framework, but with significantly diminished autonomy, because the government, learning from experience, sought to prevent the creation of autonomous counties regarded as cores of opposition.[26] This

Hrvatsku i Slavoniju 1869 [Anthology of laws and decrees valid for the Kingdom of Croatia and Slavonia] (Zagreb, Brzotiskom narodne tiskarnice dra. Ljudevita Gaja 1869) pp. 7-12.

[24] Act XVII of 1870 on the parliament of the Kingdom of Dalmatia, Croatia and Slavonia on the organization of counties. SZ (Zagreb 1871) p. 51-65

[25] In 1875 within the reforms of Mažuranić an Act was adopted on the organization of political administration as well as other Acts which were used to set the administrative organization on a completely new basis, including the sowing of seeds of public services. D. Čepulo, 'Dioba sudstva i uprave u Hrvatskoj 1874. godine – institucionalni, interesni i poredbeni vidovi [Separation of judiciary and administration in Croatia in 1874- institutional, interest and comparative aspects]', 1 *Hrvatska Javna Uprava* (1999) p. 254.

[26] M. Gross and A. Szabo, *Prema hrvatskome građanskome društvu* [According to Croatian citizien society] (Zagreb, 1992) p. 244; M. Polić, *Parlamentarna povijest kraljevina Hrvatske, Slavonije i Dalmacije sa bilježkama iz političkog, kulturnog i družtvenoga života* [The history of the Parliament of the Kingdom of Croatia,

Act is actually the beginning of a trend to limit traditional municipal government in Croatia.

As it was mentioned above, the central body was the county assembly which gathered twice a year (early in February and during August). Given that, it was replaced in its administrative duties by the executive board, one half of which comprised county clerks, and the other half was elected by the county assembly from among its members. Although the counties retained their self-governing authority in the county assembly, primarily due to their bureaucratic position, they ceased to be independent self-governing units and became first instance or appellate authorities in the hierarchy of state administration.[27] Namely, the appointment of county clerks by the Ban and the prefect (the higher-ranking ones were appointed by the Ban on the proposal of the prefect, and the lower-ranking ones were appointed by the prefect) violated one of the fundamental and most important rights connected with the counties' autonomy, which until then had elected its own office-holders. The consequence was that the county clerks were equated with state officials, and were part of state administrative system; they took their oath to the monarch, became responsible for any breach of their official duty to the prefect, they stood under the control of the Ban, and were responsible for damage caused in the performance of their official duties. Also, they had to be trained, they were appointed to their office for life, in principle, and they were paid from the state treasury because the counties had lost the right to levy local taxes.[28] This way the county apparatus implemented the policies of the government.

Even the contemporaries noticed that there were differences in the mandates of the existing counties as self-governing bodies and the former counties, and consequently they argued that 'the powers of existing counties significantly differ from the powers of the former ones, because the counties, following this fourth reorganization, can no longer be considered independent self-governing bodies'. They only 'seemed to be self-governing bodies because all affairs were formally handled under the authority of the county assembly. The government, however,

Slavonia and Dalmatia with notes on political, cultural and social life] (Zagreb, 1900) p. 142.

[27] F. Vrbanić, *Rad hrvatskoga zakonotvorstva na polju uprave od god. 1861. do najnovijega vremena* [Croatian legislation in the field of administration from 1861 until modern times] (Zagreb, 1889) pp. 41, 56.

[28] Čepulo, loc. cit. n. 22, at p. 141.

had executive powers over the county assembly, because the vice-prefect, who was the first office-holder of the county, was required to prepare and perform all the tasks entrusted to him as instructed by the government or the prefect.'[29] Since the government had powers of control over the work of the counties, this contributed to the development of a vertical organization of administration and the intertwining of the administration of justice with the county administration, which further increased the influence of the central government over local administration. Although this reform maintained the appearance of self-governance and also made some improvements, the hybrid nature of decision-making powers, the unprofessional official organization and unionist government, the close connection of the government with the judiciary and the poor territorial division of districts soon caused problems in practice and necessitated a modification of the system.[30]

Radical changes in the administration and the county system were implemented during the reign of Ivan Mažuranić in 1875 after the new Act on the organization of public administration and a number of other laws had been passed, which set the whole administrative organization on an entirely new basis.[31] This Act was passed during the second term of Mažuranić's government which lasted from 5 August 1874 to 25 October 1874 and which may be considered the most important term. In this period, the government proposed a lot of Bills in the fields of education, administration, justice, the press, the economy and health care. Of all the proposed Bills the most important was the *Bill on the organization of public administration*, which was, in contrast to the Croatian municipal tradition, founded on the concept of centralized administration, and according to which county prefects became the local executives of the government, and county officials got the position of autonomous clerks.[32] The Bill was based on the principle of the separation of powers, and that of the separation of the government and the judiciary. At the forefront of the autonomous political administration

[29] Smrekar, op. cit. n. 6, at p. 29.

[30] D. Čepulo, 'Izgradnja hrvatske moderne uprave i javnih službi 1874-1876 [Creation of modern Croatian government and public services 1874-1876]', 3 *Hrvatska Javna Uprava* (2001) p. 93.

[31] Čepulo, loc. cit. n. 25, at p. 254.

[32] 'Osnova zakona o ustroju političke uprave' [The basics of the Law on the organization of political administration], in SZ (Zagreb, 1874) pp. 425-434.

was the Ban or his deputy. Based on the new territorial-administrative system, the region of civil Croatia and Slavonia was divided into eight counties, and within each county there were administrative districts – sub-counties. The powers of the sub-counties were rather limited and they were unable to make independent decisions. At the head of the county there was a prefect, who was appointed by the king on the ban's proposal. Vice-prefects, who were at the head of the sub-county, and county officials were appointed by the governor on the proposal of the prefect. Besides sub-county assemblies, chaired by the vice-prefect, there were county assemblies led by the prefect, which were held annually.

Since Mažuranić thought that a modern and efficient administration could be established by abandonment of the municipal elements of the system, with this law he centralized the entire administration and placed it under the responsibility of the government. Thus, under this law sub-counties became the basic units of public administration (they actually had the status of administrative districts) and they performed all the political and administrative activities in the first instance, or, as it was then called, as authorities of 'first application' and an appeal from the sub-county lay not to the county, as it used to be until then, but to the autonomous government directly.[33] In their competence sub-counties completely differed from the counties because they 'were not self-governing bodies, but parts of the ministerial system of the kingdoms of Croatia and Slavonia, therefore, they performed their administrative tasks without any involvement of the population. The officers of the sub-county became state officials.[34] Thus the sub-counties were state organs which executed orders of the county and government.

The competences of public administration, counties and sub-counties extended to internal affairs, education, religion, and other affairs, sometimes even to affairs of common interest delegated to their competence by the government in Budapest. The competence of sub-counties covered affairs such as the organization and regrouping of municipalities, issuing various permits for real estate, determination of municipal taxes, loans, disputes between municipalities, supervision of municipal committees, election of the representatives to the county council, performance of public works, erection of buildings and

[33] Smrekar, op. cit. n. 6, at p. 31.
[34] Smrekar, op. cit. n. 6, at p. 32.

construction of roads etc.[35] Therefore, from this list it can be seen that all of the above were jobs of administrative, political and technical nature, and it can also be concluded that the self-governing powers of county councils were equal to zero.

The eight Croatian-Slavonian counties retained self-government only in the existence of the County Assembly, but these assemblies had no real decision-making powers. In fact, they resolved various disputes between the sub-counties and municipalities that did not fall under the jurisdiction of the ordinary courts; they conducted correspondence on all administrative and political matters, debated matters with and submitted complaints to the government, the Ban and Parliament, etc. So, the counties in the period between 1875 and 1886 were purely administrative organs.[36]

Given the fact that the sub-counties as first instance administrative authorities were territorially too big, and that in the meantime the Military Frontier had also been reintegrated into Croatia in 1881, it was necessary to carry out a new, sixth reorganization of the Croatian government. However, when it came to the issue of reorganizing the administration, public opinion was divided: some thought that the former administration, with all its flaws, was good in its essence and it only had to be upgraded. They also emphasized the harmful effects of frequent changes and reorganization of the areas, while others believed that there was a need for reorganization. Nevertheless, the central government elaborated new draft legislation on the organization of counties, and on 6 February 1886 the Act on the organization of the counties and the organization of the administration of the counties and districts was enacted. According to this law the counties again began to act as self-governing bodies, which were again divided territorially into districts instead of sub-counties, districts being significantly smaller than the earlier sub-counties. With this law the number of counties increased, however, the territory of previous sub-counties got reduced

[35] D. Pavličević, 'Županije u Hrvatskoj i Slavoniji u prijelaznom razdoblju od 1848. do 1881' [Counties in Croatia and Slavonia in transitional period from 1848 until 1881]', in F. Mirošević, ed., *Hrvatske županije kroz stoljeća* [Croatian counties through centuries] (Zagreb, Školska knjiga 1996) p. 90.

[36] I. Beuc, *Povijest institucija državne vlasti kraljevine Hrvatske, Slavonije i Dalmacije – pravnopovijesne studije* [History of the institutions of state government of the Kingdom of Croatia, Slavonia and Dalmatia – legal and historical studies] (Zagreb, 1985) p. 291

from 1163 km^2 to an average size of a district of about 708 km^2. There was also a decline in the population from 55 000 inhabitants to 29 000. Croatia was divided into eight counties: *Ličko-Krbavska, Modruško-Riječka, Zagrebačka, Varaždinska, Bjelovarsko-Križevačka, Požeška, Virovitička and Srijemska.* According to the available statistical data on migration of the population, Croatia had 2,168,410 inhabitants in 1890, 2,440,766 in 1900 and 2,602,544 in 1910. [37]

Although, according to the new political-administrative organization of 1886, the county was established as a body with a double – self-governing and territorial administrative – role, it had no special executive powers. [38] The self-administrative organ in the county was the county assembly, one half of which consisted of elected members and the other half comprised the largest taxpayers, who were entitled to elect representatives for the parliament and who were not subject to election themselves. For this purpose, for some categories of citizens the amount of the taxes paid was computed twice (intellectuals and free professions – priests of different religions, senior civil servants, doctors, pharmacists, notaries, university professors and others). The number of the members of the Assembly depended on the population of the county, because there was a member of the Assembly elected for every 2,000 people. Administrative districts were constituencies and the number of elected representatives had to be commensurate with the population of districts. The mandate of the elected representatives of the district assembly lasted maximally 6 years and every third year half of the members of the Assembly had to be reelected. The voting was public and oral. Such a composition of county assemblies and the way in which the elections were conducted allowed Ban Khuen Héderváry to have direct impact on county government. [39]

[37] *Političko i sudbeno razdieljenje kraljevinah Hrvatske i Slavonije po posljedicah popisa 1890* [Political and judicial division of the Kingdom of Croatia and Slavonia according to the census of 1890] (Zagreb, 1892) p. 3.

[38] B. Vranješ-Šoljan, 'Županijsko uređenje u posljednjoj fazi postojanja (1881-1918) [Organization of the county in the last phase of its existence]', in F. Mirošević, ur., *Hrvatske županije kroz stoljeća* [Croatian counties through centuries] (Zagreb, Školska knjiga 1996) p. 104

[39] *Saborski dnevnik kraljevinah Hrvatske, Slavonije i Dalmacije, godina 1884-1887 Vol. II* [Journals of the Parliament of the Kingdom of Croatia, Slavonia and Dalmatia 1884-1887] (Zagreb, 1887) p. 1325-1326.

The areas of competence of county assemblies, which met twice a year (in spring and autumn) or in extraordinary sessions, at the request of the prefect, vice-prefect or 1/3 of the members, included:

- the adoption of statutes which were not to interfere with the municipal self-government and which had to comply with the laws and orders of the government,
- discussing matters of public interest,
- sending petitions to the Parliament,
- discussing and making decisions on changes of municipal boundaries,
- management of the county property and entrusted foundations and institutes,
- taking out a loan,
- buying and selling real estate in the county whose validity needed government approval,
- supervision of municipal, district and county administration.

Against the decision of the county assembly an appeal could be submitted to the Autonomous Government, whose decision was final. [40] From the mentioned organization of counties it follows that they were limited in their self-government, and that the executive bodies were not able to make final and autonomous decisions, for they were under the government in the hierarchy and they were under the control of the government. The County Assembly carried out the role of self-government only formally since the execution of the conclusions of the Assembly was entrusted to only one member of the county district – the vice-prefect, who stood at the head of the county district, directed the administration and carried out the conclusions of the county assembly. So, the county assembly adopted conclusions, but did not have competence to implement them. Consequently, executive government was entirely the competence of the district, with no self-governing competence of the county. Similarly, the right to supervise the municipal and district administration was only formal, because not even the county assembly had executive power or a separate, self-responsible executive organ.

In business as well as autonomous administration, another collegial body had considerable powers and that was the board set up by each county assembly. One part of the executive board members (six of

[40] Cf. n. 39, at pp. 1325-1344.

them) were elected for two years by the county assembly with the proviso that each year half of the membership was to be replaced in a draw, while other members were selected based on the functions they exercised. According to function, the executive board included: a prefect, a vice-prefect, a doctor, an engineer, a forestry superintendent, a school superintendent, a national-economic reporter and a tax supervisor. Since the chairman of the board was a prefect, in none of its areas of competence did the board have a final say because it could submit any controversial matter to the government, which would make a final decision. The conclusions of the board in all administrative and municipal matters were mandatory, but an unsatisfied party could appeal against the decision of the executive board as a first-instance authority to the Autonomous Government. At the meetings of the board, which were held once a month, debates concerned business administration, financial and disciplinary affairs.[41]

Therefore, within its competence, the board discussed the situation and problems in the work of certain administrative bodies; it approved the budgets of municipalities and market towns if they did not have magistrates, and if the municipal levy exceeded 20% of the direct taxes. The Board of Directors approved municipal levies up to 40% of direct taxes, municipal accounts, the purchase of municipal movable and immovable assets and the loans taken out by the municipalities, it dealt with complaints against the work of district and county employees, it was in charge of forests and afforestation, education and reviewed the decisions of municipal authorities as a second instance authority.

The prefect, who was appointed by the king on the proposal of the Ban, stood at the head of the county as a representative of the executive power and the confidant of the government. As such he supervised the self-government of the county and the entire administration of the county and districts. In urgent cases he could make decisions instead of the board, but he had to inform the board subsequently. Also, he was the president of the county assembly and took an oath before it.[42] In his absence the prefect was replaced by the vice-prefect, who was in charge of the management of the entire county administration, the

[41] F. Žigrović, *Upravno pravo kraljevine Hrvatske i Slavonije s obzirom na Ustav* [Administrative Law of the Kingdom of Croatia and Slavonia with respect to the Constitution] (Bjelovar 1911) pp. 98-102.

[42] Loc. cit. n. 29, at pp. 1330-1332.

implementation of the conclusions of the county assembly and government orders.

With the government decree of 30 June 1886, counties were divided into districts, which did not have self-government, but were purely administrative organs. At the head of the districts stood district heads, who were appointed by the Ban on the proposal of the prefect. The competence of the district covered matters relating to the implementation of legislation, ensuring public safety, care and maintenance of roads, bridges and canals, education and health care, the parish, the national gendarmerie, authorizing municipal levies up to 20% of direct taxes, etc.

Thus, the widest administrative authority was in the hands of the county, which, in general, represented a tier in the central administration, while district authorities acted as first instance administrative authorities. The jurisdiction of the county covered all matters of public administration that did not belong to the government, the county assembly, the executive board or the district area. It was in fact an intermediate area between the district area and the government, formed with the intention to help revive the old municipal system in at least some elements. [43] Also, certain administrative professional services in the county and the district were organized according to the division of the Autonomous Government into departments, with professional officers at the helm. 'The concept of public service was developing, as certain professional activities were taking the form of vertically integrated administrative organizations, starting with the government and the county, and in most cases ending with districts.' [44]

There were administrative reforms in Hungary too in the meantime. Act 4 of 1869 on judicial power separated public administration from the justice system and Act 31 of 1871 abolished municipal (or county) courts. By this Act the counties and towns with municipal rights became local authorities of public administration and out of their previous rights they could only preserve their right under Act 42 of 1870 to deny the collection of taxes and the sending of recruits to the army, if there was no Act approved by Parliament regarding them.[45] This Act proclaimed that lord-lieutenants could be removed, too. Act 21 of 1886 on the

[43] Vranješ-Šoljan, loc. cit. n. 38, at p. 107.

[44] E. Pusić, *Nauka o upravi* [Teaching on administration] (Zagreb, 1968) p. 42.

[45] Frank Sala, *Magyar közjog* [Hungarian Public Law] (Budapest, Politzer Zsigmond 1900) pp. 493-494.

organization of the municipalities differentiated between two kinds of municipalities: counties and towns with municipal rights. Their legal statuses were equal to each other but their organizations differed significantly. There were 70 counties and 27 towns with municipal rights including Budapest and Rijeka on the territory of the Hungarian Kingdom at that time.[46]

Three kinds of authority were concentrated in the municipalities: self-governing, state administrative and political authority. 'By virtue of their self-governing authority, the municipalities could manage their internal affairs and adopt municipal statutes.'[47] Within its state administrative authority the municipality stood under the supervision of the Minister of Internal Affairs, who had the right to inquire into the municipality's public administration any time, and the lord-lieutenant was his executive and supervisory official in the county. With regard to its political authority the county could file an objection through the vice-prefect to the lord-lieutenant and through the lord-lieutenant to the Minister of Internal Affairs if it noticed that some governmental decrees were unlawful. If the Minister maintained the decree in force, the county assembly could submit a complaint to the Administrative Court against the decision of the Minister. If the Administrative Court rejected the complaint, the county was obliged to implement the decree, but if the complaint was allowed, the Court annulled or amended the decree by its judgment.[48]

The lord-lieutenant used to be the head of the municipality (the county), he was appointed and removed from office by the King on the recommendation of the Minister of Internal Affairs. The mayor was the equivalent of the lord-lieutenant in towns with municipal rights. The lord-lieutenant was the trustee of the government, he was entitled to exercise wide supervisory and inspectional powers, he could inquire into the work of the administrative organs, he could inspect any documentation and he had to file a report on the result of his inquiry to

[46] Ferdinándy, op. cit. n. 12, at p. 255; Nagy Ernő in his work with the title *Magyarország közjoga* [The public law of Hungary] mentions 63 counties and 25 towns having municipal rights. Nagy Ernő, *Magyarország közjoga (Állam jog)* [The public law of Hungary (State Law)] (Budapest, Eggenberg 1897) p. 334-335.

[47] Ferdinándy, op. cit. n. 12, at p. 258; Nagy, op. cit. n. 46, at p. 335; Kmety Károly, *A magyar közjog tankönyve* [Textbook of Hungarian public law] (Budapest, Politzer 1905) p. 413.

[48] Ferdinándy, op. cit. n. 12, at p. 259; Nagy, op. cit. n. 46, at pp. 336-337, Magyary, op. cit. n. 11, at pp. 270-273.

the Minister. He had the right to recommend persons to different county offices and supervised their work. By virtue of his disciplinary powers he could order an inquiry regarding officers at fault, he could suspend the officers or temporarily replace them.[49]

The municipal committee was the most important collegial organ of the municipality, which, depending on the territory of the municipality and its population, could have members from 120 up to 600. The same committee in the towns with municipal rights had members from 48 up to 400.[50] Half of the members were elected for 6 years in a three-year rotation,[51] while the other half consisted of the highest taxpayers of the county or town. All main county officers were members of the municipal committee, too.[52] The lord-lieutenant presided over the assemblies of the committee and in his absence the vice-prefect had the right to preside. The most important task of the municipality was the approval of municipal statutes and the election of municipal officers. Its authority also extended to the supervision of public works, the erection of buildings and maintenance of public utilities, the taking out of loans, acquisition and purchase of public property, preparation of the county budget and appropriation accounts, the replacement of the suspended vice-prefect or mayor, the supervision of county officers, the initiation of a disciplinary process against officers, the approval of officers' salaries, the setting up and abolishment of offices, the inspection of the county till-money, consideration at second instance of the appeals filed with it, correspondence and the filing of petitions and complaints.[53] The

[49] Ferdinándy, op. cit. n. 12, at pp. 261-262; Nagy, op. cit. n. 46, at pp. 341-343; Magyary, op. cit. n. 11, at pp. 285-288. About town self-government see more in Kajtár István, *Magyar városi önkormányzatok 1848-1918* [Hungarian town self-goverments 1848-1918] (Budapest, Akadémiai Kiadó 1992).

[50] Nagy, op. cit n. 46, at p. 338.

[51] Eligibility requirements included the minimum age of 24, Hungarian citizenship, literacy, candidates under the authority of a guardian could not stand election, and candidates must have lived for two years in the same location and must have paid the local taxes. All those were excluded, who were serving a sentence following criminal conviction or had gone bankrupt. Ibid.

[52] In the towns having municipal rights, these officers were: the mayor, the notaries and the notary in chief, the chief of police, the counselors, the prosecutors, the head of chancery and the assessors, the chief medical officer, the engineer in chief, the accountants, the archivists, the mayors of the towns with a regular council and the head of the county's architecture office. Nagy, op. cit. n. 46, at p. 337.

[53] Nagy, op. cit. n. 46, at p. 341.

assemblies were usually held twice a year but in urgent cases the lord-lieutenant could convoke extraordinary sessions, too.[54]

The municipality had both elected and appointed officials. The elected officers had a mandate lasting for 6 years and they were elected from three candidates recommended by the lord-lieutenant. The vice-prefect, the town clerk, the clerks, the prosecutors, the legal counselors of the county and the legal representatives of the royal treasury, the head of the Chancery and its assessors were elected officers. The lord-lieutenant could appoint according to his own will the chief medical officer, the district physicians, the archivist, the Chancery registrars, the administrative trainees, the district actuary, the county's assistant staff and personnel and the police chiefs in towns.[55]

The counties were divided into districts headed by the High Sheriff, whose work was helped by the sheriffs, the administrative trainees, the district auditor, the actuary, the district physician and veterinarian. Village, with the exception of towns with a regular council, belonged to a district.[56]

Each county had a public administrative committee, which was a special hybrid organ consisting partly of the officers of the self-government organ, the county officers and partly of royal officials of the central government. The organization and functioning of the public administrative committee was regulated by Acts 6 of 1876 and 20 of 1882. Its chairman was the lord-lieutenant and its assemblies were also attended by the royal commissioner for education, the royal revenue officer, and the head of the state architect's office, the royal prosecutor, the economic referee, the vice-prefect, the High Sheriff, the county prosecutor, and the head of the Chancery. 10 members were elected by the municipal assembly. The committee held its sessions at the beginning of each month. It played a mediating role between the state administration and the county self-government, handled the appeals and acted as a disciplinary authority over some county officials.[57]

Budapest had a special status among the municipalities. As Capital of State it was created by Act 36 of 1872 through the union of the cities of Buda, Pest and Óbuda. Regarding its organization it differed from the other municipalities. The lord mayor was the leader of it. His authority

[54] Ferdinándy, op. cit. n. 12, at pp. 255-266.
[55] Ferdinándy, op. cit. n. 12, at p. 256; Nagy, op. cit. n. 46, at pp. 343-345.
[56] Ferdinándy, op. cit. n. 12, at p. 257.
[57] Ferdinándy, op. cit. n. 12, at pp. 262-263.

can be compared to the authority of the lord-lieutenant. He was appointed by the King on the proposal of the Minister of Internal Affairs and his mandate lasted for 6 years. His officials were: the mayor, the deputy mayors, the council, district prefects and the officials of the Capital City. The Council served as the executive body of the Capital, it was responsible for the implementation of Acts and it managed the city budget. The Capital City was divided into districts with district prefects and an elected district committee as leading organs. The district committee consisted of 24 members. The Capital City also had a municipal committee with 400 members. Half of the members were elected and the other half consisted of the highest taxpayers. The Capital City's municipal officers were also members.[58]

III. Cities and local municipalities in Croatia and Hungary

Until 1850 some cities in Croatia and Slavonia were free from the control of feudal government and had a voice in the Parliament because they had royal privileges as free royal cities *(civitates liberae regiae)* which enjoyed the status of the nobility i.e. paid taxes directly to the king. As legal persons in their area they enjoyed all regal benefits just like the nobles, and did not fall under the jurisdiction of the county. A judge was a freely elected city magistrate, who, along with the citizens, enacted statutes that were not to be in conflict with the provisions of the autonomous laws, and which were valid only within the city's area. These cities were, just like the counties, special independent municipalities. After the abolition of feudalism, free royal towns in Croatia and Slavonia ceased to exist as feudal legal institutions.[59] Thus the imperial patent of 7 September 1850, with a temporary order for the municipal city of Osijek (and the capital of Zagreb), set new administrative principles for these two cities, while for other cities and market towns with an organized body of magistrates there was a valid temporary Ban's statement of 19 August 1851. The municipalities of Osijek and Zagreb were provided a higher degree of autonomy than it was the case with other cities with a body of magistrates.
The bodies of the municipal administration were: the City Mayor, City Council and the body of magistrates called city council. The city council

[58] Nagy, op. cit. n. 46, at pp. 350-352.
[59] D. Čengić, *Gradsko poglavarstvo Zagreb 1850-1945* [City Council Zagreb 1850-1945] (Zagreb, 2003) p. 9.

was an organ of the city self-government which represented the city and took care of its rights and duties. It elected the city mayor with a mandate of three years, and his election was confirmed by the Ban's government (city mayors of Osijek and Zagreb were confirmed by the king). The city mayor was the head of the administration which had direct administrative authority over municipal affairs and city property, and also it was under the supervision of the city council. Such an organization of the cities lasted until 1861 when on 16 January of the same year a decree was approved for a temporary organization consisting of counties, free districts, free royal cities, and privileged market towns and rural municipalities. According to this decree, the cities became self-governing *municipia,* just as they used to be until 1848 – independent like counties in their implementation of political and administrative affairs and having an independent judiciary. However, since there were no obligatory implementing regulations to go with this decree, many old rules from 1850 remained effective, so there was a municipal order from 1850 for the city of Osijek (and Zagreb), and a temporary order from 1851 for other cities.

The adoption of the Act on the separation of the judiciary from the administration abolished the judicial powers of the cities, which required further changes in their organization. Therefore, on 28 January 1881, the Act on the Organization of Urban Municipalities in the Kingdoms of Croatia and Slavonia was passed, which served as a basis for uniform city administration on the territory of Croatia and Slavonia. This law was an attempt to preserve the continuity of the organizational structure of the administration of 1850, and where it was possible, it did not greatly interfere with existing regulations on city administration.[60]

As far as innovations are concerned, it is important to emphasize the introduction of the general active suffrage for all citizens regardless of gender, i.e. this was the first time that suffrage was given to women. Passive suffrage was given only to those males who enjoyed native status.

Municipal bodies still consisted of the mayor, city council and representation. The city representation, the body of self-government, independently (without anyone's consent and confirmation) elected members of the executive authority – the City Council, except for the city mayor of Osijek (and Zagreb), whose election was approved by the

[60] Smrekar, op. cit. n. 6, at p. 461.

king, and in other cities by the Ban. Elections for the City Council were free, and the city officials were not subject to either the government or the districts, but they acted autonomously. In cases where the relations between the city representation and the executive organs were not regulated by the law, they were regulated by city statutes passed by the representation. The autonomy in performing their duties within their actual areas of competence was limited only regarding the modification of existing municipal statutes, the status and salaries of the city staff and misappropriation of municipal property.[61] In addition, every year the Autonomous (Land) Government had to be presented with the city budget and an inventory of municipal property. Actually, the government attempted to prevent anything that might not be in accordance with the state interest. Likewise, it still exercised monitoring either directly or indirectly through its organs. Since there were difficulties in practice regarding the implementation of monitoring, and in order to gain the same power over the organs of the city administration and the self-government, on 5 February 1886 a law was enacted, which modified certain provisions of the mentioned Act of 1881. It established a new supervising body, i.e. it introduced a new institution of the lord mayor for the capital of Zagreb, and in other cities a city prefect as the supreme supervising body, who was nominated by the king on the recommendation of the Ban. The lord mayor and the city prefect as the executive bodies of the government monitored the affairs of the city self-government as well as public administration which were transferred to the competence of the city council. They were authorized to issue city mayor's orders regarding the work of the administrative bodies, to suspend officers and to convene and preside over meetings of city agencies. This amendment to the law significantly diminished the powers of the city government. This law also provided for the establishment of two administrative boards in Zagreb and Osijek for taxes and disciplinary affairs. In other cities tax affairs fell under transferred competences and were subordinated to the county administrative boards, and the affairs within their own competences were subordinated to the government.

[61] D. Jelaš, 'Funkcioniranje gradske uprave i statuti Osijeka 1809.-1945. [Functioning of the city administration and the statutes of Osijek 1809-1945]', in S. Sršan, ur, *Glasnik arhiva Slavonije i Baranje* [Gazette of the archives of Slavonia and Baranja] (Osijek, 2009) p. 73.

According to the opinion of Professor Čepulo, the main feature of the Act on the organization of the cities was the establishment of a balance between guarantees of city self-government and governmental supervision which functioned in the public interest as well as the involvement of the cities in the state administration.[62] However, in some ways the law represented a step forward with regard to the Croatian circumstances (such as suffrage for women).

Because of the inconsistency that districts, as larger units with regard to their territory and population, were subordinated to counties and cities were subordinated directly to the Autonomous Government, the existing situation had to be changed.[63] Thus, the main complaint was the large number of cities that were directly subordinated to the Autonomous Government, and their population and territorial extent were no justified reasons for that. Therefore, because the law of 1881 proved defective, a new administrative organization was soon introduced. In 1895 a new law was enacted on the organization of city municipalities in the kingdom of Croatia and Slavonia[64] which identified three types of cities, each with its own special legal status. The most important change was the subordination of most cities to the county, while only the bigger ones (cities with more than 10 000 inhabitants which were able to independently perform the duties of a town *municipa*) like Zagreb, Osijek, Varaždin and Zemun were directly subordinated to the Autonomous Government. This law again limited active suffrage only to men, however voting rights were also given to those who were not domiciled citizens of Osijek but paid at least 10 forints of direct annual taxes. This law also canceled the suffrage for poor and dependent people, and also narrowed the right of passive suffrage (illiterate people were excluded). The government could continue to monitor the elections through its commissioners, and electoral bodies were formed so that the minority ruled over the majority because the two electoral bodies had the right to an equal number of representatives, but one of them

[62] D. Čepulo, 'Položaj i ustroj hrvatskih gradova prema Zakonu o uređenju gradskih općina 1881. godine [Position and organization of Croatian cities according to the Act on the organization of the city municipalities of 1881]', 1 *Hrvatska javna uprava* (2000) p. 118

[63] D. Klarić, *Razvitak ideje samouprave u svijetu i u nas i njeno realiziranje na tlu Slavonije i Baranje* [Development of the idea of organizing self-government in the world and in our country as well as its implementation on the territory of Slavonia and Baranja] (Osijek, 1987) p. 131.

[64] Smrekar, op. cit. n. 6, at pp. 463-464.

consisted of voters who paid the highest amount of direct tax with a minimum limit of a very large amount. Likewise, the government had the power to dismiss the City Council and to appoint a commissioner having the powers of the representatives and the mayor. Supervision over the operation of the city government in Osijek, Varaždin and Zemun was exercised by the city prefect, while at the head of the city of Zagreb was a lord mayor. They were all appointed by the king on the ban's proposal. In addition to the city mayor, an important city official was the captain of the city, who was at the same time a police reporter. In the cities directly subordinated to the Autonomous Government the captain was appointed by the Ban, and in other cities, by a prefect.

In addition to the cities of the first class which were directly subordinated to the Autonomous Government, according to the Act of 1895 on the organization of the city municipalities, secondary cities[65] were established as well, which existed within the county area, and were subordinated to the county in administrative and tax matters. Also a third class of cities was established which de facto had a position of rural municipalities (so called titular towns).

According to the law, bodies that manage the affairs of the city municipality are: the city representation, the city mayor and the city council. The internal organization of the city had to be regulated in a city statute which was approved by the Department of Internal Affairs of the royal Croatian-Slavonian-Dalmatian Autonomous Government. The city representation, as a body of the city self-government, was an elected body, constituted according to the size of the city and it had 12 to 15 members. Thus, the number of representatives in the City Council was also different, for example, 50 in Zagreb, 40 in Osijek, 30 in Varaždin and Zemun, while in other, smaller cities, the situation was as follows: up to 2000 residents 12 representatives, 2000 to 4000 residents 16 representatives, from 4000 to 6000 residents 20 representatives, and over 6000 residents 24 representatives. The electoral mandate of the city representatives lasted 6 years, provided that every third year a half of the members had to be reelected. At the head of the city council there was a city mayor, who was chosen among the representatives. The city representation did not have executive power, but in the affairs within its competence it was in charge of making conclusions on the merits, while

[65] Secondary cities in Croatia were: Senj, Bakar, Sisak, Karlovac, Petrinja, Koprivnica, Bjelovar, Križevci, Požega, Brod, Mitrovica, Karlovci and Petrovaradin.

the competent administrative organs had so called powers of state control. The City Government headed by a city mayor performed, as an executive body, both affairs within its own competence (internal municipal affairs) and affairs of transferred competence (affairs of public administration). Otherwise, the town mayor was responsible for the affairs of the city council to the city representatives, as well as to the higher district. Since the city mayor was also at the helm of the city representation and the city council, he thus consolidated self-governing and administrative functions.

Until 1848, according to the *urbarium* regulations of 1836, almost each place and village had its internal organization and a municipal status. At the helm of the municipality stood a judge, a governor (*iudex loci*) who was elected by the village from among three men chosen by the landowner. *Jurats* (*iurati locorum*) and sub-judges (*subiudices*) were selected the same way as judges by the villagers for one year, provided that they were not proposed by the noblemen. The Municipal Judge was responsible for the publication of provincial or aristocratic orders, ensuring labor for public works, taking care of public order and peace, while management and leasing of the common rural property and indebting the rural municipality were not possible without the knowledge of the nobleman.

Major changes occurred in 1848 when Parliament approved the abolition of serfdom, which was declared in the Ban's letter dated 25 April of the same year. The imposed constitution of 1849, which provided municipalities with some rights, such as the choice of their representatives, autonomy in managing their own affairs, was replaced with the imperial patent of 31 December 1851 and the absolutist rule. In comparison with the pre-revolutionary period the innovations were brought only temporarily with the 'Ban's ordinance of 19 August 1851 on the management of municipal affairs in the outer municipalities of the Kingdom of Croatia and Slavonia, which did not have an organized body of magistrates'.[66] According to this ordinance, at the helm of the municipality stood a municipal committee, which consisted of 6 members in the municipalities with 2000 residents, and with every additional 500 residents the number of the members would increase by one. The board elected among their own members the mayor, his deputy and an excise-man for three years, and their election was endorsed by

[66] Klarić, op. cit. n. 63, at p. 120.

the vice-prefect. Government could dissolve the municipal committee for important reasons, from which derives its dependence. Such an organization lasted until 1861, when the old organization of 1836 was restored. However, after the conclusion of the Croatian-Hungarian agreement, the requirements for efficiency and rationality in terms of government and administration required changes, so in 1870 the Parliament adopted the *Act on the Organization of rural municipalities and market towns with no body of magistrates.*[67] This law primarily defined who could become the member of the municipality, and the conditions for this status were Croatian-Slavonian citizenship and ties with the municipality in the form of a person or property.[68] The municipal judge and the notary, as well as the self-governing executive bodies, were elected by the municipal board on the recommendation of the higher administrative body. The municipal judge was responsible to this committee for the matters within his self-governing competence. The Municipal Committee comprised 12-24 members, depending on the size of each municipality, and its mandate lasted three years. Municipalities had their own resources and powers to perform their duties, but they were under the supervision of higher authorities. Competences of the rural municipalities were mainly related to the support of primary education, organization of public safety, welfare, maintenance of municipal buildings, roads and bridges, etc.[69] Supervision over the work of municipal authorities was exercised by the prefect, partly directly through his delegates and partly through district authorities.

The regulation of the organization and legal status of local municipalities in Hungary took place after the Austro-Hungarian Compromise and they got their definite organization in Act XXII of 1886. According to this Act, three types of local municipalities can be mentioned: the towns with a regular council, big and small villages. They altogether make up the county. All territories of the state have to

[67] Act XVI of 1870 on the organization of rural municipalities and market towns with no body of magistrates, SZ (Zagreb 1871) pp. 37-50.

[68] Čepulo, op. cit. n. 22, at p. 143.

[69] A. Milušić, *Izborni sistemi za lokalna predstavnička tijela u staroj Jugoslaviji s osvrtom na jugoslavenske zemlje prije njihova državnog ujedinjenja 1918* [Electoral systems for local representative bodies in the former Yugoslavia with regard to the Yugoslav countries before their national unification in 1918] (Zagreb, 1976) pp. 73-77.

belong to some local municipality.[70] The towns with a regular council fell directly under the authority of the county and the other local municipalities belonged to the authority of the districts. Big villages could usually fulfill their tasks imposed by the Acts all by themselves, while small villages had to ally to fulfill their obligations.[71] Local municipalities also had self-governing organs, they could approve local statutes and they had their officers and a prefect. They managed their finances independently, could impose local taxes, maintain the local roads and traffic, managed local education and preserved public order and safety and administered poor relief.[72] Their decisions on the municipal taxes, the alienation and purchase of the municipal property, the taking out of loans, and the establishment of new offices required the consent of the municipal authority. The municipal assembly was a self-governing body with members of 10 to 200 depending on the population of the local municipality. One half of the members were elected and the other half was constituted by the highest taxpayers of the local municipality.[73] The judge was the head of the assembly in the big and small villages and the mayor was his equivalent in towns with a regular council. The notary, the chief of police, the counselors, the prosecutor, the assessors of the Chancery, the treasurer, the accountant, the public guardian, the town or village physician, the engineer of the town or village and the forest officer were also present at the sessions. The municipality could elect its officers on the assembly.

IV. Summary

If we compare the administrative system of the two countries in the different historical periods we can get to the conclusion that regarding the administrative system there were many similarities. This could happen because of the common past and the partner – state status, and also because for the implementation of the Compromise Act between Croatia and Hungary – even if internal affairs were handled separately – the administrative system had to be rationalized. As a detectable difference it can be mentioned that, maybe, the self-governing function

[70] Magyary, op. cit. n. 11, at p. 303.
[71] Ferdinándy, op. cit. n. 12, at p. 264.
[72] Nagy, op. cit. n. 46, at p. 357; Magyary, op. cit. n. 11, at p. 308.
[73] Nagy op. cit. n. 46, at pp. 358-359.

of the counties in Hungary remained stronger than in Croatia because the attempts at governmental centralization failed to succeed.

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Universal foundations of local laws – example of 'just price' (*iustum pretium*)

I. Introductory remarks

The present paper endeavors to analyze the influence of traditional universal legal systems (in particular Roman and Canon law) on the development of Hungarian and Croatian local legal systems by the example of the institution of 'just price' (*iustum pretium*). The first part of the paper is dedicated to the examination of the institution of *laesio enormis*:[1] firstly, it tries to answer the question, whether the regulations

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[1] On the questions of *laesio enormis* see the rich literature: K. Visky, 'Die Proportionalität von Wert und Preis in der römischen Rechtsquellen des III. Jahrhunderts', 16 *Revue internationale des droits de l'antiquité* (1969) pp. 355-388; K. Hackl, 'Zu den Wurzeln der Anfechtung wegen laesio enormis', 98 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* (1981) pp. 147-161; K. Visky, *Spuren der Wirtschaftskrise der Kaiserzeit in den römischen Rechtsquellen* (Budapest, Akadémiai Kiadó 1983) pp. 24-66; H. T. Klami, '«Laesio enormis» in Roman law?', 33 *Labeo* (1987) pp. 48-63; A. J. B. Sirks, 'Diocletian's Option for the Buyer in Case of Rescission of a Sale. A Reply to Klami' 60 *Tijdschrift voor Rechtsgeschiedenis* (1992) pp. 39-47; A. Pókecz Kovács, 'A laesio enormis és továbbélése a modern polgári törvénykönyvekben [The principle of laesio enormis and its influence on the modern Civil Codes]', 5 *Jogtudományi Közlöny* (2000) pp. 177-185; M. Pennitz, 'Zur Anfechtung wegen laesio enormis im römischen Recht' in M. J. Schermaier, et al., Hrsg., *Iurisprudentia universalis – Festschrift für Theo Mayer-Maly zum 70. Geburtstag* (Köln, Böhlau 2002) pp. 575-591; J. D. Harke, 'Laesio enormis als error in negotio', 122 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* (2005) pp. 91-102; A. J. B. Sirks, 'Laesio enormis again', 54 *Revue internationale des droits de l'antiquité* (2007) pp. 461-469; R. Westbrook, 'The Origin of Laesio Enormis', 55 *Revue internationale des droits de l'antiquité* (2008) pp. 39-52; M. Armgardt, 'Zur Dogmengeschichte der laesio enormis' in K. Riesenhuber, et al., Hrsg., *Inhaltskontrolle im nationalen und Europäischen Privatrecht* (Berlin, Walter de Gruyter 2009) pp. 3-16; J. Jusztinger, 'The principle of laesio enormis in sale and

of Roman law were successful in harmonizing the freedom of contract and the criterion of equality in exchange; secondly, if the Roman law could reconcile the demands of the rule of law, and the requirements of a stable commercial life with the principle of elimination of inequality and the principle of equality, both aiming for protection of the economically more defenseless, weaker party and if so, to what extent.
The different elaborations of *iustum pretium* in medieval Roman legal tradition and medieval Canon law will be briefly analyzed thereafter. Based on this analysis, the central part of the paper will focus on the potential influence of the medieval elaborations of a just price on contemporary Hungarian and Croatian legal sources, in particular *Tripartitum* (1514) and the *Statute of Ilok* (1525). Therefore, all the relevant aspects of the legal meaning of the term *iustum pretium* and other equivalent or similar expressions (*condignum pretium, iusta aestimatio, condigna aestimatio*) of those two legal sources will be examined.
In the final part of the research, the influence of the Roman-canonical principle of equality in exchange as a manifestation of commutative justice (*iustitia commutativa*) on contemporary Hungarian and Croatian law of obligations will be investigated. The examined principle as a present form of the ancient idea of 'just price' (*iustum pretium*) will also be analyzed on a particular example of the institution of gross disparity (*laesio enormis*).

II. Ancient Roman law: from free bargain to the rule of *laesio enormis*

1. The regulations of the classical Roman period

In relation to the regulations of the classical Roman period regarding purchase price, the only visible restrictions to the rule were that it had to be expressed in terms of money,[2] be defined (*certum pretium*) and true

purchase contracts in Roman law' in Zs. Balogh, ed., *Studia Iuridica Auctoritate Universitatis Pécs publicata* 149 [*Essays of Faculty of Law University of Pécs, Yearbook of 2011*] (Pécs, University of Pécs, Faculty of Law 2011) pp. 107-123; J. Platschek, 'Bemerkungen zur Datierung der laesio enormis', 128 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* (2011) pp. 406-409.

[2] See Gaius 3,141; I. 3,23,2; Paul. D. 18,1,1,1. Cf. A. Bürge, 'Geld – und Naturalwirtschaft im vorklassischen und klassischen römischen Recht', 99 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* (1982) pp. 128-142.

(*verum pretium*).[3] This meant that classical Roman law did not wish to interfere with the process of bargaining, since it regarded it as natural that the contracting parties would have tried to reach the price most favorable to them.[4] On the grounds of these facts it is possible to say that the purchase price did not have to express the objective value of the object sold, while relation between price and value was irrelevant, which made its fairness questionable (*iustum pretium*).[5]

The system, which regarded this *circumscriptio* as a natural element of the sale and purchase process, remained unchanged for many centuries in Roman law.[6]

Numerous rescripts, issued by *Diocletian* and *Maximian* in 293 confirm that the agreed purchase price had a binding force in relation to both parties, and it had nothing to do with the question whether it was equal to the real value of the object sold or not.[7] This meant that the state had no possibility of modifying the contract in order to help the economically weaker party on the grounds of inequality between performance and counter-performance.[8]

[3] For more detailed information, with references to further reading, see Jusztinger J., *A vételár meghatározása és szolgáltatása a konszenzuális adásvétel római jogi forrásaiban. PhD értekezés* [Determination and performance of purchase price in roman legal sources concerning sales contract. Doctoral Thesis] (Pécs, PTE ÁJK Doktori Iskolája 2012) pp. 44-99, 128-132.

[4] Paul. D. 19,2,22,3: '*in emendo et vendendo naturaliter concessum est, quod pluris sit, minoris emere, quod minoris sit, pluris vendere, et ita invicem se circumscribere';* Ulp.-Pomp. D. 4,4,16,4: '*Idem Pomponius ait in pretio emptionis et venditionis naturaliter licere contrahentibus se circumvenire*.' Pap. Iustus D. 18,1,71: '*[…] quibus mensuris aut pretiis negotiatores vina compararent, in contrahentium potestate esse […]*'.

[5] Cf. Th. Mayer-Maly, 'Privatautonomie und Vertragsethik im Digestenrecht', 6 *Iura. Rivista internazionale di diritto romano e antico* (1955) p. 128, 131; J. W. Baldwin, *The Medieval Theories of the Just Price. Romanists, Canonists and Theologians in the Twelfth and Thirteenth Centuries* (Philadelphia, The American Philosophical Society 1959) p. 13.

[6] See R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Cape Town, Juta 1992) pp. 255-258.

[7] See Diocl. et Maxim. CJ. 4,44,4; CJ. 4,44,6; CJ. 4,44,11,1; CJ. 4,45,2,2.

[8] Cf. L. Kecskés, et al., 'A szolgáltatás és ellenszolgáltatás értékaránytalansági problémái a szerződési jogban I' [The problems of the difference between the value of performance and counter-performanced in contract law I], 46/2 *Magyar Jog* (1999) p. 65, 66.; Pókecz Kovács, loc. cit. n. 1, at p. 177.

2. The emergence of *laesio enormis* in imperial rescripts

Besides the imperial rescripts preserving mostly the principles of the classical period, two rescripts can be found in the *Codex Iustinianus*, attributed to emperors *Diocletian* and *Maximian*. Their conception is fundamentally different from the preceding approach, as they allowed the seller the rescindment of the contract on the grounds of an apparent disparity between contractual performances. The first of these dates back to 285, eight years before the previously mentioned rescripts.

> *CJ. 4,44,2 (Impp. Diocletianus et Maximianus AA. Aurelio Lupo):*
> *Rem maioris pretii si tu vel pater tuus minoris pretii distraxit, humanum est, ut vel pretium tu restituente emptoribus fundum venditum recipias auctoritate intercedente iudicis, vel, si emptor elegerit, quod deest iusto pretio recipies. Minus autem pretium esse videtur, si nec dimidia pars veri pretii soluta sit. (a. 285)*

The rescript appearing in CJ. 4,44,2 that was addressed to *Aurelius Lupus* contained the following rule: the seller is entitled to demand the return of the property if the negotiated purchase price has not reached the minimum of the half of the market price at the time of the conclusion of the contract. However, the purchaser has the option (*facultas alternativa*) to increase the amount already paid up to the real price of the object (*verum rei pretium*), which was equal to the objective value of the merchandise. In the latter case, the contract remained valid.
The second rescript, which appeared eight years later, in 293, is also attributed to *Diocletian.*

> CJ. 4,44,8 (*Idem et CC. Aureliae Euodiae*):
> *Si voluntate tua fundum tuum filius tuus venum dedit, dolus ex calliditate atque insidiis emptoris argui debet vel metus mortis vel cruciatus corporis imminens detegi, ne habeatur rata venditio. Hoc enim solum, quod paulo minori pretio fundum venumdatum significas, ad rescindendam emptionem invalidum est. Quod videlicet si contractus emptionis atque venditionis cogitasses substantiam et quod emptor viliori comparandi, venditor cariori distrahendi votum gerentes ad hunc contractum accedant vixque post multas contentiones, paulatim venditore de eo quod petierat detrahente, emptore autem huic quod obtulerat addente, ad certum consentiant*

> *pretium, profecto perspiceres neque bonam fidem, quae emptionis atque venditionis conventionem tuetur, pati neque ullam rationem concedere rescindi propter hoc consensu finitum contractum vel statim vel post pretii quantitatis disceptationem: nisi minus dimidia iusti pretii, quod fuerat tempore venditionis, datum est, electione iam emptori praestita servanda*. (a. 293)

According to the rescript addressed to *Aurelia Euodia*, *Aurelia*'s son had sold her land with parental consent. The rescript expresses the imperial point of view that a contract could be declared void on the basis of a very serious cause: fraud must have been proven due to the craft and guile of the buyer, or the immediate fear of death, or the possibility of physical torture must have been manifested. In the absence of these, the sole fact that the purchase price may have been a little lower was insufficient to rescind the purchase ('*ad rescindendum emptionem*'). Actually, the major part of the rescript emphasizes the importance of the consensus of the parties to the contract. This part of the rescript does not describe the negotiations which had taken place in the particular case, but it rather provides an abstract legal and sociological description of a process mirroring the continuity of such classical principles as the principle of freedom of contract.[9] Surprisingly enough, at the end the text provides the seller with the possibility of rescission from the purchase, if the purchase price had not reached at least one half of the 'just (equitable) price' at the moment of the conclusion of the contract.[10] Both rescripts represent the legal institution of *laesio ultra dimidium*, or, expressed with its medieval name,[11] *laesio enormis*, and both have obviously accorded to the mentioned classical principles. However, by the purchase of a real estate, the rule has clearly given the seller such a right that has never been available before to either of the parties, namely that, if the purchased price was lower than one half of the market price, the seller could unilaterally, without having the purchaser's consent, or even contrary to his will, demand the termination of the contract and, simultaneously, the mutual restitution of the performances. If a party wished to avoid this, it had no other option available than to pay a purchase price according to the real value of the property.

[9] See Hackl, loc. cit. n. 1, at p. 148.
[10] See also Westbrook, loc. cit. n. 1, at p. 40; Pennitz, loc. cit. n. 1, at p. 581.
[11] Cf. V. Arangio-Ruiz, *La compravendita in diritto romano* [The sale and purchase contract in Roman law] (Napoli, Jovene 1956) p. 148.

3. The criterion of '*dimidia pars*'

The Roman rule of *laesio ultra dimidium* determines strictly the conditions of its application and has an objective basis: the most important criterion is the difference between the purchase price and the real value of an object sold, which should exceed fifty percent, but other, more subjective circumstances, such as the good faith of the seller and/or the purchaser, do not come into question. There is neither need nor space for an examination of other circumstances surrounding the conclusion of a contract, and the economic situation of the parties is also irrelevant, as well as their possible lack of experience in business matters. It is also required that the obvious disparity between performance and counter-performance has to manifest itself at the time of the conclusion of the contract ('*tempore venditionis*').

The strict criterion of '*dimidia pars*' has been explained by means of many different opinions in the Romanist literature: some emphasized the Oriental influence,[12] certain authors drew attention to the works of Aristotle,[13] to Stoic moral philosophy,[14] to St. Augustine[15] and to the Christian ethical doctrine.[16] This colorful setting needs to be observed together with the rule's origin. According to Genzmer's view, whose starting point is the Romans' unifying approach to substantive and procedural law, the criterion of '*nec dimidia pars*' was nothing other than the application of the *id quod interest* concept. He considers the rule of *laesio* an innovation of *Justinian*'s legislation, which was nothing else than a successful *compromissum* between the classical principle of the freedom of contract and the Christian teaching on equity that protected the economically weaker and more defenseless party through the just price (*iustum pretium*) equivalent to the market price.[17]

[12] See Westbrook, loc. cit. n. 1, at p. 44.

[13] See Baldwin, op. cit. n. 5, at pp. 10-12.

[14] See Hackl, loc. cit. n. 1, at pp. 159-160; H. Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte* (Heidelberg, C. F. Müller 2005) p. 66.

[15] Cf. E. Albertario, 'Iustum pretium e iusta aestimatio', in *Studi di diritto Romano* Vol. 3 (Milano, Giuffre 1936) p. 403.

[16] See Mayer-Maly, loc. cit. n. 5, at p. 138; M. Kaser, *Das Römische Privatrecht. Vol. 2* (München, Beck 1975) p. 390; R. Zimmermann, op. cit. n. 6, at p. 261.

[17] See E. Genzmer, 'Die antiken Grundlagen der Lehre vom Gerechten Preis und der laesio enormis', in E. Heymann, Hrsg., *Deutsche Landesreferate zum II. Internationalen Kongress für Rechtsvergleichung im Haag 1937* (Berlin, Walter de Gruyter 1937) p. 25, pp. 55-59.

According to Sirks' opinion, this criterion was established in Oriental law schools in order to be able to determine the definition of *damnum grande* (*damnum enorme*) more precisely, which was necessary for the application of *in integrum restitutio*. The Dutch author refers to a certain limit of value, which had been fixed through intervention of the state, and which appears in a decision of CJ. 4,44,6, where the seller was unable to reach the invalidation of the contract, even though he offered the purchaser a repayment of the double of the original purchase price.[18] We can conclude that the two rescripts in the *Codex* of *Justinian* – with their strict criterion of *dimidia pars* – testify to the first rudimentary yet important step towards a balance between the freedom of contract and the principle of equity aiming at the protection of the economically weaker party. In a system where objective criteria for just price had not been determined, there was no possibility that *iustum pretium* could become a general rule. In conclusion, the ancient rule of *laesio enormis*, which had been an individually applied concession in Roman times, became a general instrument of state intervention concerning private autonomy only in its medieval stage of development.[19] It is true that the concept of equality in exchange and the question of state intervention have changed during the course of time, and by their nature they have appeared in different ways in every legal system. Still, the Roman regulation, as well as the basic idea that law cannot tolerate an obvious disparity between contractual performances, has played an important role in European history and the development of private law.

III. *Iustum pretium* in medieval Roman and Canon law

The set of issues relating to just price re-emerged as a subject of legal analyses and practical application during the glossatorial and post-glossatorial periods, with highly relevant influences from Canon law and scholastic theology. In their studies of Roman legal sources, members of the Glossator School started from the view that the market price is actually the just price. Basing his viewpoints on classical Roman law sources, where the term *iustum pretium* originally appeared,[20] and in

[18] See Sirks 1992, loc. cit. n. 1, at p. 46.

[19] Cf. U. Wolter, *Ius canonicum in iure civili. Kaufrecht, laesio enormis, iustum pretium, aequalitas* (Köln, Böhlau 1975) p. 113; Baldwin, op. cit. n. 5, at pp. 41-58.

[20] Cf. two classical Roman fragments wherein the application of the *iustum pretium* notion significantly corresponds to its use in Hungarian and Croatian sources of law. The first of those fragments is D. 10,3,10,2 (Paulus 23. ad ed.): *In communi*

particular on a Paulus' fragment dealing with objective price determination (D. 35,2,63 pr.), the last great glossator Accursius stated that the just price was not an amount that two or three persons would have paid for a thing, but rather the amount for which that thing was typically sold.[21] Thus, the usual or common price (*pretium commune*) was actually the market price identified as the just price. Aside from that, Accursius reached a conclusion, based on Roman sources, that the prices of goods may vary from place to place,[22] and that the market values of goods may rise or fall over time.[23] Discussing the previously analyzed imperial rescript C. 4,44,2, the glossators extended the application of the rule *laesio ultra dimidium iusti pretii* to the benefit of the buyer as well, then the purchase and sale of movable property, and ultimately to all *bonae fidei* contracts,[24] thereby largely taking the credit for expanding the scope of the application of the just price notion in contract law. In spite of this extension of the use of *laesio enormis*, due

dividundo iudicio iusto pretio rem aestimare debebit iudex et de evictione quoque cavendum erit. In this fragment, Paulus states that in procedure based on a lawsuit for the division of co-owned property, the judge must determine the just price of the property, so that the division can be carried out based on such estimation. In the other fragment, the issue is the just price of a pledged property: D. 20,1,16,9 (Marc. l. sing. ad formul. hypothec.) *Potest ita fieri pignoris datio hypothecaeve, ut, si intra certum tempus tempus non sit soluta pecunia, iure emptoris possideat rem, iusto pretio tunc aestimandam [...]* As we can see, in both cases the real values of properties, i.e. their just price (*iustum pretium*), are determined on the basis of an unbiased and objective estimation, e.g. by a judge (*iudex*). For more on this topic, see M. Petrak, '*Iustum pretium* u Werbőczyevom Tripartitu i u Iločkom statutu. Prilog raspravi o utjecaju rimske pravne tradicije na ugarsko-hrvatsko pravo [*Iustum pretium* in Werbőczy's Tripartitum and the Statute of Ilok. A contribution to the discussion about the influence of Roman legal tradition on Hungarian and Croatian law]', 52, 3-4 *Zbornik Pravnog fakulteta u Zagrebu* (2002) p. 763.

[21] Accursius, Glossa '*funguntur*' ad D.35,2,63; '*autoritate iudicis*' ad C.4,44,2; '*non est*' ad C. 4,44,6; cited by J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford – New York, Clarendon Press 1991) p. 65.

[22] Accursius, Glossa '*varia*' ad D. 13,4,3; cited by Gordley, op. cit. n. 21, at p. 65

[23] Accursius, Glossa '*autoritate iudicis*' ad C. 4,44,2; cited by Gordley, op. cit. n. 21, at p. 65

[24] See M. Horvat, 'Prekomjerno oštećenje (*Laesio enormis*)' [Gross disparity (*Laesio enormis*)], 1 *Hrestomantija rimskog prava* (1998) p. 239; Gordley, op. cit. n. 21, at p. 65; Zimmermann, op. cit. n. 6, ad p. 262; A. Petranović, *Položaj kupca u pravnom režimu rimske kupoprodaje*, Doktorska disertacija [The Position of the Purchaser in the Legal Regime of Roman Sale, Doctoral Thesis] (Zagreb, 1996) p. 242.

to a change with regard to prerequisites, i.e. introduction of subjective element of the injured party's lack of knowledge about the true value of property, its application at the same time became limited. Namely, contract rescission was allowed only if the injured party was unaware of the true value, giving a completely different form to the theoretical construction of this institute, whereby it transforms into a special case of invalidity of a legal transaction due to an error by a party to a contract. In case of the injured party's ignorance, *dolus* is presumed for the other party, so for this instance a new term of '*dolus re ipsa*' was introduced.[25]

The glossators' teachings were adopted by their successors, the post-glossators (commentators), and explored further.[26] The rules of objective price determination were established with improved precision by Bartolus de Sassoferrato, who stated that the price of property cannot be judged by eye, but rather on the basis of reason and experience (*'non potest videri per oculum, sed intelligentur per intellectum'*), and the most accurate estimate can be made by experts of the respective type of property (*'debent mitti periti in arte sua hoc faciendum'*).[27] The Roman law casuistry discussing *iustum pretium* was in turn interpreted by his student, Baldus de Ubaldis, with the help of Aristotle's newly discovered ethical concepts.[28] Starting from Aristotle's teaching of commutative justice, which requires the principle of the equality in exchange to be observed, Baldus stated that an unjust price is contrary to natural equity

[25] The subjective element as a new presumption was first stated by the glossators Azo and Placentinus. Azo, '*Summa Codicis*', '*De resc. vend [...] puto quod altera ratione urget emptorem rescindere contractum [...] vel nisi dixerit se donari quod erat ultra precium conventum, quod videtur dici si sciat rem valere ultra dimidiam, nec enim videtur deceptus qui soivit [...]*'; Placentinus, '*Summa Codicis*', '*De resc. vend in fine [...] item in summa illud sciendum est quod judicio meo, ei qui vendidit ex certa scientia, dimidia justi precii non dabitur rescindendi licentia [...]*' cited by Horvat, loc. cit. n. 24, at p. 169.

[26] Cf. H. Lange and M. Kriechbaum, *Römisches Recht im Mittelalter. Band II. Die Kommentatoren* (München, C.H. Beck 2007) p. 771, 910.

[27] The cited text was taken from Bartolus' comment '*De rescindenda venditione*' related to C. 4,44; cited by K. Visky, 'La lesione enorme nel pensiero di Bartolo', Studi Senesi, LXXXIV, ser. III, XXI, fasc. 3, Siena, (1972) p. 413; Petranović loc. cit. n. 24, at p. 245.

[28] On the influence of Aristotle on Baldus de Ubaldis in general, see N. Horn, 'Philosophie in der Jurisprudenz der Kommentatoren: Baldus Philosophus', 1 *Ius Commune* (1967) p.104.

(*aequitas naturalis*).[29] Therefore, we can conclude that in forming his views on the just price this post-glossator creatively linked Roman legal tradition with Greek philosophical heritage. Medieval Canon law is consistent with the reasoning of Roman legal rules in terms of just price, as evident from the decretals of Pope Gregory IX of 1234 comprising a decretal by Pope Alexander III from 1178 which almost fully corresponds to the content of the cited rescript C. 4,44,2:

> X. 3. 17. *De empt. vend. c. 3 (cum dilecti)*: *'Tenet venditio, licet venditor sit deceptus ultra dimidiam iusti pretii; potest tamen venditor agere, ut restituatur res vel iustum pretium suppleatur, et, si alterum praecise petit, succumbit [...]*
> *Quia vero in arbitrio emptoris est, si velit, supplere iustum pretium, aut venditionem rescindere, cum res minus dimidia iusti pretii comparatur[...]'*

The great scholastic theologians devoted considerable attention to the issue of the just price as well. St. Albert the Great and St. Thomas Aquinas also started from the viewpoint that the market price is at the same time the just price.[30] The late Spanish scholastics maintained this viewpoint: for instance, Domingo de Soto held that the just price was determined on the basis of a usual or common estimation (*communis aestimatio*) by all the participants in the market.[31] Linking the Christian moral doctrine with Aristotle's teaching of commutative justice, St. Thomas Aquinas even took a step further in his analysis of the idea of the just price and attempted to rebuild the entire contract law on the foundations of their shared principles.[32] For this reason, he could not be satisfied merely with the Roman law provisions adopted by Canon law, which sanctioned only *laesio* above one half of the true value of an object. Aspiring toward a full realization of the basic Christian moral commandments and corresponding commutative justice requirements, St. Thomas claims that '*[...] carius vendere aut vilius emere rem quam*

[29] Baldus de Ubaldis, *Commentaria ad C. 4,44,2, no. 18* cited by Gordley, op. cit. n. 21, at p. 67. For more details on commutative justice, see Petrak, loc. cit. n. 20, at p. 760 and 768.

[30] See A. Magnus, *Commentarii in quattuor libros sententiarum Petri Lombardi* (Paris, 1890) dist. 16, art. 46; T. Aquinas, *Summa theologica I-II*, (Madrid, 1963) 77, a.3, ad. 4; a.4, ad.2. cited by Gordley, op. cit. n. 21, at p. 67.

[31] De Soto, *De iustitia et iure libri decem* (Salamanca, 1553) n.9, lib.6, q.2, a.3; cited by Gordley, op. cit. n. 21, at p. 97.

[32] Cf. Gordley, op. cit. n. 21, at p. 10; Zimmermann, op. cit. n. 6, at p. 265.

valeat, est secundum se iniustum et illicitum'.[33] Therefore, he particularly indicates that divine law (*lex divina*), unlike human law (*lex humana*), does not permit any deviations from the just price.[34] It is quite apparent that St. Thomas was adamant in promoting absolute observance of the just price, regardless of any provisions of current human laws.[35] In that sense, medieval Canon law, firmly based on the idea of just price, abandoned the subjective element of ignorance and returned to the objective Roman criterion of disparity as a prerequisite for contract rescission. Constructed subjectively by the glossators and post-glossators, the institute of *laesio enormis* protects only that contractual party which did not know the real value. In a case where a party knows what the real value is, is not misguided and is not deceived, there is no '*dolus re ipsa*', and thereby it has no right to protection, irrespective of its being objectively injured by the other party. As opposed to this, the objective construction of Roman law and Canon law comes to the rescue of a party who was, even if aware of the real value, limited in its free choice by necessity and forced to enter into a harmful contract.[36] These opposing tendencies between the subjective and objective criteria also come to the forefront in modern laws that have adopted the institute of gross disparity and will be the subject of research in the following sections.

Based on this brief overview of the standpoints on just price in medieval Roman law tradition and medieval Canon law and scholastic theology, we can conclude that these linked Roman legal tradition with Greek philosophical heritage in a fruitful way, creating permanent foundations for all subsequent discussions on the issues of the just price.

IV. *Iustum pretium* in medieval Hungarian and Croatian law

As discussed earlier, the idea of the just price developed in parallel with the provisions concerning gross disparity. The institute of *laesio enormis*, however, cannot be found directly regulated within the frame

[33] Aquinas, op. cit. n. 30, at II-II, q. 77, a.1.

[34] Aquinas op. cit. n. 30, at II-II, q.77, a.1, ad.1; cf. R. Dekkers, *La lésion énorme* (Paris, 1937) p. 69 sqq.; J. M. Aubert, *Le droit romain dans l'oeuvre de Saint Thomas* (Paris, 1955) p. 67 sqq.

[35] See Petrak, loc. cit. n. 20, at p. 769.

[36] Cf. Horvat, loc. cit. n. 24, at p. 170.

of medieval Hungarian and Croatian law.[37] However, while *Corpus iuris civilis*, unlike in most legal systems of contemporary Europe, did not serve as a direct source for Hungarian and Croatian law, we can by no means rule out the presence of medieval Roman and Canon legal tradition in the Hungarian and Croatian legal systems.[38] For that purpose, we will briefly analyze the idea of just price in the most important source of Hungarian and Croatian law – Werbőczy's Tripartitum (*Tripartitum opus juris consuetudinarii inclyti regni Hungariae*) of 1514,[39] as well as in the Statute of Ilok of 1525, one of

[37] Thus, for example, in the subject index of von Jung's book 'Darstellung des ungarischen Privat-Rechtes', next to the term *laesio enormis*, we can find the following lapidary statement: 'Verletzung über die Hälfte des Werthes, wird in den Ungarischen Gesetzen nicht berürhrt'. Cited by J. von Jung, *Darstellung des ungarischen Privat-Rechtes. Band II.* (Wien, Beck 1827) p. 479. However, Bónis, in his detailed research of the influence of Roman legal tradition on medieval legal practice in Hungary, did find a case dating from before *Tripartitum* was compiled where a contract was rescinded due to gross disparity. Yet, this one practical case can in no way be the basis for a general conclusion that the Hungarian and Croatian medieval law was acquainted with this legal institute. See G. Bónis, ed., *Ius romanum medii aevi V.* (Milano, Giuffrè 1964) p. 102.

[38] On the influence of medieval Roman legal tradition on the legal system in the The Lands of the Crown of Saint Stephen in general, see e.g. A. Timon, *Ungarische Verfassungs- und Rechtsgeschichte* (Berlin, 1904) p. 325 sqq; I. Zajtay, 'Sur le rôle du droit romain dans l'évolution du droit hongrois', In W. Kunkel ed., *L'Europa e il diritto romano. Studi in memoria di Paolo Koschaker. Vol. II.* (Milano, Giuffrè 1954) 183 sqq; G. Bónis, 'Einflüsse des römischen Rechts in Ungarn' in G. Bónis, ed., *Ius romanum medii aevi* (Pars Giuffrè 1964) p. 1 sqq; J. Zlinszky, 'Das Recht, erhalten und neu belebt durch römisches Recht. Ungars Verhältnis zum römischen Recht in der Vergangenheit und in der Gegenwart', 62 *Tijdschrift voor rechtsgeschiedenis* (1994) p. 61 sqq; G. Béli, et al., '*Corpus Iuris Civilis* and *Corpus Iuris Hungarici.* The Influence of Roman Legal Tradition on the Hungarian and Croatian law' in Drinóczi, et al., eds., *Contemporary Legal Challenges: EU – Hungary – Croatia* (Pécs – Osijek, Faculty of Law, university of Pécs, Faculty of Law, Strossmayer University in Osijek 2012) p. 65. sqq.

[39] On Werbőczy's Tripartitum as the most important traditional legal source of Hungarian and Croatian law see e.g. K. Kadlec, *Verböczyovo Tripartitum. Soukromé právo Uherské i Chorvatské šlechty v něm obsažené* [Werbőczy's Tripartitum. The Private Law of Hungarian and Croatian Nobility Contained in It], (Praha, Česká Akad. 1902) p. 17 sqq.; M. Lanović, *Privatno pravo Tripartita* [The Private Law of *Tripartitum*], (Zagreb, 1929) p. 85 sqq.; M. Lanović, 'Stjepan pl. Verböcz, veliki učitelj staroga našega prava'[Stjepan pl. Verböcz, the Great Teacher of Our Law], *Rad HAZU*, Volume 277 (126) (1943) p. 74 sqq; G. Hamza, 'Das "Tripartitum" von István Werbőczy als Rechtsquelle. Ein Beitrag zur Rechtsquellenlehre in der

the 'more significant sources for the legal history of Croatian towns in Slavonia'.[40]

1. *Condignum pretium* in Werbőczy's Tripartitum

As an introduction, it should be noted that the term *iustum pretium*, found as early as in classical Roman law, does not appear at all in Tripartitum, but this in no way indicates that the notion of just price was completely foreign to Hungarian and Croatian law. Tripartitum is familiar with the expression *condignum pretium* or its synonym *condigna aestimatio*. To our knowledge, the stated expressions appear in at least two places in that legal source.[41]. In relation to this, the adjective *condignus*, which is very rarely found in Classical Latin, otherwise means 'worthy, appropriate, befitting'.[42] However, in the context of the above Tripartitum expressions, this adjective is evidently almost synonymous with the adjective *iustus.*[43]

Within the framework of the legal norms of the Tripartitum, an entire *titulus* is dedicated to the estimation of goods (*aestimatio bonorum*).[44] It is familiar with two types of estimation of goods: common estimation (*aestimatio communis*) and the so-called permanent or perennial

europäischen Rechtsgeschichte', 24 *Ungarn-Jahrbuch. Zeitschrift für die Kunde Ungarns und verwandte Gebiete* (1998/1999) p. 19 sqq. It is interesting to note that Werbőczy in his Tripartitum expressly stated that the entire Hungarian and Croatian law originated from the sources of Roman law and Canon law: '*Omnia fere iura regni huius originaliter ex pontificiis caesareique iuris fontibus progressum habeant*' (Trip. II, 6, pr.). Yet in spite of this proclamation by Werbőczy, Tripartitum first and foremost contains the norms of Hungarian and Croatian customary law, with a certain influx of Roman and Canon legal elements; on the influence of Roman legal tradition on Werbőczy's Tripartitum in general see amplius Zajtay, loc. cit. n. 38, at p. 197 sqq; Bónis, op. cit. n. 37, at p. 68. sqq.

[40] See L. Margetić, 'Iločka pravna knjiga (tzv. Iločki statut) [The Ilok Law Book (the so-called Statute of Ilok)]', 44 *Zbornik Pravnog fakulteta u Zagrebu* (1994) p. 93.

[41] See e.g. Trip.1,60,1; Trip.1,133,46.

[42] See M. Divković, *Latinsko-hrvatski rječnik* [Latin-Croatian dictionary] (Zagreb, Naprijed 1900) p. 223.

[43] Thus, for example, Margetić translated the syntagm *condigna et communis aestimatio* into Croatian as 'pravedna i običajna procjena' ['just and common estimation']. The text in question is contained in Trip. 1,60,1; see L. Margetić and Apostolova Maršavelski, *Hrvatsko srednjovjekovno pravo: vrela s komentarom* [Croatian Medieval Law: Sources with Comments], (Zagreb, 1999) p. 261.

[44] Trip. 1,133, which is called 'Quod sit, et qualiter fiat bonorum mobilium, et immobilium aestimatio?'

estimation (*aestimatio perennalis*).[45] Starting from a fragment by Paulus preserved in D. 35,2,63 pr., the glossators, post-glossators and certain scholastic theologians used the expressions *pretium commune* or *aestimatio communis* to denote the market price or estimation as the just price or estimation, but the Tripartitum uses the expression *aestimatio communis* in a different meaning. It denoted a common or customary estimation of goods conducted 'according to common prices, which had been, for certain objects of property, determined by custom since ancient times'.[46] Since these ancient customary prices were listed in Tripartitum, *aestimatio communis* was carried out according to those fixed customary prices (and not according to fluctuating market prices). On the other hand, perennial or permanent estimation (*aestimatio perennalis*) was used only in relation to nobility's real estate and this only in cases where the use of such estimation was expressly prescribed by a law or a contract.[47] The perennial price of real estate was ten times higher than its customary price.[48]

The customary estimation of goods (*condigna et communis aestimatio*, 'just and common estimation') as described in Trip. 1,60,1,[49] regulating the alienation of a nobleman's property whether by sale or pledge, prescribes the redemption of a real property in the amount established by a 'just and customary' estimation of such real property.[50] Looking at the legal interpretation of the expression *condigna et communis aestimatio*, this construction fully conforms to the aforementioned glossatorial, post-glossatorial and scholastic formulations regarding the common price (estimation) being the just price (estimation). However,

[45] Trip. 1,133,3: 'Et duplex est aestimatio, scilicet perennalis, et communis'.

[46] Cit. acc. to M. Lanović 1929, op. cit. n. 39, at p. 207.

[47] Trip.1,133,5.

[48] Trip.1,133,3.

[49] Trip.1,60,1: *Et ideo quaelibet possessionaria venditio, imo et impignoratio, legitimam semper requirit filiorum, aut filiarum, vel fratrum, ad quos successio, et devolutio hujusmodi jurium possessionariorum, venditioni aut impignorationi expositorum spectare dignoscitur (ut illam, vel illia ad se recipiant) admonitionem. Qui si legitime admoniti, et requisiti, possessionem, seu jura hujusmodi possessionaria, juxta condignam, et communem eurum aestimationem, ac valorem pro se habere, et ad se recipere voluerint: ante omnes alios emptores, aut foeneratores, liberam, plenariamque habent pro se recipiendi, et emendi facultatem.*

[50] Regarding the real estate purchase and sale according to Tripartitum provisions see amplius Lanović 1929, op.cit. n. 39, at p. 275 sqq.; Margetić, op. cit. n. 40, at p. 334 sqq; Petrak, op. cit. n. 40, at p. 778.

in terms of content, these are two different things. Namely, in the said place in Tripartitum, customary estimation is denoted as just estimation, unlike in medieval Roman legal tradition where common estimation stood for market estimation as just estimation. However, in another provision of Tripartitum it is said that the market value of a property (*competens valor*) is at the same time the just price (*condignum pretium*), which must be strictly distinguished from the customary estimation (*aestimatio communis*) of the respective property. Therefore, the expressions *condignum pretium* and *aestimatio communis* contradict each other in the said provision and denote completely different methods of estimating the value of things, which in practice lead to completely different results:[51] according to the first provision, the customary price is at the same time the just price, while according to the second provision, the market price is actually the just price.[52] It seems reasonable to assume that the former view is older, and that the latter view emerged only at the moment when market prices started to deviate from ancient customary prices. This assumption is supported by the fact that *aestimatio communis* was abandoned over time,[53] which means that market prices became so distant from customary prices that the latter could no longer be denoted as just ones. Therefore, in the further

[51] Trip.1,133,46: *Verum, si rusticum quempiam, vel etiam nobilem in territorio alterius vineam habentem, dominus terrestris de ipsa vinea ejicere, et excludere voluerit; authoritatem quidem ejiciendi habet: attamen non aestimatione illa communi, quae de virgulto, et rubeto immediate praenotata est; sed competentem valorem, seu condignum pretium ejus, juxta aequam, rectamque limitationem, et taxationem judicis, ac juratorum civium ejus loci, ad quem ipsum promontorium pertinet, illi refundere tenetur.*

[52] This latter view on the just price can also be discerned from Trip.1,134,3, where it is prescribed that the estimation of certain movables was to be carried out *'juxta verum pretium illarum, prout videlicet in foro vendi possent'*; v. Trip.1,134,3.

[53] Thus, for instance, estimation of goods to be sold had been abandoned already by the 17th century and all holders of pre-emption rights had to pay the price stated in the contract. Furthermore, according to the provisions of Tripartitum (Trip.1,60,8), the real estate was not permitted to be pledged as a security for a claim arising from a loan the amount of which exceeded the real estate value according to customary estimation. However, it was already Kitonić in his work 'Centuria contrarietatum sive dubietatum', published in 1619, who stated that the pledging of real estate was also permitted as a security for a loan the amount of which exceeded the value of real estate according to customary estimation. See Margetić, op. cit. n. 40, at p. 336; on the gradual abandonment of *aestimatio communis* as a goods estimation method in general see Jung, op. cit. n. 37, at p. 305; Kadlec, op. cit. n. 39, at p. 168 sq.

development of Hungarian and Croatian law the expression *aestimatio iusta et condigna* was used solely to identify an estimation by which the actual, i.e. market value of goods was determined.[54]

Based on all the stated facts, it can be claimed with certainty that medieval Hungarian and Croatian law was, after all, familiar with the notion of just price and that medieval Roman and Canon law doctrines did to an extent influence the articulation of the views on the just price in the Tripartitum. However, it needs to be noted that the influence of that universal legal tradition on the stated segment was far from complete and comprehensive. As we have seen, the idea of a just price was applied in Tripartitum in a significantly narrower scope, and the methods of realization of this idea in many ways stand apart from the solutions known to Roman and Canon law tradition.

2. *Iustum precium* in the Statute of Ilok

Unlike the Tripartitum, which, to our knowledge, makes no mention of the term *iustum pretium*, the Statute of Ilok[55] uses this term in two places.[56] According to the Statute's provision I,4,[57] none of the landlords or noblemen may act violently against citizens, nor receive or take anything from citizens, but should rather purchase all necessary things at

[54] See amplius Jung, op. cit. n. 37, at p. 305, defining *aestimatio condigna* as 'die Schätzung nach dem inneren Werthe der Sachen'; Kadlec, op. cit. n. 39, at p. 168 sqq.; Lanović 1929, op. cit. n. 39, at p. 207.

[55] On the Statute of Ilok in general, its structure, contents and significance see amplius Margetić, op. cit. n. 40, at p. 93 sqq.; A. Zdravčević, *Iločki statut iz 1525. godine i njegova nasljednopravna regulacija*, doktorska disertacija [The Statute of Ilok from 1525 and its Regulation of Succession Doctoral Thesis] (Osijek, 1992); D. Vitek, *Društveni odnosi u srednjovjekovnom Iloku prikazani Iločkim statutom iz 1525. godine*, Magistarski rad [Social Relations in Medieval Ilok According to the Statute of Ilok from 1525. Master Thesis] (Zagreb 2000) p. 1 sqq; D. Vitek, 'Struktura i izvorište teksta Iločkog statuta [The Structure and Origin of the Statute of Ilok]', 1 *Scrinia Slavonica. Godišnjak Podružnice za povijest Slavonije, Srijema i Baranje Hrvatskog instituta za povijest* (2001) p. 404 sqq.

[56] I,4 and I,9. In addition, the Statute contains several synonymous or matching expressions, such as *iusta estimacio* (V,8), *condignum precium* (II,4), *condigna estimacio* (V,8; V, 12)

[57] Cap. IIII. *Quod violenter nemo dominorum aut Nobilium possit in ipsos ciues, eorumque domos descendere. Item, Quod nullus dominorum aut Nobilium super ciues violentum descensum contra eorum voluntatem possit facere, nec descendentes ab eisdem ciuibus valeant quicquam recipere et auferre, sed iusto precio omnia necessaria eant et comparent.*

a just price (*iustum precium*). Another provision of the Statute, I,9,[58] vouches for the town's market rights and sets forth that none of the landlords' officers or caretakers may in any way jeopardize this right. Moreover, it is prescribed that the said persons may not, for the account of their lords, receive, take away anything or have anything taken away without having paid a just price for that (*iustum precium*). If they should, however, seek to commit such an offence, the town authorities have the power to prevent them from doing so. In our opinion, the writer of the privileges used the expression *iustum precium* in the above provisions to emphasize that landlords, noblemen and landlords' officers and caretakers did not enjoy any special rights within the town community and that they had equal rights as all other citizens. We also believe that on the basis of these provisions it can be concluded without much doubt that the expression *iustum precium* therein denotes the market price as the just price. In Roman law, the term *iustum pretium* was primarily used in the private law sphere; in the first book of the Statute, conversely, the syntagm *iustum precium* was incorporated into a specific public law context, whereby the said expression was given a somewhat different legal meaning and purpose.[59]

In terms of the purchase and sale of movables, the key provision of the Statute is III, 42, concerning 'servants who sell a thing entrusted to them by their lord at a low price'.[60] According to this provision, if any citizen

[58] Cap. VIIII. *De libertate fori, et de violencia non fienda per officiales dominorum.Item, Quod forum quotidianum liberum, in medio eorum, absque aliquali violencia officialium celebretur, ciues dicte ciuitatis et forenses, cum mercibus et rebus suis quibuscunque vniuersaliter liberi sint et existant, nec dicti officiales, et nostri dispensatores, presentes et in futurum constituendi, bona et res ipsorum ciuium et forensium, in foro, aut in vicis et plateis, ac domibus vel alibi vbicunque existentes, nostram ad racionem recipere, auferre, et auferri facere possint et valeant, nisi iusto prius precio persoluto. Et si iidem officiales, dispensatores, transgredi attemptare voluerint, extune Judex cum Juratis et electis personis inhibere valeat et possit, Authoritate nostra in hac parte eisdem attributa.*

[59] For more details on the just price and fundamental town rights and liberties within the frame of the Statute of Ilok in general see Petrak loc. cit. n. 20, at p. 776 sqq.

[60] Cap. XLII. *Quod si familiares vendiderint rem dominorum suorum ipsis confisam leui foro, tunc emptor non tenetur ad restitucionem rei empte.Item, Si quis Ciuium res suas cuiuscunque generis existant per familiares suos vendicioni exposuerit pro precio deliberato, et famulus transiens, huiusmodi res pro medietate, citra vel circa, aut leuius vendiderit, easdem nequaquam rehabere valebit, sed ipsas, emptor eo quo emerat precio pro se rentinebit. Ab eo enim famulo ad quem res suas confisus fuerat, dampnum illatum rehabere debebit, dummodo fateatur, quod res ipsas*

gives his servant a thing so that he should sell it, and the servant then sells it for approximately one half of its value or even less, the owner of the thing has no right to annul the contract, but he has the right to claim damages from the servant. Based on this provision, we can conclude that the Statute of Ilok, unlike Roman law, did not permit contract annulment due to gross disparity (*laesio enormis*). Still, it is interesting to mention that the cited provision refers to the sale of movable property for 'one half of its value or even less' ('*res pro medietate, citra vel circa, aut leuius vendiderit*'), which supports the claim, as has already been noted in literature, that the writers of this provision were familiar with the previously described Roman rules on *laesio* above one half of the real value of property (*ultra dimidium iusti pretii*).[61] During the composition of the aforesaid provisions, the idea of the just price was taken into account, but in this case that idea was not accomplished by means of private law, but primarily by those of criminal law.[62]

As for purchase of real estate, the Statute of Ilok contains a similar provision as the Tripartitum in case of the alienation of a nobleman's real estate, redemption of which is guaranteed to the closest relatives according to a 'just and common estimation' (*condigna et communis aestimatio*). Namely, the Statute's norm (II,4) anticipates the possibility of redemption 'at a just price' (*pro condigno precio*). The question of real estate purchase and sale contract annulment due to gross disparity is regulated by the Statute in a notably casuistic manner, i.e. only in relation to real estate purchase and sale contracts with staged payments. If it is allowed to make any general conclusions based on that particular case, we might presume that the Statute of Ilok did not allow real estate purchase and sale contracts to be annulled due to gross disparity , since, as was regulated by the Statute's provision II,16 S, a seller who would claim he had sold his property too cheaply ('*si venditor forum factum leve esse existimaverit'*) and would therefore accept no installment, would not have the right to revoke (*reuocare*) the contract.[63]

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famulo suo ad vendendum dederit aut commiserit. Si autem per vim ab illo, qui emerit, abstulerit in facto potencie conuincetur.

[61] See Margetić, op. cit. n. 40, at p. 111.

[62] For more details on this analysis see Petrak loc. cit. n. 20, at p. 778. sq.

[63] Cap. XVI. *Si quis forum factum voluerit reuocare, eo quod hereditatem suam existimet leui foro vendidisse. Item, si quispiam hominum, domum, vel vineam, seu quascunque alias hereditates emerit, precium in duobus, tribus, vel pluribus terminis soluturus, et si vendiditor forum factum, leue esse existimauerit,*

Since the institute of the estimation of goods is especially emphasized in the enforcement law, it is precisely those provisions of the Statute of Ilok regulating the enforcement procedure that emphasize the necessity of a just estimation of debtor's goods. Thus, under the Statute's provision V,8, there are two synonymous expressions: *condigna estimacio*,[64] known from the Tripartitum, and *iusta estimacio*, which dates back to classical Roman law. Both expressions denote the just estimation of the value of a given property, carried out, according to the letter of the Statute, by honest men (*viri probi*),[65] credible fellow citizens (*fidedigni homines conciues*) or respectable fellow citizens (*honesti conciues*).[66] These different terms actually denote the same kind of people. These are people who are in a particularly good standing among their fellow citizens due to their moral characteristics. Therefore, it was reasonable to expect that they would be able to estimate goods in the most equitable manner.[67] Pledged properties were estimated in the same way,[68] and these were carefully estimated (*conscienciose estimetur*

pecuniamque in nullo termino leuare voluerit, ita ut forum ipsum factum, modis omnibus intendat reuocare. Tunc emptor in ipsis terminis, sine omni dilacione, coram Juratis seu Jurato ciue venditori satisfaciat. Quod si venditor pecuniam tollere recusauerit, tunc huiusmodi pecunia non circa emptorem valeat remanere, sed circa Juratum ciuem. Demum in proximo sequenti termino iuridico, in presenciis Judicis et Juratorum ciuium personaliter comparere, ac illis, de solucione in terminis prefixis per ipsum facta, et pecunia Jurato ciui presentata protestacionem facere, et hec omnia in librum Ciuitatis minorem conscribi facere tenebitur, et sic persolutis singulis terminis hereditatem emptam obtinebit.

[64] The expression *condigna estimacio* also appears in the Statute's provision V,12.

[65] V,8.

[66] V,12.

[67] On the role of good men (*boni viri, probi viri*) in the court procedure of Hungarian and Croatian law in general see Timon, op. cit. n. 38, at p. 496. sq, with references to further readings. Incidentally, it is interesting to note that *arbitrium boni viri* as a method for just estimation occurs already in classical Roman law and is present throughout the latter Roman legal tradition; cf. M. Kaser, *Das römische Privatrecht* (München, C.H. Beck 1971) p. 490, with references to relevant classical sources and further readings on the said issues.

[68] On the regulation of the institute of pledge law in the 1525 Statute of Ilok and its Roman legal foundations, see amplius A. Zdravčević, 'Oko založnog prava po Iločkom statutu iz 1525. godine [Concerning Pledge Law According to the Statute of Ilok of 1525]', 14 *Pravni vjesnik* (1998) p. 103 sqq.

by credible citizens (*fidedigni ciues*).[69] However, the procedure of estimating the value of a mortgaged house, regulated by the Statute's provision V,17, contains certain particularities. The value of the house was estimated on the basis of a conscientious estimation (*conscienciose estimetur*), but this estimation was not to be done by respectable fellow citizens, but rather by appropriate experts. Analysing the medieval Romanistic views on just price, we have noted that specifically Bartolus emphasised the fact that the most accurate estimate could be made by experts for the respective type of property.[70] The possibility that the standpoint of this great commentator had exerted some influence on the writers of the above provision should not be excluded in our opinion.

Based on the preceding analysis, it can be concluded with certainty that medieval Hungarian and Croatian law was familiar with the term of just price. Furthermore, it needs to be stated that medieval Romanistic doctrine influenced the formation of views on the just price to a degree, both in Werbőczy's Tripartitum and in the Statute of Ilok. Moreover, those teachings had exerted a somewhat greater influence on the Statute of Ilok, including its central part which contains tavernical law (*ius tavernicale*), than on Werbőczy's Tripartitum itself. However, it should also be noted that the influence of universal Roman and Canon legal tradition in the stated segment on local laws was far from complete and comprehensive. Thus, for example, Hungarian and Croatian law was not at all familiar with the institute of gross disparity (*laesio enormis*) as the most important method of realising the idea of the just price in medieval Roman legal tradition. Namely, unlike Roman legal tradition, where the notion of *iustum pretium* was primarily used in the sphere of private law, Hungarian and Croatian law quite commonly realised this notion by means of specific public law measures. Therefore, it should be concluded that the notion of *iustum pretium* was used in medieval

[69] V,15: *'[…] quibus sic peractis, Judex pecuniarum per se vel per familiares suos, conciui, cuius ipsa vagia existunt, si incola Ciuitatis existit, tunc tenebitur ei insinuare, vt infra spacium quindecim dierum, sua vagia redimat, et si in ipsis quindecim diebus redimere non curauerit, tunc per fidedignos Ciues, illud vagium conscienciose estimetur, et si superabundauerit, summa, pro qua fuerit inuagiatum, Ipsam summam excedentem actor in iudicio erga Judicem pecuniarum reponere tenebitur, quo ad restitucionem vagii inuagiati, videlicet illi, qui eam rem inuagiauerat'*. On the said provision (V, 15) see amplius Zdravčević, loc. cit. n. 68, at p. 105 sqq.

[70] See supra under point III.

Hungarian and Croatian law in a much narrower scope than in Roman legal tradition.

V. *Iustum pretium* in contemporary civil law

Thus far, we can conclude from the analysis of gross disparity (*laesio enormis*) that its genesis and development were extremely complex. Over the course of its further development, this tendency simply continued, and the attitude toward this institute changed depending on whether a state's protective legislation strictly controlled and determined prices or left the determination of prices to the discretion of contractual parties, in line with the principle of autonomy. For this reason, natural law codifications have branched in different directions.[71] In order to look at this development more closely, this section will contain an analysis of the basic features of the regulation of individual European legal systems, with special reference to Hungarian and Croatian legislation.

According to §§ 58 ff I 11 of the General State Laws for the Prussian States of 1794 *(Allgemeines Landrecht für die Preußischen Staaten*, hereinafter ALR), cases where a contract can be annulled if 'the purchase-money amounts to twice the value of the property' are more closely regulated. Unlike Roman law, which favoured the seller, ALR awards the right to terminate the contract only to the buyer, as the law in case of disproportionate performances starts from the presumption that the buyer was misguided. Considering that *presumptio iuris* is at hand, unless proven otherwise, the buyer will have the right to annul the contract, but in that case he has no *facultas alternativa* at his disposal to keep the contract in force, if he is paid back the difference in the purchase-money.[72]

The French *Code Civil*, thanks to Napoleon's direct intervention, contains a provision under Art. 1674, protecting only the seller of real estate, if the price amounts to less than 5/12 of the property.[73]

[71] On the individual stages of this development see amplius H. Kittelmann, 'Laesio enormis', LVII Zürcher *Beiträge zur Rechtswissenschaft* (Aarau, 1916) p. 67. sqq.

[72] Cf. Kittelmann, loc. cit. n. 71, at p. 77; T. Finkenauer, 'Laesio enormis' note in Hopt, et al., eds., *Max Planck Encyclopedia of European Private Law* (Oxford, Oxford University Press 2012) p. 1030.

[73] Cf. Horvat, loc. cit. n. 24, at p. 171. sqq; Kittelmann, loc. cit. n. 71, at p. 79; Finkenauer, loc. cit. n, 72, at p. 1030.

Article 934 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*; hereinafter ABGB) starts from the practice of *ius commune* and prescribes protection for both contractual parties, the buyer and the seller, in the case of 'underpayment below the half of value' at the moment of entering into contracts against payment. Austrian law, therefore, has retained the objective standard of gross disparity, but just like medieval theory, it has made it conditional upon the subjective element of the injured party's misconception regarding the actual value. The injured party is given the right to request contract termination within 3 years, while the other party is enabled to maintain the validity of the transaction by paying the difference up to the just price.[74]

Conversely, the German Civil Code (*Bürgerliches Gesetzbuch*; hereinafter BGB) has rejected the concept of gross disparity. No limitations are placed upon the parties in their freedom to mutually agree on the price. In that respect, the BGB, just like the provision of the Swiss Federal Law on civil obligations under Article 21/1 (*Schweizerisches Obligationenrecht*, 'OR'), is a result of the prevailing philosophical views on freedom and economic liberalism of the late 19th century. The BGB's Article 138/1 prescribes the nullity of legal transactions that are contrary to good customs, and Article 138/2, as a special case of such nullity, addresses those legal transactions by which someone, taking advantage of another's necessity, recklessness or inexperience concludes a contract binding the other party toward him or a third party to a performance which will obtain him benefit that is in clear disparity with such performance. This abandons the Roman criterion of *laesio ultra dimidium*, seeking the objective criterion that the performances in the moment of concluding a contract should be in clear disparity, which is estimated by a court in each individual case, as well as the subjective element of intentional or at least conscious exploitation of another's necessity, recklessness or inexperience.[75]

European legal systems follow either the older model of gross disparity (*laesio enormis*) based on Diocletian's constitution starting from an objective control of price or the younger, subjective concept, which has the purpose of protecting an unaware weaker party from being taken advantage of. The former model presumes that the parties have reached an agreement on the just price, which gives the injured party the right to terminate the contract even in the case of a mere deviation of the

[74] Cf. Horvat, loc. cit. n. 24, at p. 174. sqq; Kittelmann, loc. cit. n. 71, at p. 79.
[75] Cf. Horvat, loc. cit. n. 24, at p. 177. sq; Kittelmann, loc. cit. n. 71, at p. 95. sqq

contract price from the just price above a certain limit. Such a model is used in France, Belgium and Austria. The latter model, however, in addition to a clear disparity between performances, requires the subjective element of the injured party's lack of knowledge of the real value or the intention of a party benefiting from a transaction to take advantage of another's inexperience or necessity.[76] This type of model was chosen by Germany, Switzerland, Portugal, Spain, Denmark, Italy and Great Britain. These models also differ from each other in terms of the legal consequences of gross disparity. In most cases, the injured party has the right to rescind the contract; while in some cases the party benefiting from the contract is allowed to keep it in force provided it compensates for the difference in values.

The liberal concept of protecting the parties' contractual freedom with a more or less arbitrarily determined disparity between performances focuses on a conscious exploitation of a weaker party, specifically as an essential prerequisite for providing legal protection. This model, which emerged during the 19th century, prevails even today in European civil law codifications. In spite of that, especially in the field of consumer protection, we can trace an aspiration toward strengthening a paternalistic system of price control. In accordance with the principle of protecting the weaker party, all projects aiming at the unification of private law by creating common principles of contract law (e.g. Article 4:109 *Principles of European Contract Law* PECL, Article 3:10 *UNIDROIT principles of international commercial contracts* UNIDROIT PICC and Article II, 7:207 *Draft Common Frame of Reference* DCFR) stipulate that a party can request contract termination if the other party benefited by taking advantage of the former's position of necessity, recklessness, ignorance or inexperience. At the request of either of the parties, a court may adjust contract provisions with the principle of good faith (*bona fides*). This transition from party autonomy toward social responsibility can be, according to Zimmerman's view, seen in a wider context as a return to the ethical foundations of *ius commune*, which in turn, replaced the individualism of classical Roman law.[77] It is precisely on the foundations set by the Roman and Canon

[76] See Finkenauer, loc. cit. n. 72, at p. 1030.

[77] See Zimmermann, op. cit. n. 6, at p. 270. Moreover, it should be mentioned that certain creators of the already famed *Principles of European Contract Law*, one of the most significant projects to date aimed at the Europeanization of private law, have established in their detailed analyses that the stated principles are essentially a

legal tradition as the source of universal legal culture in the sphere of private law that the contradicting requirements of equity and equality on the one hand and legal security on the other hand need to be reconciled in the future.

Taking into consideration all the aforementioned facts, a possible wider scope of the application of the *ius commune* rules in the Hungarian and Croatian judicial practice would not represent just a nostalgic quest for the hidden treasure of the European legal tradition, but a part of a long-term creative effort for the Europeanization of the contemporary legal orders on the firm foundations of the common legal culture.

1. Contemporary regulation of the Hungarian Civil Code

Although Hungarian law resisted the direct reception of Roman law for several centuries,[78] the Hungarian judicial practice and doctrine has since the second half of the 19th century onwards – due to the withering away of feudal relations and consecutive failed attempts to adopt a modern national civil code[79] – gradually elevated *ius commune* to the level of a subsidiary source of law.[80]

In fact, the Hungarian Civil Code (Act IV of 1959) as law in force gives the contracting parties freedom regarding the determination of purchase price in the same way as the classical Roman legal regulation.

modern reformulation of the rules of the traditional European *iuris communis*. Cf. R. Zimmermann, '*Ius Commune* and the Principles of European Contract Law: Contemporary Renewal of an Old Idea', *European Contract Law: Scots and South African Perspectives* (2006) p. 1 sqq.

[78] On the reasons for resisting the reception of Roman Law in Hungary, see e.g. Zajtay, loc. cit. n. 38, at p. 183 sqq.; Bónis, loc. cit. n. 38, at p. 1 sqq., 111. sqq; Béli, loc. cit. n. 38, at p. 70 sq.

[79] On various attempts, proposals and drafts of the codification of civil law in Hungary in the 19th century and the first half of the 20th century, see e.g. Zlinszky, op. cit. n. 38, p. 43 sqq; cf. E. Heymann, *Das ungarische Privatrecht und der Rechtsausgleich mit Ungarn*, (Tübingen, Mohr 1917) p. 9 sqq; G. Hamza, *Die Entwicklung des Privatrechts auf römischrechtlicher Grundlage unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, Österreich, der Schweiz und Ungarn* (Budapest, Andrássy Gyula Deutschsprachige Universität 2002) p. 135 sqq.

[80] On the gradual acceptance of *ius commune* as subsidiary law in the Hungarian private law system see, e.g., G. Hamza, 'Sviluppo del diritto privato ungherese e il diritto romano', in C. Colognesi, ed., *Ivris vincvla. Studi in onore di M. Talamanca*, (Milano, Jovene 2001) p. 357 sqq; cf. Heymann, op. cit. n. 79, at p. 12. sqq; Hamza, op. cit. n. 79, at p. 134. sq.

Generally, the parties can determine the purchase price freely, according to the market relations of demand and supply. Article 201(2) of the Civil Code – which is the descendent of the ancient institution of *laesio enormis* in contemporary Hungarian law – is the only general limit of this freedom of contract:[81]

> Article 201(2) If at the time of signing the contract there is an unreasonable and gross disparity between the value of contractual performances, without either party having the intention of bestowing a gift, the injured party shall be allowed to contest the contract.

It follows from the principle of freedom of contract[82] that the parties are allowed to define the values of contractual performance and counter-performance freely, and if they have a mutual intent, they can diverge from the reasonable estimation determined by the economic value of the performance.

Since the Hungarian Civil Code sets up the presumption of onerousness,[83] the sanction is applied only if the balance between the value of the contractual performance and counter-performance breaks down extensively. In such cases, the possibility of contesting the contract is ensured.

Compared to the strict fifty percent criterion of the Roman '*dimidia pars*', the wording of the regulation is more general and it leaves the determination of gross disparity between the value of performance and counter-performance to legal practice. Therefore, Hungarian law does not determine a certain percentage, but the court is obliged to decide at its discretion on a case-by-case basis whether the difference between the values is excessive or not. It is necessary for the judge to examine the circumstances of entering into a contract, the whole content of the contract, the relations of market value, the peculiarities arising from the character of the legal transaction and the way that performance and

[81] See Kisfaludi András, *Az adásvételi szerződés* [The sale and purchase contract] (Budapest, Közgazdasági és Jogi Könyvkiadó 1997) p. 76.

[82] Art. 200(1) The parties are free to define the contents of contracts, and they shall be entitled, upon mutual consent, to deviate from the contract provisions if such deviation is not prohibited by legal regulation.

[83] Art. 201(1) Unless the contract or the applicable circumstances explicitly indicate otherwise, a counter-performance is due in exchange for performance set forth in the contract.

counter-performance are defined.[84] In this case, the basis of judicial intervention in contractual relations is actually not inequality in exchange, but the fairness which has to have the purpose of protecting the contracting parties.[85] The protection appears in respect of the purchase price as the counter-performance. However, regarding the requirement of legal security, the application of the above rule is reasonable only within definite narrow bounds, in the contractual relations of private individuals.[86]

Furthermore, we have to mention that the Civil Code does not regulate the gross disparity between values as a reason for nullity but as a reason for contest. Differently from the reasons causing nullity[87] – such as the usurious contract,[88] which is regarded as the subjective case of gross disparity between values – the legal consequence of the invalidity of a contract which is concluded with the gross disparity between the value of performance and counter-performance can take place only in the case of a successful contest and within the deadline.[89]

It is clear from the wording of the law that the gross disparity has to exist at the time of concluding the contract, and the contract can be contested only if the injured party did not have the intention of bestowing a gift.

According to the Hungarian law, in the case of a successful contest the court restores the state of affairs having existed prior to the conclusion of the contract or it has the possibility to remove the cause of invalidity by eliminating the disproportionate advantage and declare the contract valid.[90] In the latter case, respecting the autonomy of the parties – in

[84] See PK No. 267.

[85] Cf. Kecskés László, et al., 'A szolgáltatás és ellenszolgáltatás értékaránytalansági problémái a szerződési jogban II [The problems of the difference between the value of performance and counter-performanced in contract law II]', 46/3 *Magyar Jog* (1999) p.132, 136.

[86] Cf. Vékás Lajos, 'Az autópálya-használati szerződések és a Ptk. 201. § (2) bekezdése [Contracts of highway-usage and the Article 201(2) of the Civil Code]', 45/6 *Magyar Jog* (1998) pp. 321-327. Kovács Kázmér, 'A Ptk. 201. § (2) bekezdése védelmében [In defence of Article 201(2) of the Civil Code]', 45/7 *Magyar Jog* (1998) pp. 403-407.

[87] See Art. 200(2).

[88] Art. 202 If a contracting party has stipulated an unreasonably disproportionate advantage at the conclusion of the contract by exploiting the other party's situation, the contract shall be null and void (usurious contract).

[89] See Art. 235(1).

[90] See Art. 237(2).

contrast with the Roman legal regulation where the buyer, who used his *facultas alternativa*, had agreed to pay the difference up to the regular market price – the law enacts only the elimination of disproportionate advantage and it does not mean the reduction or rise of the value of the contractual performance up to the market value.[91] Thus, the purpose is the determination of a performance which stands closest to the interests of the contracting parties.

The freedom to agree on the purchase price is, however, not absolute in Hungarian law either. As in ancient Rome, it should meet the measures of the public control of prices[92] and, furthermore, the other public measures of central state interference in price formation,[93] and the situation is not different nowadays either. The Act LXXXVII of 1990 on Price Setting (hereinafter the Price Code) points out in its preamble that the most significant regulator of prices is the market and economic competition, but in those cases where Act LVII of 1996 on the Prohibition of Unfair Market Practice (hereinafter Competition Code) does not provide adequate shelter from trade restricting agreements and abuses of economic power, it intervenes in the free price calculation of the parties. The Price Code makes the calculation of official price possible for the competent ministers or local authorities in the case of those products and services (a current example is the connection fee of

[91] According to PK No. 267 when the court decides which legal consequence should be, it is important to what extent the parties performed the contract, what happened after the performance is made, what changes took place in the position of the contract parties and last but not least the contentious statements of the parties.

[92] Cf. Jakab Éva, 'Aediles curules', 40/9 *Acta Universitatis Szegediensis de Attila József nominatae. Acta Iuridica et Politica* (1991) pp. 134-135; M. Kurylowicz: 'Zur Marktpolizei der römischen ädilen', in M. Zabłocka, ed., *Au-dela des frontieres. Mélanges de droit romain offerts à Witold Wołodkiewicz. Vol. 1* (Warszawa, 2000) pp. 439-456.

[93] See for example Diocletian's Edict on Maximum Prices (*Edictum de pretiis rerum venalium*). Cf. S. Lauffer, *Diokletians Preisedikt* (Berlin, Walter de Gruyter 1971); S. Corcoran: *The empire of the tetrarchs. Imperial pronouncements and government, AD 284-324* (New York, Oxford University Press 2000) pp. 205-233; H. Brandt, 'Erneute Überlegungen zum Preisedikt Diokletians', in A. Demandt, et al., Hrsg., *Diokletian und die Tetrarchie* (Berlin, Walter De Gruyter 2004) pp. 47-55; B. Salway, 'Mancipium rusticum sive urbanum. The Slave Chapter of Diocletian's Edict on Maximum Prices' in U. Roth, ed., *By the sweat of your brow: Roman slavery in its socio-economic setting* [*Bulletin of the Institute of Classical Studies Supplements* 109] (London, The Institut 2010) pp. 1-20.

long-distance heating) which are listed in the enclosures of the law.[94] In the latter case, the parties still have a small margin because the official price is not a fixed price, but it gives only the highest or the lowest price. If the parties diverge from it or they do not agree on the purchase price, the official price has to be regarded as the content of the contract.[95] If the official price calculator perceives the breach of the regulations referring to official prices, he can prohibit the application of the price that infringes the law and – beyond imposing a fine – he can oblige the entrepreneur to refund the surplus of the income which was obtained by disregarding the regulations referring to official price to the injured party, and if the identity of this person cannot be determined, to pay it to the state.[96]

2. *Laesio enormis* in Croatian contract law

Even though medieval Hungarian and Croatian law was familiar with the notion of the just price, the influence of Roman legal tradition on this legal system in this aspect, as previously concluded, was not comprehensive. Namely, the institution of *laesio enormis* as the most significant instrument of realizing the concept of just price was not regulated within it. The institution of gross disparity was ultimately brought to life in the Croatian legal system by provisions of the ABGB, (i.e. on the basis of the *ius commune* doctrine incorporated in the provisions of ABGB), which was gradually introduced during the 19th century in all parts of Croatia. Until the Law on Obligations Act of 1978 entered into force, the ABGB's Articles 934 and 935 sanctioned the breach of the principle of the equivalence of performances only in the case where a party has not received even one half of what it gave to the other party, i.e. it held on to the Roman criterion of *laesio ultra dimidium*.

A further development of this institution ensued via the elaboration of the principle of the equal value of performances (the principle of equality in exchange) as one of the core principles of the Law on Obligations Act (hereinafter LOA).[97] The principle of equality in exchange [LOA Article 7(1)] starts from the premise that in bilaterally

[94] See Art. 7 of the Price Code.
[95] See Art. 13 of the Price Code.
[96] See Art. 16 of the Price Code.
[97] Law on Obligations Act, Official Gazette, Narodne novine, NN 35/05, 41/08, 125/11.

binding contracts each party should, in exchange for the value received under contract, give the equal value to the other party. This principle is not absolute, as the equivalence of mutual performances is, from the mathematical point of view, unattainable in each individual case in practice. Yet even if there are no excusable reasons for departing from this principle, a breach of it will not always entail legal consequences, but this will rather be the case in expressly prescribed situations: gross disparity (Article 375), usurious contract (Article 329) and change of circumstances (Article 369).[98]

For the institution of *laesio enormis* to be applicable in practice, the following legal preconditions have been prescribed:

> Čl. 375. st. 1. *Ako između činidaba ugovornih stranka u dvostrano-obveznom ugovoru postojao u vrijeme sklapanja ugovora očit nesrazmjer, oštećena strana može zahtijevati poništaj ugovora ako za pravu vrijednost tada nije znala niti je morala znati.*
> [Art. 375/1 *If at the time of concluding a synallagmatic contract there was an evident disparity between the performances of the contracting parties, the injured party may request the annulment of the contract, provided that at that time it did not know or had no reason to know of the true value.*]

[98] Corrections of mutual values of performances are also possible under some other circumstances, such as, for instance, liability for material and legal defects (Art. 357, 401, 410 and 430), the possibility of reducing an excessively high contractual penalty sum (Art. 354) or earnest (Art. 304/4) etc. Cf. V. Gorenc, *Komentar zakona o obveznim odnosima* [A Comment on the Civil Obligations Act] (Zagreb, RRIF Plus 2005) p. 18 and 571.

This institute, therefore, applies to all synnallagmatic contracts.[99] A gross disparity between performances, which must exist to allow requesting the annulment of the contract, is not determined by an exact ratio in advance, but it is rather left to the estimation of judge.[100] In that respect, there is a departure from the earlier requirements of the ABGB, i.e., that the disparity must be above one half of the value. The very nature of value estimation, as we were able to ascertain through the historical analysis of the just price concept, implies that there is no generally valid and precisely determined value. Whilst no objective criterion is contained in Art. 375/1 for determining disparity, such disparity must still be evident to approve protection, as otherwise the parties' freedom of contract would be breached. Considering that after the conclusion of a contract the value of the object may change, leading to a disparity between performances, the value of the object at the moment of entering into the contract is given precedence.

Alongside the value of performances as a criterion, the Act provides an additional criterion requiring that the injured party did not know nor had any reason to know of the true value at the moment of concluding the contract. It is important to emphasize that such an invincible mistake must not be provoked by the other party, as that would constitute a fraud. This subjective criterion presuming the existence of a mistake (defect of will) of the injured party follows medieval Roman legal tradition, which departs from the solution of ancient Roman law. The

[99] As is the case with the Roman law provisions requiring that the price is at the time of concluding the contract determined or determinable, the rules do not apply to aleatory legal transactions, as the parties due to the incomplete certainty of performances consciously assume the risk of a disparity between the values of mutual performances. They also do not apply in case of public sale or when object is given due to particular preference [cf. Art. 375(5)]. A specific feature of Croatian law until the adoption of the new LOA in 2005 was that the application of the institute extended also to commercial law contracts, even though parties to such contracts are, as a rule, legal subjects who are experts and should be aware of the value of sold property. See J. Čuveljak, 'Prekomjerno oštećenje [Gross disparity]', 6 *Hrvatska pravna revija* (2003) p. 37.

[100] Leaving out a precise ratio of values enables the provisions of the Act to be adapted to the circumstances of a concrete case, but law practitioners are at the same time required to invest more effort in explaining the reasons for any decisions they make. Thus, for example, a decision of the High Commercial Court of the Republic of Croatia established a gross disparity in a situation where the value of real estate amounted to approximately 60% of the agreed price (Decision Pž-1577/92). Cited by Gorenc, loc. cit. n. 98, at p. 573.

use of this criterion corresponds to the requirement to exercise due care and familiarize with the actual state, as well as to reasonably assess the concrete situation when entering into legal transactions.
The consequence of gross disparity is the possibility to terminate the contract. The injured party may within one year request the contract to be annulled, while the legislator, starting from the principle of *favor negotii*, gives the other party the possibility to keep the contract in force if it offers compensation up to the real value. Thus the contemporary legislation departs from the Roman solution found in the imperial rescript which guaranteed *facultas alternativa* to the injured party – asking for payment up to the real value or contract rescission.

VI. Concluding remarks

Classical Roman law started from the premise of a complete freedom of the parties in respect of negotiating the price of goods and did not set any requirements in terms of the just price (*iustum pretium*), nor did it have to represent the objective value of property. Therefore, we can conclude that only the two imperial rescripts in the *Codex Iustinianus* with the strict criterion of *dimidia pars* testify to the first, rudimentary yet important, steps towards a balance between the principle of freedom of contract and the principle of equality, which aimed to protect economically weaker parties. The most important way of realizing the idea of just price was the Roman legal institution of *laesio enormis.* Over the course of history, the institution of gross disparity has been subject to numerous changes, depending on whether a state's protective legislation intervened with price regulation or allowed the freedom for parties to mutually negotiate their contracts.
Having analyzed the medieval sources of Hungarian and Croatian law – Werbőczy's Tripartitum and the Statute of Ilok – it can be claimed with certainty that the medieval Romanistic doctrine influenced the formation of the views on just price in those sources to some extent. Moreover, that doctrine had exerted a somewhat greater influence on the Statute of Ilok, including its central part which contains *ius tavernicale*, than on Werbőczy's Tripartitum itself. However, it should also be noted that the influence of universal Roman and Canon legal tradition in the stated segment on local laws was far from complete and comprehensive. Thus, for example, Hungarian and Croatian law was not at all familiar with the institute of gross disparity (*laesio enormis*) as the most important method of realizing the idea of the just price in medieval Roman legal

tradition. Namely, unlike in Roman legal tradition, where the notion of *iustum pretium* was primarily used in the sphere of private law, Hungarian and Croatian law quite commonly realized this notion by means of specific public law measures. Therefore, it should be concluded that the notion of *iustum pretium* was used in medieval Hungarian and Croatian law in a much narrower scope than in Roman legal tradition.

Although Hungarian law, as we have seen, resisted the more profound reception of Roman law for several centuries, the Hungarian judicial practice and doctrine have since the second half of the 19th century onwards – due to the withering away of feudal relations and consecutive failed attempts to pass a modern national civil code – gradually elevated Roman private law in the form of *ius commune* to the level of a subsidiary source of law. Following this universal legal tradition, the notions of *iustum pretium* and *laesio enormis* were incorporated in the current Hungarian Civil Code. On the other hand, the institute of gross disparity was brought to life in the Croatian legal system based on the provisions of the ABGB, which was gradually introduced in all parts of Croatia over the course of the 19th century. The related provisions of the ABGB were also based on the doctrine of *ius commune*, and their influence was undoubtedly important in the formation of Croatian contract law provisions in force concerning the stated subject matter as well.

Therefore, we can ultimately state that the influence of the just price (*iustum pretium*) concept on Hungarian and Croatian laws in various stages of their development constitutes a prime example of the gradual reception of universal legal concepts in local legal systems. The authors of this paper hope that their analysis, carried out on one concrete example of the relationship between the 'universal' and the 'local' levels in a historical and comparative perspective, is not without relevance *per analogiam* to the ongoing discussion concerning the relationship between the 'European' and the 'national' level in the process of harmonization and/or unification of European legal regimes.

Environmental protection: legal protections

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The role of lower and higher courts in the interpretation of Hungarian and Croatian law

I. Introduction

Legal development can be continuous and periodical. Continuous legal development is the result of judicial activity; periodical development is that of codification or legislation. There is no doubt that each legal system has to face the fact of the role of *judicial practice* in legal changes[1] and the Central-Eastern European region is no exception.

II. The role of judicial practice in the Hungarian legal history

In the historical development of Hungarian law, customary law and judge-made law both played an important role and they had several meeting points over the course of time. The so-called *Tripartitum* (1514), the summary of living feudal common law, which as a result of royal assent never became a statute of legal force, began to be applied by the courts all over the country, thus becoming legally binding by way of custom. Later it was included in the *Corpus Iuris Hungarici*, too (1629).

Judicial practice remained the broadest field of the enforcement of common law, mainly the judgments of the supreme courts with that of the Royal Kúria in the first place. A collection called *Planum Tabulare* (1800) containing rules of procedure, decisions of the royal board, the practice of legal proceedings instituted by the country courts, the judicial administration of justice in towns, the practice of legal proceedings instituted by manor courts as well as decisions concerning it had considerable influence on judicial administration.

Following the 8-year-long rule (1853-61) of the Austrian *Allgemeines Bürgerliches Gesetzbuch* (1811) in Hungary, the Council of the Lord

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[1] Cf. e. g. R. David and J. E. C. Brierley, *Major Legal Systems in the World Today* (London, 1985); K. Zweigert and H. Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (Tübingen, 1971); J. Wróblewski, *The Judicial Application of Law* (Dordrecht/Boston/London, 1992).

Chief-Justice, summoned in 1861, created the so-called *Provisionary Rules of the Administration of Justice*. Like the *Tripartitum*, though, these never became statutes of legal force. In fact, they became part of the legal system through judicial application, through decisions made in concrete legal cases. Hungarian judicial practice, in this way, acquired a very considerable role in the creation and development of law, mainly in the field of civil law. It united common law as it existed before 1848; legal regulation was introduced and maintained mainly in connection with cadastral land registration, and the short orders of the above mentioned Provisionary Rules. Following the creation of the Commercial Code (1875), judicial practice developed the rules of modern relations in the field of trade law, on the basis of the German Commercial Code and the Austrian ABGB.

From the turn of the century onwards, judicial practice has been considerably influenced by the Civil Code Bill, the fifth draft of which (1928) never came to be of legal force. Most parts of it, however, through legal practice and as common law maxims, became part of the Hungarian legal system. Naturally, this code contained several legal principles and had been developed by judicial practice which survived in the judicial administration of justice in this form. In the non-codified fields of civil law, judicial practice continued to be the source of law till 1959 and even later, in questions regulated by statutes, it was judicial practice which made the initiative steps.

III. The role of judicial practice in contemporary Hungarian legal system

Judicial practice in Central-Eastern Europe develops the legal system in two ways. In the strict sense, it does so by fostering congruence between the changing social-economic relations and the corresponding, unchanged legal regulation. In the broad sense, judicial practice develops the legal system by bringing the already regulated and unchanged conditions of life into harmony with legal norms that reflect them in an inadequate – too narrow or too broad – form.[2] The main spheres and forms of the judicial development of law are the interpretation, the concretization, and the individualization of legal rules, the filling of legal gaps by way of analogy, and the setting of examples of equity. The means of the judicial development of law are

[2] See A. Visegrády, *A bírói gyakorlat jogfejlesztő szerepe* [The Law-developing Role of Judicial Practice] (Budapest, 1998).

the interpretation of legal rules and the so-called *analogia legis* and *iuris*. The law-developing role of judicial practice encompasses nearly all fields and levels of the legal system. Within the mechanism of the judicial development of law, we can distinguish between the *direct* and the *indirect* judicial development of law – two methods which cannot be easily demarcated in practice. The essential characteristic feature of the former is that the law-developing effect is the result of judicial practice itself, and not only that of the practice of the supreme courts but also the result of the activity of lower courts. In the case of the indirect model, the judicial development of law is the result of solutions elaborated by the judicial authorities and by legal science as well as in the course of attorneys', solicitors' and legal counsels practice. Thus the judicial development of law is to be conceived as a complex process.

In the Hungarian law-developing process the decisions of fundamental importance of the Supreme Court play dominant role. Courts do not merely 'implement', but also interpret and apply the law, and thereby they also necessarily develop it. The Roman legal principle of *praetor ius facere non potest* is a living principle even today, at least in a formal sense based on the Act on Legislation. However, in a specific case, when passing judgment, with regard to the choice, interpretation and application of a legal norm (and/or its individual elements), as a matter of fact, the judge also makes 'case-law' (*praetor ius facit inter partes*). Therefore, the permanent and uniform judicial practice of courts, the individual decisions of 'precedential value' are developing it and certain Supreme Court decisions may be considered as norms having the character of source of law.

In accordance with Section 27 of Act of 1997 on the Organization and Administration of Courts, the Supreme Court shall ensure the uniformity of the application of law by the courts, and within the framework of performing this duty it shall adopt uniformity decisions binding on courts, which shall be published in the Hungarian Official Gazette. The law uniformity procedure – which may also be initiated by a court division – may take place if it is required for the further development of judicial practice or for ensuring the uniformity of judicial practice. In order to ensure the uniformity of judicial practice, the divisions of the Supreme Court, the Regional Courts of Appeal and the county courts analyze the practice of courts and may – even without initiating a law uniformity procedure – express an opinion or take a divisional stand, which is then published and will be followed by the courts. Examples

for this include – without aiming to provide an exhaustive list – Civil Division position № 10, which deals with disputed issues arising concerning the termination of joint property, PK. № 32, which resolves the question of *integrum restitutio* resulting from an invalid contract, or Economic Division position GK. № 66, which, among others, settles the rules relating to the performance of money debts (capital and late payment interest) in relations between economic operators, but mention should also be made of Administrative Division position KK № 2, which deals with factors to be taken into consideration by the court when registering foundations.[3]

Divisional Opinions and positions are not pro forma binding on the proceeding court chambers; however, it may be proved statistically that the number of opposing decisions taken in individual cases is insignificant. Although individual decisions and judgments published in the columns of 'Court Decisions' or other publications (Decisions of the Regional Courts of Appeal) or the Collection of Court Decisions – which also contains judgments of the Regional Courts of Appeal – do not (officially) form part of the control exercised by the Supreme Court relating to matters of principle, their guiding role is hardly debatable. They are not binding on lower courts either, to put it in another way, following them is 'compulsorily recommended', courts of second instance like to see them being applied, litigants (or their legal representatives) often refer to them in their submissions, just like trial courts often cite them in their decisions to support their reasoning. Instead of law-developing interpretation it could in essence be regarded as *contra legem* judicial law-making[4] when, in the field of non-pecuniary damages, Supreme Court Directive № 16 laid down pre-conditions whereby it re-qualified alternative conditions into joint conditions (instead of rendering life 'lastingly or seriously' difficult, it required rendering life 'lastingly and seriously' difficult) and thereby it changed the applicability of a specific piece of legislation.

Let us see some statistical data on the number of Supreme Court divisional opinions and uniformity decisions, between 2008 and 2010:

- in the Criminal Division: 31 divisional opinions and 15 uniformity decisions;

[3] Cf. G. Bíró and B. Lenkovics, *Magyar Polgári jog. Általános tanok* [Hungarian Civil Law. General Doctrines] (Miskolc, 2010).

[4] See on this J. Wróblewski, "Interpratatio secundum, prater et contra legem" *Panstwo i Prawo* No. 4-5. (1961).

- in the Administrative Division: 24 divisional opinions and 13 uniformity decisions;
- in the Civil Division: 10 divisional opinions and 14 uniformity decisions.

With regard to our topic, decisions of the Constitutional Court play a special role. The decisions of the Constitutional Court are rather important for the different branches of law, e.g. in the fields of the freedom of contract, protection of secrets, the constitutional prohibition of unjustified discrimination of legal subjects and the requirement of legal security. The activity of the Constitutional Court does not extend to the application of law, this (special) body cannot resolve specific legal disputes, its primary role is 'negative law-making', the 'weeding out' of norms that are in conflict with the fundamental law by annulling them (norm-control as it is called), and its secondary role is the authentic interpretation of the constitution. The 'Constitution as interpreted' by the Constitutional Court is directly binding on the courts and through them; it is also indirectly binding on the participants of proceedings.

The Constitutional Court also plays a significant role in developing law by the reasoning provided by it for its decisions of annulment. It plays an even more direct role in law development through its decisions urging the elimination of a constitutional omission. For if the Constitutional Court establishes a 'constitutional omission' on the part of legislature, it calls upon the Parliament to 'perform its legislative duty'. This was the case when the Constitutional Court annulled Article 685 point c) of the Civil Code laying down a definition for economic operators because it did not include sole traders. It has also occurred on many occasions that the Constitutional Court provided directly applicable instructions with regard to the new norm that was to be created (for example in the case of data protection).

IV. Analysis of judicial practice

Further on, let us consider a few specific examples from various branches of law, firstly from civil law.

Earlier judicial practice had taken the position that a service contract concluded by a bungler was void. Compared to this, some changes could be observed in the 1990s. A special guiding role may be attributed to the case, concerning which the Supreme Court pointed out that it could be decided based on specific legal regulations relating to the exercise of

trade whether the governing regulation would qualify the contract invalid in the absence of an appropriate license. The lack of a license itself does not render the contract void if the service constituting the subject-matter of the contract is not prohibited by law. In accordance with other new legal regulations, which also reflect social and economic changes, such contracts give rise to the same legal consequences as if the contractor had possessed the required license, in other words, the contractor has warranty obligations and the principal is obliged to pay the contractor's fee.

A similar role of judicial law-development can be noticed in changing the term 'unreasonable and extensive difference in value' to 'unreasonable and extensive disproportion in value'. Based on Article 201 (2) of the Civil Code, a contract may be found invalid only if there is an unreasonable and extensive difference in value between the provided service and the consideration due. Court practice has replaced the expression 'difference in value'– for the very reason of the impossibility of objective measurement of the difference – with the term 'disproportion in value'. The rule of the Civil Code does not provide a precise basis for determining what extent of difference could be considered unreasonable and extensive. Detailed elaboration of this has fallen on judicial practice, and despite the rich jurisprudence developed in this field, only a general definition may be given for it, in other words, it is not possible to define a specific percentage serving as the standard, and one must examine the circumstances of each specific case individually. Judicial practice does not generally qualify even a 20-30% difference in value as unreasonably disproportionate. On the other hand, the Supreme Court has found that in a contract of sale, the agreed purchase price differing by 40% from the market value constituted an unreasonable and extensive difference in value, having regard also to the fact that in the particular case there was no such extraordinary circumstance that would have justified a disproportion of such measure. Consequently, judicial practice makes a subjective decision about the unreasonable and extensive disproportion between the provided service and the consideration due by weighing every circumstance of the case.

On January 1st, 1989, the Companies Act of 1988/VI came into force in Hungary. The statute, having been created in a very short time based on Austrian, German and Swiss juristic materials, was intended, in the light of the initial practical experiences and in consideration of the Hungarian legal, political and economic demands, to be modified later. The above

legislative deliberation was, from the very beginning, well-known to the judges of the Court of Registration who made the best of the opportunity to practice their law-developing function.

This law-developing role of the Registry Courts– having been upgraded due to the change of the régime – was taken into consideration in the new Companies Act modified by the Act LXV of 1991. Let it be illustrated with the following examples.[5]

At the beginning of the operation of Registry Courts, it was established that the capitalized rental right of immovable property could be also reckoned with as part of the assets of the company. In such cases the right of use or the rent were accepted as contribution in kind which appeared as pecuniary value in the primary capital. These emergency measures however raised various, hardly resolvable, debatable issues.

Because a practically never paid nominal rent was calculated as the value of contribution, the property of the company became increased by a fictitious sum of money already at the start. As opposed to this, it is in the general interest that only marketable property possessing actual cash value (also sizeable if necessary) is accepted as contribution in kind [Companies Act, Article 22(2)]. The Supreme Court decided in a rather extraordinary case pertinent to this question. According to the facts, the then forming company intended to contribute to their property about 2600 m^2 of water surface belonging to the boat landing stage in the harbor of Balatonföldvár. The Court pronounced in their judgment that a specific area of the natural water surface of the Lake Balaton cannot be rendered into company property, with regard to point (a) of Article 173 of the Civil Code, according to which state property cannot be considered to be negotiable.

Negotiability always has to be examined in relation to enforceability, that is, it must be examined whether the contributed chattels are suitable for the indemnification of the creditors in case the company ceases to exist. The reasoning of the Supreme Court in this individual case pointed out that the partial or complete assignment of the right of use would in substance mean the acceptance of official license as contribution in kind.

Contributed real property passes into the ownership of the company only when the proprietary rights have been registered to the benefit of the company. Act LXV of 1991 declared that registry court practice

[5] Cf. A. Visegrády, 'Judicial Practice as an Element of Legal Development' 3 *Rechtstheorie* (1995).

according to which a real estate debited with some kind of right such as, for example, the right of enjoyment cannot be accepted as contribution and even the announcement of the agreement of the entitled party makes no difference in this respect. Another such right is mortgage, because on the basis of this the creditor may put the property up to auction regardless of it being a contribution to the capital of a company. Inalienability and the prohibition of encumbrance are reasons for exclusion as well.

In the field of criminal law – since analogy is not permitted – judicial law-development has a more restricted role than in other branches of law. However, consistent judicial practice has led to remarkable results.[6] The unit of continuity, introduced by Act IV of 1978, had been elaborated by judicial practice beginning from the 19th century. It has also been referred to as "judicial unit". In today's dogmatics, the unit of continuity (*delictum continuatum*) constitutes an independent instance of statutory or artificial unit created by legislature. It is hard to understand why this institution had been set aside for one and a half centuries.

The evaluation of indirect perpetration has a peculiar history, too. Although it had been laid down by the Austrian Criminal Code of 1952 already, in Hungary the term of indirect perpetration was introduced only by Act LXXX of 2009. Nevertheless, in the practice of courts, indirect perpetration had continuously been recognized and upheld since the 19th century. The reason for the non-application of the term was probably that the perpetrator is a person who realizes the legal facts of a crime, however, the indirect perpetrator does not realize the objective elements of the crime, he realizes the subjective elements only.

Concerning this question, judicial practice did not wait for theoretical debates to come to rest.

According to Criminal Division Opinion BKv № 10 (BK 24.), if the pregnant woman loses her fetus as a result of physical assault, the perpetrator's action shall be classified as bodily harm causing permanent disability and serious deterioration of health.

A persistent problem is constituted by the parallelism and delimitation of fraud and tax fraud. At present Criminal Law Uniformity Decision No. 1/2006 attempts to make a distinction between the legal facts of the two crimes:

[6] See on this Á. Balogh and L. Kőhalmi, *Büntetőjog. Általános rész* [Criminal Law. General Part] (Budapest – Pécs, 2010); E. Erdősy et al., *Büntetőjog. Különös rész* [Criminal Law. Special Part] (Budapest – Pécs, 2007).

> '1. The criminal offence of fraud is committed by a person who applies for the refund of value-added tax on the basis of accounting documents made out while not being a subject of taxation, or while being a subject of taxation but not carrying out real economic activity. The damage forming the basis for legal classification is the amount of value-added tax that has been reclaimed and refunded or otherwise accounted.
> 2. The felony of tax fraud is committed by a person subject to the payment of value-added tax, if – either with regard to the payable tax that has been charged by him or the indication of the amount of deductible tax that another subject of taxation has preliminarily charged to him – he provides the tax authorities with false data based on fictitious accounting documents, provided that the result of his act remains within the confines of the legally prescribed tax liability. The perpetration value serving as the basis for the legal classification of the act is the amount of tax reduction.'

It would be useful to amend the statutory text on tax fraud in accordance with these statements of the Criminal Law Uniformity Decision. Similarly useful is the statement made in Criminal Law Uniformity Decision No. 1/2005 according to which the crime of embezzlement cannot be committed in relation to immovable property. According to Criminal Division Opinion No. 34 (BK 93),

> '[w]hile the display of violent conduct required for disorderly conduct does not necessarily presuppose the infliction of actual bodily harm, at the same time, there are crimes in case of which one cannot speak of the display of violent conduct but rather of violent commission. Violence laid down by statute in the legal facts of such crimes means the exertion of physical force directly affecting some person, which breaks the resistance of that person.
> In comparison, violence exerted during the commission of these crimes – as opposed to the display of disorderly conduct, which is also of aggressive nature, but which means milder behaviour – is most of the time accompanied, also according to common views of life, by the infliction of actual bodily harm on the injured party.'

As a result of this, Article 11(1) of Act LXXIX of 2008 supplemented Article 271 with the definition of violence: Article 271(5) Under this

Section, the exertion of physical influence of aggressive nature on another person is also classified as violent conduct even if it is not capable of causing bodily harm.

In Labor law the role of the judicature has been increased as the effect of the regulative conception of the Labor Code (promulgated in 1992). With the assistance of the positions of the Supreme Court's Labor Division, the nominally traditional, but in their content renewed legal institutions tried to evolve an integrated interpretation in practice.[7]

The Labor Code contains new legal institutions as well; their proper interpretation was facilitated by the practice of the courts. Finally we should not underestimate the smooth introduction of the fields that were not regulated in the Labor Code into the legal practice.

The so-called Transfer Directive shows the change of conception in the European Union's social politics. The substance of the directive is the so-called concern concentration, to compensate dangers that concern employees in social politics. The implementation of the directive in each member state cause heated debates and until now many problems of interpretation remain.

The change of subject in the person of the employer is significant in Hungarian Labor Law, because in 1992 – in the year of promulgation of the current Labor Code – there was a privatization process in progress that necessarily comes with the employer's change of subject. The facts of the case have not been regulated by the legislator; we can say that the employer's change of subject has been left out of the circle of minimal standard considered by the legislator. The silence of the legislator created a critical situation. In 1992 the Labor Division of the Supreme Court published position No. 154, attempting to create a unified point of view for the judicature.

The position, in compliance with the directive, clearly states that an occurred succession in the change of the employer's person does not affect the employment relationship. In comparison to the employment relationship established with the predecessor, the employment relationship with the successor remains unchanged, specifically regarding the notice period and the severance pay, the time spent in the employment relationship shall be counted together. The Supreme Court emphasized that the change in the employer's person does not dissolve the employment relationship and does not create a new one, but the

[7] Cf. Gy. Kiss, *Munkajog* [Labour Law] (Budapest, 2005).

employment relationship – in lack of modification based on consensus – remains unchanged between the successor employer and the employee.
On the part of the employer, the exercised voluntary termination of employment the most important fact is the validity of argument. Position No. 95 of the Supreme Court's Labor Division applies to this case. The resolution details what the authenticity of the argument's content is and compared to this what reasonableness means. According to the position, the requirement of conformity to the reality means that in case of an inappropriate justification the voluntary termination of employment cannot be accepted. The grounds for resignation have to be authentic and also they given case the employee's job is not necessary, therefore the employment relationship should be determined.
The resolution emphasizes that justified dismissal cannot be annulled neither on the grounds of equity nor in consideration of such circumstances that are outside of the scope of litigation.
The explanation of dismissal has to define the reason of the voluntary termination of employment clearly.
Position No. 95 emphasizes that it is not relevant whether the dismissal has a detailed explanation, but it is relevant that out of the reasons the employer stated as the reasons of dismissal it could be established why the employer does not need the work of the employee.
According to the position, the employee's reference to inaptitude in the job does not accomplish the requirements if a detailed, factual circumstance that caused the inaptitude is not made clear.

V. The role of judicial practice in Croatian legal history

In the state union of Croatia and Hungary, judicial decisions appeared to be the most important sources of law (*fontes iuris*).[8] *Tripartitum opus iuris consuetudinari inclyti regni Hungariae* drawn up by royal curia prothonotary Stephan Werbőczy in 1514 represented the foundations of the legal system. Werbőczy based the Tripartitum on customary law and denoted decisions of royal courts, royal ordinances, and orders and royal benefits as the three types of legal sources which make up the legal system.[9]

[8] M. Vuković, *Interpretacija pravnih propisa* [Interpretation of Legal Acts] (Zagreb, Školska knjiga 1953) p. 49.
[9] D. Nikolić, 'Elementi sudskog prava u pravnom sistemu Srbije i Evropske unije [Elements Of Judge-Made Law In Serbia And European Union]', 126 *Zbornik Matice srpske za društvene nauke* (2009) p. 15., available at

That legal system was subject to substantial reforms in the second half of the 19th century. The royal resolution of 9 April 1861 led to the establishment of the Supreme Court having jurisdiction over the territory of Croatia and Slavonia – the Table of Seven presided by the viceroy (ban) since that time, the executive branch of governance was not separated from the judiciary. After the judiciary had been detached from the executive branch, which happened during the rule of Viceroy Ivan Mažuranić (1873-1880), the special act of 28 February 1874 set forth the position of the chairman of the Table of Seven.[10]

That court used to indicate the importance of judicial practice in its decisions, i.e. 'the need for its permanence'.[11] In its decree no. 1240 of 26 April 1889 aimed at the 'recognition of the same power of evidence of the commercial records of Cisleithanian traders as of those of domestic traders', the Table of Seven pointed out that 'judgments on whether the validity period of the respective power of evidence in concrete cases shall be calculated according to the provisions of paragraphs 19 and 20 of the Introductory Act to the Austrian Commercial Act of 17 December 1862 or according to paragraph 31 of the Croatian-Hungarian Commercial Act, are only seldom discussed about, which implies that there was no consistent practice in this view at all'.[12] The plenary conclusion no. 1221-1893 of 20 October 1892 in a case referring to 'a usufruct in immovable items instead of that in interests', included the following assertion:

> 'considering possible great sensation among the people and jurists if the Table of Seven completely abandoned the previous principle after yearlong practice'.[13]

http://www.doiserbia.nb.rs/img/doi/0352-5732/2009/0352-57320926007N.pdf (29.1.2013).

[10] N. Engelsfeld, *Povijest hrvatske države i prava : razdoblje od 18. do 20. stoljeća*, 3., dopunjeno izd. [History Of Croatian State And Law] (Zagreb, Sveučilišna naklada 2006) p. 118.; D. Čepulo, 'Vladavina prava i pravna država-europska i hrvatska pravna tradicija i suvremeni izazovi [The Rule of Law and Rechtsstaat – European and Croatian Legal Traditions and Contemporary Challenges]', 51 *Zbornik PFZ* (2001) p. 1346.

[11] Examples of decisions made by Table of Seven are taken from M. Vukovic. See Vuković, op. cit. n. 8, at p. 50.

[12] Ibid. See also E. Čimić, *Rješidbe kr. Stola sedmorice* [Rulings of the Royal Table of Seven] (Zagreb, 1913) p. 143.

[13] See Čimić, op. cit. n. 12, at p. 126.

It is worth mentioning that during the era of Austria-Hungary, absolutism took the standpoint that the practice of higher courts shall be binding for inferior courts in terms of 'passing declarative and general judgments' for reasons completely different from those affecting common law countries.[14] This was related to the political circumstances in the country at the time. Although the Mažuranić reforms resulted in separation of the judiciary from the executive branch of governance and establishment of the independent institution of the state attorney's office, those solutions did not live long in practice since the Croatian Parliament abolished the permanence of the position of judges as soon as 1884.[15]

VI. The role of judicial practice in contemporary Croatian legal system

In the first years of Croatian independence, judges were not completely acknowledged due significance in the development and creation of law.[16] It was considered that the Croatian judges do not have 'creative powers' when resolving cases.[17] Contrary to the 1990 Constitution which incorporated liberal-democratic standards and was based on the principle of the separation of powers and the rule of law, legal culture remained based on legalism[18], positivism and formalism.[19] In this view,

[14] Vuković, op. cit. n. 8, at p. 51.
[15] Čepulo, loc. cit. n. 10, at p. 1347.
[16] See S. Rodin, 'Interpretativna nadležnost Vrhovnog suda RH po novom Zakonu o sudovima [Interpretative jurisdiction of the Supreme Court of the Republic of Croatia under the new Law on Courts]', authorized presentation at the 10th panel of the Faculty of Law of the University of Zagreb and Zagreb Lawyers Club (Zagreb, 19 April 2006).
http://www.pravo.unizg.hr/_download/repository/INTERPRETATIVNA_NADLEZNOST_VS_RH_PO_NOVOM_ZAKONU-31-01-06.pdf, p. 11. See also T. Ćapeta, 'Interpretativni učinak europskog prava u članstvu i prije članstva u EU [Interpretative Effect of European law in and Before EU Membership]', 56 *Zbornik PFZ* (2006) pp. 1443-1494; T. Ćapeta, 'Court, Legal Culture and EU Enlargement', 1 *Croatian Yearbook of European Law & Policy* (2005) pp. 23-53.
[17] Ćapeta 2006, loc. cit. n. 16, at p. 9.
[18] I. Padjen, 'Prijedlozi promjena Ustava Republike Hrvatske 2009-2010' [The Proposals to Change the Constitution of the Republic of Croatia 2009-2010], *Okrugli stol o promjenama Ustava* [Roundtable on Constitutional Changes] (Zagreb, April 9 2010), available at *http://www.hr.boell.org/downloads/padjen_ustav.pdf* (20.11.2012).
[19] Ćapeta 2005, loc. cit. n. 16, at p. 6.

'law is exclusively constituted of statutes and such statutes require interpretations only in exceptional cases while judgments purely represent concretization of those statutes'.[20] A great share of jurists used to deem courts as 'impersonal, rational institutions, able to objectively apply legal rules. […] Courts cannot have a judicial policy, as their only task is to resolve individual cases by applying objective rules of law that contain all the answers'.[21] Judges regarded acts and bylaws as the main source of law and did not refer to any other source of law.[22]

Croatian judges and jurists in general were prone to avoiding interpretations of law or in other words, as suggested by prominent jurists like J. Barbić, to stick to every single letter incorporated in a respective statute by the supervisors of the Government's Legislation Office.[23] All this made the constitution makers, when adopting new constitutional provisions aimed at enabling and facilitating the Croatian accession to the European Union in 2010, to feel an urge to explicitly regulate by Article 118(3) of the 2010 Constitution that judges shall administer justice based on the Constitution, law (acts), international treaties and 'other valid sources of law'. Until then, the Constitution had stipulated that courts shall administer justice according to the Constitution and law [Article 117(3), consolidated version of the 2001 Constitution]. Hence, the Constitution marked the difference between statute and law.[24] The new Act on Courts incorporates judicial practice into sources of law as well (Article 5 of the Act on Courts).[25]

[20] Padjen, loc. cit. n. 18.

[21] Ćapeta 2005, loc. cit. n. 16, at p. 8.

[22] Ćapeta 2005, loc. cit. n. 16, at p. 9.

[23] See Padjen, loc. cit. n. 18. According to Jakša Barbić, '[p]rimarily due to the fact that nobody takes care of the integrity of the legal system. Therefore, our laws are often contrary to the constitution. In the last couple of years, I have hardly seen an act which contains no provision contrary to the constitution. Is it possible that legal gaps are filled with byelaws dealing with issues which are supposed to be resolved by the act itself? Moreover, byelaws regulate things contrary to the law, they "remedy" the law.' See authorized presentation at the 10th panel of the Faculty of Law of the University of Zagreb and Zagreb Lawyers Club (Zagreb, 19 April 2006), available at *http://www.pravo.unizg.hr/_download/repository/INTERPRETATIVNA_NADLEZNOST_VS_RH_PO_NOVOM_ZAKONU-31-01-06.pdf*.

[24] Ćapeta 2005, loc. cit. n. 16, p. 8. 'A view of the law as a set of written rules is not only common among Croatian judges, but also among lawyers in general and the public at large. The best example of this is the typical usage of the word "law" in the media (both TV and newspapers), as well as the writings of lawyers, where it is

The assertion that courts are subjected to the legislator and that the law is exclusively interpreted by a linguistic method is revealed by the fact that legal gaps have not been filled by judicial interpretation but by authoritative interpretation of the Croatian Parliament,[26] which respectful legal theoreticians deem as disturbance in the separation of the legislature from the judiciary.[27] A fair number of authoritative interpretations bring the judiciary into an unequal and 'instrumental position' with respect to the legislator.[28]

For a long time, flaws in the perception of the role of the judiciary have been disclosed by the absence of applications for assessment of the constitutionality of particular laws submitted by judges if they have doubts about it.[29] If a competent Croatian court determines that an act applicable in a concrete case or one of its provisions is not compliant with the Constitution, it is not entitled to decide on non-application of that act,[30] but it shall cease the proceedings and submit an application for assessment of its compliance with the Constitution to the Constitutional Court.[31] Unlike their Croatian colleagues, Hungarian judges often grab this opportunity, so, for instance, the Hungarian Act on Public Assembly has been amended for that reason.[32] Yet, the

given as *zakon*, meaning "statute", and not as *pravo*, meaning "law".' According to Rodin, '[t]he differentiation between statute and law originating from the German legal tradition which differentiates between *Gesetz* and *Recht* – acts (statute) and law have been totally vulgarized in our legal order and reduced to the notion of positive norm'. See Rodin, loc. cit. n. 16.

[25] Official Gazette, Narodne novine, NN 28/2013.

[26] S. Rodin, 'Diskurs i autoritarnost u europskoj i postkomunističkoj pravnoj kulturi [Discourse and Autoritarianism in European and Post-Communist Legal Culture]', 42 *Politička misao* (2006) p. 52. In Rodin's opinion, the role model of such a relation between the legislature and the judiciary originates from the Soviet Union and its 1936 Constitution where the *ius interpretandi* referred to the Presidium of the Supreme Soviet.

[27] Padjen, loc. cit. n. 18.

[28] The power to adopt an authoritative interpretation is not foreseen by the Constitution but by the Rules of Procedure of the Croatian Parliament. See Rodin, loc. cit. n. 26, at p. 52.

[29] Ibid. In the paper, the author emphasize that until 2005, no such case had been recorded in the available practice of the Constitutional Court.

[30] Čapeta 2005, loc. cit. n. 16, at p. 9.

[31] Article 37 of the Constitutional Act on The Constitutional Court of the Republic of Croatia, NN 49/02.

[32] Check the respective information at *http://www.usud.hr/* (20.6.2013).

Croatian legal system is facing significant changes in that area. For example, Commercial Court judge M. Kolakušić submitted an elaborated application for assessment of the constitutionality of eleven provisions of the Act on Financial Operations and Pre-Bankruptcy Settlement on 27 July 2013.[33]

Due to the low frequency of such applications in Croatia, it is no surprise that the executive branch of the government, precisely the minister of finance S. Linić, reacted fiercely thereto and came down on the judge at the emergency press conference where the former stated that 'judges are not holy cows'.[34] Following the announcement of the information on the submission of the above application, the press broadcasted the critiques of the minister directed to the judge, stating that the task of judges is to obediently apply the laws proposed by the executive branch of governance and adopted by the Croatian Parliament. This case is a reliable indicator of the current relation between the legislature, the executive and the judiciary or, in other words, of the role of the judiciary in the generation of laws.[35]

The minister brought up that by submitting an application for assessment of the constitutionality of the respective law 'judge M. Kolakušić sent a message to the Croatian public that the Croatian Parliament and the executive branch of governance were into criminal

[33] Act on Financial Operations and Pre-Bankruptcy Settlement, NN 108/2012. The application for assessment of the constitutionality of eleven provisions of the act puts the following allegation into the focus of the objection to the Act on Financial Operations and Pre-Bankruptcy Settlement: 'no mechanisms for control of the legality of the procedure for specification of claims have been ensured, which brings to illegal and unconstitutional disposals'. Available at *http://www.index.hr/vijesti/clanak/kolakusic-trazi-ocjenu-ustavnosti-zakona-o-predstecajnoj-nagodbi-linic-on-je-taj-koji-nista-ne-zeli-rjesavati/691675.aspx* (20.8.2013).

[34] See Izvanredna konferencija ministra financija 'suci nisu svete krave! A onog koji vladu optužuje za kriminal, nitko neće moći zaštiti' [Special Conference of Minister of Finance' Judges are not Holy Cow! The One Who Government Accuses of a Crime, No One Can Protect], available at *http://www.jutarnji.hr/-sudac-kolakusic-optuzuje-vladu-da-se-bavi-kriminalom--linic-zestoko-uzvratio-na-napade/1116018/* (20.8.2013).

[35] According to Rodin, '[w]hen I mentioned that the perception of law is shaped through a discourse, I wanted to emphasize that the legislator and courts are important participants in that discourse. In fact, the legislator adopts a certain standard and then courts, through its interpretation, disclose what that standard means for them and which sense it makes.' Rodin, loc. cit. n. 16.

affairs and jeopardized the entire system thereby'.[36] According to Linić, the judge wrote an accusation to the Parliament and the Government.[37] The perception of the executive branch of governance about the role of the judiciary is revealed by the minister's allegation that some judges have already passed judgments in pre-bankruptcies proceeding without challenging the constitutionality of the referring law.[38] Such a viewpoint is considered obsolete today. Although the Croatian legal system is aimed at uniform application of law, judges autonomously pass judgments, a power granted by the Constitution and the Act on Courts. It should be noted that due to a lack of experience in submitting such applications, it is still not clear who is entitled to submit an application: the judge as an individual or the court as an institution.[39] In its practice to date, the Constitutional Court has shared the opinion that the court as

[36] *http://www.jutarnji.hr/-sudac-kolakusic-optuzuje-vladu-da-se-bavi-kriminalom--linic-zestoko-uzvratio-na-napade/1116018/* (20.8.2013)

[37] Ibid. The minister claimed that the personal interests of the judge or even of the judiciary were hidden behind such an application: 'My opinion on the judge who does not want to make decisions or who hides behind his application is not a positive one. He is the one who does not want to resolve anything! His job is to stick to the law. If he had thought that some creditor was done harm in the bankruptcy procedure, he should have passed a negative judgment. He has not done that, he just does not want to judge.' See *http://www.hrt.hr/index.php?id=vijesti-clanak&tx_ttnews%5Btt_news%5D=217237&cHash=cdc596d0b5* (29.7.2013). 'He (judge – author's comment) claims that bankruptcies belong to the scope of judges' competences and that they are the ones who can deal with the creditors' rights in the best way. Pre-bankruptcy settlements imply no costs for the creditors, but bankruptcy proceedings incur large costs for them, even exceeding their compensation set forth by the court. Is it all in the interest of the creditors?' Available at *http://www.jutarnji.hr/-sudac-kolakusic-optuzuje-vladu-da-se-bavi-kriminalom--linic-zestoko-uzvratio-na-napade/1116018/*(20.8.2013).

[38] *http://www.index.hr/vijesti/clanak/kolakusic-trazi-ocjenu-ustavnosti-zakona-o-predstecajnoj-nagodbi-linic-on-je-taj-koji-nista-ne-zeli-rjesavati/691675.aspx* (27.7.2013). This argument was not appropriate even in case of the Criminal Procedure Act which was in force from 2008 to 2012 when the Constitutional Court delivered a decision on abolishment of its 43 provisions. Rodin pointed out that at the moment of its accession to the European Union, Croatia has to put efforts into harmonization of its legal culture with the European legal culture that fosters democratic pluralism entailing a different role of the judiciary and 'permanent reinterpretation of legal norms' – 'identical situations in which law should be uniformly applied generally do not exist'. Rodin, loc. cit. n. 16.

[39] *http://www.jutarnji.hr/branko-hrvatin---linicev-istup-nije-bio-pritisak-na-autonomiju-suda-/1116653/* (27.7.2013)

an institution has to submit the application, an argument used at the abovementioned press conference by minister Linić who added that a judge is not in a position to submit an application individually but it should have been done by the Commercial Court. The situation was resolved by "submission of the application by the Commercial Court on behalf of judge M. Kolakušić as a judge in a single, concrete case", which was deemed as a valid procedure by the submitter and confirmed by the president of the Constitutional Court.[40] The minister's conduct in the respective case was condemned by the association of Croatian judges while the president of the Supreme Court, minister of justice and president of the Republic of Croatia did not see it as a pressure on the judiciary.[41]

Despite everything, judicial practice as a source of law is undoubtedly gaining importance in terms of the decision-making of courts and administrative bodies. Similarly to the relating situation in Hungary, consistent interpretation of law is attempted to be realized through judgments and publication of judicial decision. The following chapters of this paper first deal with the important role of the Supreme Court in the development of law and harmonization of judicial practice and then with the role of the Constitutional Court in the same issue.

VII. The role of the Supreme Court in the development of law and harmonization of judicial practice

The 2010 Amendment of the Constitution of the Republic of Croatia depicts, in its Article 119(1), the role of the Supreme Court of the Republic of Croatia as the highest court of law as ensuring 'uniform application of law and equality of all before the law'. Prior to the amendment, Article 118(1) of the Constitution stated that 'the Supreme Court of the Republic of Croatia, as a highest court, shall secure uniform application of laws and equal justice'. It should be noted that uniform application of laws is in close correlation with 'the enforcement of the principle of legality' or legal security,[42] pursuant to which 'subjective

[40] *http://www.jutarnji.hr/sudac-kolakusic-podnio-zahtjev-ocjene-ustavnosti-zakona-o-financijskom-poslovanju-i-predstecajnoj-nagodbi/1117074/* (20.8.2013)

[41] Ibid.

[42] D. Aviani and D. Đerđa, 'Uniformno tumačenje i primjena prava te jedinstvenost sudske prakse u upravnom sudovanju [Uniform Interpretation and Application of Law and the Uniqueness of Court Practice in Administrative Adjudication Process]', 49 *Zbornik radova Pravnog fakulteta u Splitu* (2012) p. 372.

rights shall be prescribed by the law and designated in their content'.[43] Other tasks of the Supreme Court are stated in Article 20 of the 2013 Act on Courts and include the following: deciding on extraordinary legal remedies against final decisions of all courts in the Republic of Croatia and on ordinary legal remedies when provided for by a separate law, resolving conflicts of jurisdiction when provided for by a separate law and discussing all important legal issues concerning judicial practice.

The Supreme Court is made up of a Criminal Law Department, a Civil Law Department, Service for Monitoring, Studying and Recording Judicial Practice at Departments, and Service for Monitoring and Studying of Courts Deciding at the Level of the Council of Europe or the European Union [Article 43(1)]. The Civil Law Department comprises the fields of civil, commercial and administrative law [Article 43(2)]. The Criminal Law Department encompasses the fields of criminal and tort law and disciplinary proceedings in compliance with regulations on attorneys and notaries public [Article 43(3)].

At this point, we will focus on the role of the Supreme Court in the harmonization of judicial practice. One should note that Croatian judicial practice is not a formal source of law even though it has been recognized as a guarantee for 'legal security' and 'the efficiency of justice'.[44] The harmonized practice of the Supreme Court in particular cases influences proceedings initiated at lower courts by virtue of the Court's authority.[45] Judicial practice in the Croatian legal order, belonging to the continental legal order, is honored due to 'the excellence of standpoints' and not due to the formal binding force like in common law systems.[46] The authority arises from the power, i.e. 'the persuasiveness of reasoning in legal issues'.[47] By the reasoning of their judgments in which legal and factual issues are dealt with, the courts have, in Rodin's view, made the judicial practice persuasive[48] and despite the fact that their reasoning lacks a binding force for lower courts which are facing the same issues, the latter tend to keep track

[43] Rodin, loc. cit. n. 16.
[44] See 'Strategija reforme pravosuđa [Judicial Reform Strategy hereinafter Strategy], *www.uhs.hr/data_sve/docs/Strategija_reforme.doc* (20.8.2013).
[45] Ibid.
[46] Ž. Harašić, *Sudska argumentacija* (Split, Pravni fakultet u Splitu 2010). p. 99.
[47] Rodin, loc. cit. n. 16.
[48] Ibid.

with them,[49] which will in the end bring about uniform application of laws by the judiciary.[50]

Thus, Croatian courts, unlike some other courts in continental law systems (e.g. the Hungarian legal system) which apply the term of 'precedents' even in those decisions of higher courts in which 'their reasoning is referred to in decisions of lower courts due to its persuasiveness', exclusively use the term of judicial practice.[51] The Hungarian practice differentiates between reference to judicial practice and reference to precedents.[52]

Ž. Harašić, who has studied the application of the authority argument in the Croatian legal order, has come across two ways of referring to judicial practice by Croatian judges: "in some decisions, courts refer only to the judicial practice and in other cumulatively, both to judicial practice and legal provisions". Harašić finds matters in which the court refers both to legal provisions and case law "a false authority argument" and in such cases, reference to judicial practice is not of great importance: 'even if the court had not mentioned the judicial practice, the decision would have remained the same in its essence and the higher court would not have overruled the decision in case of omission of the term of "judicial practice". Besides, reference to judicial practice, without specifying a respective decision, does not enable the concerned entity (except if it is a higher court) to check the decisions which the case law is composed of'.[53]

Consistent judicial practice results from 'clear' judgments that cater for an answer to controversial issues being the scope of the proceedings. The need for passing harmonized judgments with respect to factual and legal situations has been understood as a guarantee of the right to a fair trial which is granted by the Croatian Constitution in any case.[54]

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[49] Since there cannot be, pursuant to Rodin, two identical legal situations.

[50] D. Aviani and D. Đerđa, loc. cit. n. 42, at p. 387.

[51] Harašić, op. cit. n. 46, at p. 99.

[52] Ibid, n. 155. Žaklina Harašić substantiates the assertion that 'the term of precedent is characteristic for the highest courts in continental law systems' by research of the application of arguments by Hungarian courts published by Hungarian jurist Béla Pokol. See B. Pokol, 'Statutary Interpretation and Precedent in Hungary' 46 *Osteuruparecht* (2000) 3-4, pp. 262-277.

[53] Harašić, op. cit. n. 46, at p. 100.

[54] In Croatia, particular attention is paid to the protection of the right to a fair trial. That right is encompassed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and since the accession of

There are numerous problems related to uniform application of laws in Croatia. Besides the vagueness and ambiguity of the wording of law, which allows for different interpretations of a particular legal provision, and different approaches of its users (from linguistic to teleological approaches), the issue of harmonized interpretation and application of law has, in numerous cases, resulted from a lack of regulation or from incomplete regulation of certain substantive or procedural matters. In J. Barbić's opinion, Croatia does not pay due attention to the integrity of its legal system when adopting laws which are enacted hastily, so the legal system is full of contradictions and legal gaps.[55]

A lacking or incomplete legal regulation gives the implementers of law considerable freedom to create legal practice.[56] Judicial practice bears great relevance since observations on interpretations and application of law are often made at sessions of courts' departments or even at gatherings of all judges of a certain court.[57] If the Supreme Court wishes to have an effect on the further development of judicial practice (e.g., to make the courts follow a certain legal perception), it does not have to realize this only by means of a decision in a concrete case but there are also mechanisms that enable it to carry out its intention in an abstract manner at department sessions or at a general convention of the Supreme Court, regardless of the respective case.[58]

In line with the aforementioned, it is worth mentioning that pursuant to the Croatian Constitution, courts shall be autonomous and independent when performing their judicial duty [Article 118(2)]. The Constitution contains no instruction on the interpretation manner which shall be adhered to by judges.[59] The only restriction might refer to the values stated in Article 3 of the Constitution, which represent a ground for its

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the Republic of Croatia to the Council of Europe, it has turned into the most frequent cause of ('appears in 90 % of judgments which have confirmed violation of the Convention') initiation of proceedings against the Republic of Croatia before the European Court of Human Rights. See A. Uzelac, 'Pravo na pravično suđenje u građanskim predmetima: nova praksa Europskoga suda za ljudska prava i njen utjecaj na hrvatsko pravo i praksu [The right to a fair trial in civil cases: new case law of the European Court of Human Rights and its impact on Croatian law and practice]', 60 *Zbornik PFZ* (2010) p. 102.

[55] Barbić, loc. cit. n. 23.

[56] Aviani and Đerđa, loc. cit. n. 42, at p. 371.

[57] Ibid.

[58] Rodin, loc. cit. n. 16.

[59] See Ćapeta 2006, loc. cit. n. 16, at p. 24.

interpretation as governed by the Constitution itself.[60] According to Article 27(3) of the Act on Courts, higher courts, in exercising their powers, shall not in any way influence the independence and freedom of lower courts as to deliver a decision in an individual case.

Matters of mutual interest to particular or all courts on the territory of the Republic of Croatia shall be discussed at sessions of the departments of the Supreme Court of the Republic of Croatia. The same applies to draft regulations referring to particular areas of law. The discussions shall be accompanied with appertaining opinions [Article 38(3)].

Sessions of a Court department or sessions of all judges shall be convened if it is established that differences in understanding of the application of law exist among individual councils or judges, or if a particular council or a judge departs from a previously adopted interpretation of law. Legal interpretation adopted at a session of all judges or of a department of the Supreme Court, High Commercial Court, High Administrative Court, High Misdemeanor Court and the county courts shall be binding for all second-instance councils of judges and individual judges of the same department but not for other courts [Article 40(2)].

The President of the Supreme Court may summon a general convention of the Supreme Court which can be attended by representatives of other courts. The General Convention of Judges of the Supreme Court shall particularly 'give opinions regarding draft laws or other regulations which are intended to regulate issues relevant for operations of courts or exercising court powers' and 'instruct courts on how to monitor judicial practice' [Article 47(1)-(2)].

As already mentioned above, the publication of judicial decisions is vital for the uniformity of judicial practice. It encourages the principle of transparency with respect to affairs of the judiciary,[61] legal security and equality of all citizens.[62] Until recently, the Croatian case law could not in practice be considered a source of law, irrespective of its authority, since judgments were not regularly published.[63] Courts' rulings were not

[60] Ibid. Freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia.

[61] Aviani and Đerđa, loc. cit. n. 42, at pp. 388-389.

[62] See Strategy, loc. cit. n. 44.

[63] Ćapeta 2005, loc. cit. n. 16, at p. 10.

published regularly, only periodically. Furthermore, they were not made available in their entirety but announced were only those parts of judgments which were considered relevant by the editors of a certain edition.[64] Hence, unlike the Constitutional Court which realized the importance of judicial practice as a source of law, regular courts used to rarely take account thereof.[65] Even today, only judgments of higher courts are available to the public. Since 2004, the Supreme Court has published its judgments on the new webpage as have the Administrative Court and the High Commercial Court. The Constitutional Court has announced its judgments in the Official Gazette of the Republic of Croatia (Narodne novine) since its beginnings. The High Misdemeanor Court and county courts have not systematically published their case law.[66]

VIII. The application for uniform application of laws

The Supreme Court was, from 2005 to 2008, dealing with a pretty controversial legal instrument in the Croatian legal system: the application for uniform application of laws. This extraordinary legal instrument was at that time stipulated by Article 59 of the Act on Courts. In case an extraordinary legal remedy was not permitted (in small disputes, e.g. trespassing or offences against the public order and peace) and second instance courts issued different decisions regarding the same factual and legal matter, this Article empowered the state attorney and the party to file an application aimed at the examination of possible endangerment of the uniform application of laws and equality of citizens' [Article 59(1)]. Decision-making on the merits of the application belonged to the competence of the Supreme Court [Article 59(4)]. The Court was entitled to request from second-instance courts to submit concrete cases in which the controversial decisions were made [Article 59(5)]. Even prior to the decision on the merits of the application, the Supreme Court had had the power, following a proposal of its 3-member committee, to order the courts to suspend their decisions in pending proceedings until the department of the Supreme Court adopted a legal interpretation of the uniform application of a certain law [Article 59(6)]. The legal interpretation of the department of the Supreme Court was binding for all courts in all proceedings which

[64] Ibid.
[65] Ibid.
[66] See Strategy, loc. cit. n. 44.

the respective legal interpretation referred to and in which an effective judgment had not been passed until the date of issue of the interpretation [Article 59(7)]. The application could be filed within one year after the decision had been delivered to the party in which the controversial provision of the law had been applied for the first time [Article 59(8)].
While some thought, without a further explanation of their standpoint, that it was 'a very efficient legal instrument for harmonization of interpretation and application of law',[67] some legal theoreticians like S. Rodin used to stress that this way, the Supreme Court was awarded 'the function of the retroactive legislator' and thus the possibility to directly intervene in pending judicial proceedings.[68] According to Rodin, such a rearrangement of 'social power' resulted in an advantage of the Supreme Court over citizens who had no power to influence the way in which judges made decisions at department sessions and over inferior courts since they were not in position to autonomously interpret laws any more.[69]
However, the Supreme Court did not want to award itself the title of a legislator who would declare legal standpoints beyond concrete cases in an abstract manner. Moreover, B. Hrvatin, president of the Supreme Court declared: 'courts and higher courts in particular have never been and will never be in the position of a legislator but they are only supposed to rule in concrete cases'.[70] In 2008, a modification of the Act on Courts brought to abolishment of this extraordinary legal instrument.[71]

IX. The role of the Supreme Court in the harmonization of judicial practice

It should be noted that uniform application of law in Croatia is encouraged by judgments of the Constitutional Court of the Republic of Croatia passed in proceedings initiated by constitutional complaints. Despite the fact that the competences of the Constitutional Court as the

[67] Aviani and Đerđa, loc. cit. n. 42, at p. 378.
[68] Rodin, loc. cit. n. 16.
[69] Ibid.
[70] A paper that was presented by the President of the Croatian Supreme Court Branko Hrvatin at the conference with the theme 'non-pecuniary damages' in Opatija, 23 and 24 September 2010. *http://www.vsrh.hr/EasyWeb.asp?pcpid=778* (20.8.2013)
[71] Article 11 of the Law on Courts, NN 113/2008. See more in Aviani and Đerđa, loc. cit. n. 42, at p. 379, n. 44.

latest form of courts' ruling do not encompass harmonization of the judicial practice, its strong informal influence on the unification of the judicial practice does exist.[72] The constitutional designation of the competences of the Supreme and Constitutional Court now makes their overlap possible and the issue of their boundary should not be, in the view of Constitutional Court judge D. Ljubić, observed statically as a description of the status but as a process.[73]

The Constitution regards the Constitutional Court not as the fourth judicial instance but as a body which primarily decides on the compliance of an act with the Constitution or the compliance of other regulations with the law and the Constitution and adjudicates in constitutional complaints against individual decisions of state bodies, local and regional self-government bodies and legal entities with the powers of public authorities if in such decisions, human rights and fundamental freedom are violated (Article 129). As already mentioned in this paper, the Croatian legislation is dominated by mess,[74] laws are adopted hastily and additional interventions in the legislative procedure lead to laws that are full of contradictory legal regulations and vague in the determination what makes the role of the Constitutional Court vital for the development of Croatian law.[75]

When interpreting laws, regular courts are obliged to pay attention to the content of constitutional law which is elaborated by the Constitution. Interpretation of constitutional provisions by regular courts is subject to re-examination by the Constitutional Court.[76] The decisions and the rulings of the Constitutional Court are binding and every legal and

[72] The decision of the Croatian Constitutional Court: U-III-795/2004 of 27 October 2004. See more in Aviani and Đerđa, loc. cit. n. 42, at p. 379.

[73] D. Ljubić, 'Granice ustavnog sudovanja iniciranog ustavnom tužbom [Limits in constitutional adjucation initiated by constitutional complaint]', 50 *Zbornik radova Pravnog fakulteta u Splitu* (2013) p. 159 at p. 163.

[74] Lecture of the president of the Croatian Constitutional J. Omejec at the 178th forum of the Jurist Club of the City of Zagreb held on 20 June 2013. The topic of the lecture was 'Truths and Delusions Regarding the Role of the Constitutional Court in the Light of the Europeanization of Croatian Law', available at *http://www.usud.hr/* (20.8.2013).

[75] As an example we can mention almost identical criticism of academic J. Barbić aimed at the Croatian Companies Act (Barbić, loc. cit. n. 23) and Aviani and Đerđa aimed at the Croatian Law on Administrative Disputes (Aviani and Đerđa, loc. cit. n. 42, at p. 379).

[76] Ljubić, loc. cit. n. 73, p. 173.

natural person shall respect them [Article 31(1) of the Constitutional Act on The Constitutional Court of the Republic of Croatia],[77] whereas all the bodies of state authorities and local and regional self-government shall, within their constitutional and legal competences, implement decisions and the rulings of the Constitutional Court [Article 31(2)]. The Government caters for, through bodies of state administration, the implementation of decisions and the rulings of the Constitutional Court [Article 31(3)].

As far as our topic, the uniform interpretation and application of laws, is concerned, what can be derived from the practice of the Constitutional Court is the fact that this Court will always intervene if a challenged judgment is arbitrary or if it is clearly contrary to recent judicial practice.[78] A proper example of such practice can be found in the judgment of the Constitutional Court in a case referring to violation of the right to a fair trial stated in Article 29(1).[79] The decision of the Constitutional Court made following a constitutional complaint filed against the judgment of the County Court of Zagreb included the reasoning that the party could legitimately except that they could not have been imposed on the costs of the proceedings neither in their entirety nor proportionally if they had been successful therein to a great extent. This can be clearly derived from the following lines of the decision of the Constitutional Court:

> 'The firm grounds for such an interpretation are reaffirmed by the constant case law (this is a false authority argument pursuant to the classification of Ž. Harašić since concrete judgments are not laid down and the judicial practice is quoted together with legal provisions, author's comment) according to which the damaged person (claimant) may sue joint and several debtors aggregately or individually and thus be issued an effective judgment on total damage compensation against each of them. This does not mean that the claimant can be compensated for the entire damage by each of them. In order to prevent a possible claimant's attempt to settle the same claim in multiple instances, the

[77] Article 31(1) of the Constitutional Act on the Constitutional Court of the Republic of Croatia, NN 49/2002.

[78] Ljubić, loc. cit. n. 73, p. 163.

[79] The decision of the Croatian Constitutional Court: U-III-4611/2008 of 12 May 2011, NN 59/11.

> execution decree grants the joint and several debtors the possibility to file an appeal against the settlement (as stated in the concrete case in the first instance judgment no. Pn-1956/04 on page 5) and the court is not supposed to prevent such an attempt in advance by rejecting the otherwise well-grounded claim only due to the fact the claimant has already been compensated for.'
>
> '[T]he Constitutional Court made the assessment that the disputed judgment was based on misinterpretation and erroneous application of the applicable law to the extent that made it arbitrary and as such constitutionally unacceptable, i.e., that the effects of such an interpretation and application of the law led to violation of the constitutional rights of the claimant'.

Similarly to the situation in the Republic of Hungary, the Croatian Constitutional Court performs its role in the development of law not only by the abolishment of legal provisions contrary to the Constitution but also by filling legal gaps[80] or by giving immediate instructions how new constitutional provision should be shaped. What could be a good example in this regard is the decision of the Constitutional Court made at the session of 19 July 2012 prescribing abolishment of 43 provisions of the Criminal Procedure Act due to excessive interference with the rights of the accused and of the defense. In that judgment, the Court set forth the limits of its powers regarding the control of the Criminal Code

[80] Despite the fact that there is a certain disaccord among Croatian jurists in this regard. Indeed, S. Sokol, former president of the Constitutional Court (1999-2003), declared as follows: 'The principle of rule of law is a goal which in a concrete case of constitutional interpretation may provide the Constitutional Court with a solid ground for deeming a particular legal provision as unconstitutional due to a legal gap appearing on the occasion of regulation of the respective relation since such a regulation brings to inequality or discrimination against a certain group. It is in our opinion the last frontier and the Constitutional Court, when it comes to the protection of rule of law, should not go any further in order to avoid its transformation into a legislator and replacement of the latter in the full and real meaning of that word. Accordingly, we think that the Constitutional Court would not be able to intervene if the legislator failed to regulate a social relation or relations, which means that there is no single legal provision within which there could be a legal gap or with which that gap could be linked.' S. Sokol 'Ustavni sud Republike Hrvatske u zaštiti i promicanju vladavine prava [The Constitutional Court of the Republic of Croatia in Protection and Promotion of the Rule of Law]', 51 *Zbornik Pravnog fakulteta u Zagrebu* (2001) p. 1163.

or when exercising its supervising powers in matters requiring *in abstracto* judgments with respect to the constitutionality of laws. It was, as asserted by the current president of the Constitutional Court, one of the most significant judgments of all 70,000 judgments passed by that court in the last 20 years.[81] That decision clearly addressed the importance of case law in the Croatian legal order.[82]

> 'Accordingly, from the viewpoint of human rights protection and the exercise of rule of law in criminal procedure legislation, developed, common, steady and harmonized state attorney's and judicial practice considering application of challenged legal standards in concrete cases is relevant for judgments on the (non)-compliance of a respective challenged standard with the Constitution. In fact, judicial practice is capable of complementing a faulty legal standard, of clearing up an unspecific legal standard or of specifying the scope of the application of a too broad legal standard in compliance with the requirements arising from the Constitution and the Convention. While implementing constitutional supervision over such a legal standard, in abstracto practice shall always be relevant from the viewpoint of constitutional law since it, from the aspect of rule of law and human rights protection obtains the properties of binding law.' 'Making considerations on the development of the national criminal procedural law in line with the development of a democratic society and changes implied by that development is a constitutional task of the Constitutional Court. The essence of the Croatian Constitution refers to development and advancement. Therefore, the Constitutional Court embraces the dynamic or evolutionary interpretation of the provisions of the Constitution originating from the field of "criminal procedural law", which respects modified living circumstances and the need for permanent advancement of the Croatian criminal procedural law in compliance with applicable European legal standards and the contemporary national policy regarding criminal procedural law, the objectives of which are constantly harmonized with social changes at a national, regional (European) and global level.'

[81] *http://www.tportal.hr/vijesti/hrvatska/205219/Od-150-spornih-clanaka-Ustavni-sud-ukinuo-tek-43-odredbe-ZKP-a.html* (20.8.2013)
[82] NN 91/2012.

For that reason, the Constitutional Court shed light on the 'internal structure of the new model and […] set forth its fundamental structural flaws and defects. The legislator is constitutionally obliged to remedy these deficits in the procedure for decision enforcement in order to fully harmonize the new national criminal procedure model with the Constitution and the Convention and to achieve its permanent internal legal consistence and coherence.'
As stressed by Constitutional Court president J. Omejec:

> 'The decision of the Constitutional Court provides the Parliament with guidelines suggesting how to go further in order to reconcile mutually confronted interests in the Criminal Procedure Act: on one side, efficient criminal prosecution, protection of public interests and national security, and on the other side, respecting the procedural rights of an individual and prohibition of excessive interference with those rights, which shall be dependent on the criminal offence which resulted in the prosecution of the individual. […] Now the Parliament is on the move. The Constitutional Court has done its share of the work.' [83]

At the end of the part of the paper referring to the Croatian legal order we must emphasize once again the important change in the role of judicial practice which is inevitable due to the Croatian accession to the European Union. Except that it should be available to all interested parties, transparent and stable, the practice will gain new importance in Croatian legal system when applying European law which is completely different from Croatian legal tradition.[84] Judges will be forced to learn how to interpret legal provisions in a teleological manner and thus learn how to fill legal gaps and resolve legal ambiguities.[85] According to the viewpoint of Constitutional Court president J. Omejec at a forum organized by the Jurist Club of the City of Zagreb, the bad condition of the Croatian judiciary has resulted mainly from its burden made of 'the chains of textual and grammatical positivism'.[86]

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[83] *http://www.tportal.hr/vijesti/hrvatska/205219/Od-150-spornih-clanaka-Ustavni-sud-ukinuo-tek-43-odredbe-ZKP-a.html* (20.8.2013).
[84] See Strategy, loc. cit. n. 44.
[85] Ibid, see also Hrvatin, loc. cit. n. 78.
[86] Presentation of the Court president at the 178th forum of the Jurist Club of the City of Zagreb held on 20 June 2013. The topic of the lecture was "Truths and Delusions

X. Conclusion

The major differences between the Anglo-Saxon and Continental judge-made law may be summed up as follows.

1. The role of elaboration by legal dogmatics.[87] As much as the elaboration and application of statutes is based on legal dogmatic notional systematization in continental legal systems, the activity of legal scholars becomes entwined in the effect of precedents too. Continuous commenting on the decisions of superior courts, highlighting judgments of key importance and elaborating on them in essays play a determining role regarding which precedents will have a wider effect and which ones will fade away later on.

2. Precedents reported with brief summaries of facts. As a result of this and the influence of Continental-Roman legal culture, following precedents manifests itself rather in the form of following abstract rules than in the form of following legal positions based on the thorough and detailed elaboration of facts.

3. Following judicial practice instead of individual precedents.[88]

4. In recent decades, interpretive precedents have acquired rather an important role in the legal systems of continental countries: as a matter of fact, the increasing role of case-law has led to the expansion of the mass of interpretive precedents and not to the appearance of primarily regulatory precedents.

5. Finally the following question arises: how to evaluate the judicial development of law from the point of view of the effectiveness of law?[89] When answering this question it is useful to start from a relation revealed by legal theory: namely that the optimal nature of legislation constitutes the basis of the effective enforcement of legal rules. This suggests that the effectiveness of law, too, can be regarded as a function of the sphere of legislation. This, however, is not true in an absolute

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Regarding the Role of the Constitutional Court in the Light of the Europeanization of Croatian Law." available at *http://www.usud.hr/* (20.8.2013).

[87] Cf. L. Morawski, et al., 'Precedent in Poland', in McCormick and Summers, eds., *Interpreting Precedents* (Dartmouth, 1997); R. Alexy and R. Dreier, 'Precedent in the Federal Republic of Germany', in McCormick and Summers, eds., *Interpreting Precedents* (Dartmouth, 1997); M. la Torre and M. Taruffo, 'Precedent in Italy', in McCormick and Summers, eds., *Interpreting Precedents* (Dartmouth, 1997).

[88] Cf. e. g. B. Pokol, *Jogelmélet* [Theory of Law] (Budapest, 2005).

[89] A. Visegrády, *Zur Effektivität des Rechts, Legal Philosophy: General Aspects. ARSP-Beiheft 82.* (Stuttgart, 2002).

sense, since the law-developing activity of the judicial organs affords the possibility of correcting the shortcomings of legislation both from the point of view of techniques and content, and it also affords the possibility of producing congruence between legal norms and social relations constituting their basis. Thus the judicial development of law not only improves valid law but also makes judicial activity more even and smooth by way of applying legal rules to concrete cases.

The conclusion which can be drawn from the foregoing is that judicial practice – by means of its law-developing role – may contribute to the advancement of the effectiveness of law to a great extent. Our research has cast a new light upon the relationship between judicial practice and legislation. Judicial practice, on the one hand, has a *de lege ferenda function* towards legislation: it points out aspects of disintegration of congruence between legal regulations and the social relations which serve as their basis. In this way, judicial practice calls attention to the necessity of creating new laws or to the modification of old ones. Judicial organs serve, at the same time, as assistants of legislation in so far as they "offer' temporary solutions of the related problems having jelled in the course of their administration of justice which legal principles, being of normative conciseness sometimes, can be weighed together with other important information as essential proof consistent with the conditions of life. To understand the value and significance of these alternatives anticipating the direction and content of legal regulation, we saw several examples which show that the legal principles elaborated by judicial practice are transformed, mostly word by word, into legal norms in the course of modification. Even if these legal principles offered by judicial organs are not identical with ready-made legal rules, they serve as models for legal regulation in the making.

Since the legislator is free to decide whether or not to realize these models, judicial practice – through its law-developing role – may seem to impair the process of legislation. This is not so, of course, since in the end it is the legislator who decides whether he transforms the legal principle elaborated by judicial practice into legal norm or not. Legislation usually utilizes the result of the judicial development of law, in other cases it intentionally deviates from the suggested solutions, thus also having a role of control over it.

We hope to have proven that in Central and Eastern European legal systems, the judicial development of law cannot be regarded as an

unhealthy phenomenon, on the contrary, it is a necessary and desirable thing which eases the burdens of the legislator by making the connection with life-conditions more natural and realistic without decreasing the role and significance of legislation itself. The veracity of this thesis can best be illustrated by the fact that legal principles and judicial practice are already reckoned in the codices. On the basis of all these, we believe that the perspectives of the development of Central and Eastern European legal systems lie in the conscious combination of the legislative and judicial development of law.

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The polluter pays (?) – Compensation for cross-border environmental damages

I. Introduction

Causes of environmental pollution are various, yet they all derive from certain human action or omission to act. Intensive industrial and agricultural activity often lead to accidents with consequences for the environment, its natural resources, plants, health conditions of both animals and humans. Such damage cannot take account of administrative borders or territorial division of state sovereignty;[1] on the contrary, such damage easily crosses borders, ending up with a situation that a harmful event occurring in one state causes damage in one or several other states.[2] One might even conclude that such cross border pollution is most likely to happen in neighboring areas and in the end concerns several states in a respective region. Let us take a very expressive example: spilling out poisonous chemicals in the Danube headwaters in Germany can cause serious environmental damage to the entire lower river flow of the Danube region: Austria, Hungary, Croatia, and Serbia.

This paper is concerned with the polluter pays principle in cross border environmental damage settlement. Elaborating this topic requires focusing on two distinctive legal areas. First we deal with one of the mayor principles of international environmental law: the polluter pays principle and its implication on the law of the European Union. In this chapter we outline the characterization of the polluter pays principle

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[1] 'La responsibilite en droit international en cas de dommages causes a l'environment', *Yearbook of the Institute of International Law*, Session Strasbourg Vol. 67/II (1997) pp. 486-513.

[2] Ch. Von Bar, 'Environmental damage in Private International Law', 268 *Recueil des Cours* (1997) p. 291 et seq.

with special regard to its economic background and furthermore we briefly describe the evolution of this principle in the EU *acquis* and its implication for the EU civil liability regime.
Secondly we deal with the legal settlement of cross border environmental damage, whereas in this section we first elaborate the relevant legal sources (with focus on European Union legislation), and then we deal with the most commonly employed legal method of cross border tort settlement: choice of law and international civil procedure. We seek to examine the rules of EU regulations and present the outlook of concrete application deriving from European secondary legislation applicable to possible environmental damages between Hungary and Croatia. Two previously discussed major legal issues are in the end merged on the point of *ratio,* foundations and practical implications of current European environmental damage settlement.

II. The polluter pays principle and its implications for EU law

1. Characterization of polluter pays principle

The polluter pays principle started as a political declaration without legal force. The constitutional basis of this principle can be found in the right to a clean environment. This fundamental right implies a duty of the state to protect its citizens, but it is questionable whether these principles or social rights can yet be considered subjective rights, meaning that they can be enforced by citizens in a court. However, some see the right to a clean environment as a human or natural right existing independently of politically decided treaties. Finally, the polluter pays principles is now seen in specific pieces of legislation becoming more (or some might say 'less') than a grand constitutional statement of an intractable human right.[3]
The principle first appeared in a legal context in a document prepared by the international Organization for Economic Cooperation and Development (OECD).[4] The document included the following recommendation:

[3] I. Mann, *A Comparative Study of the Polluter Pays Principle and its International Normative Effect on Pollutive Processes* (Forbes Hare, British Virgin Islands), Manuscript (30 pp.) at p. 3 et seq., available at *www.consulegis.com* (10.6.2013).
[4] OECD Acts: Guiding Principles Concerning International Economic Aspects of Environmental Policies (Recommendation adopted on 26th May, 1972) C(72)128. (hereinafter: OECD Acts), available at *http://www.tradevenvironment.eu/uploads/OCDE_GD_92_81.pdf* (10.6.2013).

> '(t)he principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called "polluter pays principle". This principle means that the polluter should bear the expenses of carrying out the above mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the costs of goods and services which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment.'[5]

After the OECD recommendation, the principle has appeared in a number of international legal documents addressing issues surrounding environmental law. For instance, the principle played a significant role in the formation of law and policy in the European Community. In 1992, the United Nations Conference on Environment and Development included the principle in its Rio Declaration on Environment and Development,[6] an

> 'instrument of international jurisprudence [that] articulates policies and prescriptions directed at the achievement of worldwide sustainable development'.[7]

Principle 16 of the Rio Declaration provides that national authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

The principle's inclusion in one of the most important and influential international statements of the fundamental principles of environmental

[5] OECD Acts, Article A a) 4.

[6] Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, U.N. Doc. AICONF. 151/5/Rev.1 (1992)., available at *http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm* (10.6.2013)

[7] J. Batt and D. C. Short, 'The Jurisprudence of the 1992 Rio Declaration on Environment and Development: A Law, Science, and Policy Explication of Certain Aspects of the United Nations Conference on Environment and Development', 8 *Journal of Natural Resources and Environmental Law* (1992-1993) pp. 229-230.

law demonstrates its significance in environmental liability regimes around the world.[8]

In 2001, the OECD Joint Working Party on Agriculture and Environment stated that a new and expanded form of the polluter pays principle should provide that:

> 'the polluter should be held responsible for environmental damage caused and bear the expenses of carrying out pollution prevention measures or paying for damaging the state of the environment where the consumptive or productive activities causing the environmental damage are not covered by property rights'.[9]

As can be seen, the polluter pays principle seeks to cover the costs of accident prevention and to 'internalize' the environmental costs caused by accidents. The polluter pays principle was initially conceived as an economic theory to maximize resource allocation. It has since been recognized as a potential mechanism for pollution abatement and control.[10]

As originally propounded, the polluter pays principle is not a liability principle, but is rather a principle for the allocation of the costs of pollution control. To have a clear understanding of the polluter pays principle and what it stands for as a matter of international law and policy, one must maintain the distinction between the assessment of liability for the abatement of specific harms on the one hand and the allocation of the costs of broad preventive measures on the other.[11]

Pollution in economic terms simply means improper cost allocation. That is, the cost of one resource, i.e., water or air, is not properly

[8] E. T. Larson, 'Why Environmental Liability Regimes in the United States, the European Community, and Japan Have Grown Synonymous the Polluter Pays Principle', 38 *Vanderbilt Journal of Transnational Law* (2005) at p. 546.

[9] OECD ENV/EPOC(2000)13/REV3, paragraph 17. The Environmental Strategy was adopted by OECD Ministers of the Environment at their meeting on 16 May 2001.

[10] Mann, op. cit. n. 3, at p. 5. See also U. Kettlewell, 'The Answer to Global Pollution? A Critical Examination of the Problems and Potential of the Polluter Pays Principle', 3 *Colorado Journal of International Environmental Law and Policy* (1992) at p. 431.

[11] S. E. Gaines, 'The Polluter-Pays Principle: From Economic Equity to Environmental Ethos', 26 *Texas International Law Journal* (1991) at p. 468.

reflected in the product price.[12] Such improper cost allocation was initially the result of the common belief that neither air nor water was a scarce resource and, therefore, that the use of these resources was free to all. Producers simply passed the cost of using the air or water for waste disposal on to the future users of those resources.[13]

Today, however, most societies have recognized that using air or water involves a cost, just like the use of any other resource.[14] Therefore, the allocation of that cost must be addressed. But as long as incentives are lacking to motivate polluters to internalize such costs, complete production costs will not be reflected in the product price. This failure to properly allocate costs stimulates over-production, which can ultimately lead to 'market failure'. Such failure, if not corrected, will result in a variety of pollution problems such as air, water, solid waste, noise, toxic pollution. According to economists,

> 'the logical way to correct this "market failure" is thus to ensure that these external costs, that is, damage caused by pollution, are adequately paid for. This is commonly known as the theory of internalization of external costs,'[15]

an idea that is the basis of the polluter pays principle. In practical terms, this means that if polluters were asked to pay for the total pollution damage (i.e., total internalization), they would first pay for all abatement costs required to reduce the pollution to the optimum level (determined by the government), and then pay for the residual pollution damage. Whether total or partial internalization of pollution costs is required depends on the environmental policies of the government entity implementing the polluter pays principle.[16]

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[12] K. R. Reed, 'Economic Incentives for Pollution Abatement: Applying Theory to Practice', 12 *Arizona Law Review* (1970) at p. 511. and pp. 513-514.

[13] Kettlewell, loc. cit. n. 10, at p. 431.

[14] A. Kecskés, *Felelős társaságirányítás – Corporate Governance* (Budapest, HvgOrac 2011) pp. 43-59; A. Kecskés, 'The Legal Theory of Stakeholder Protection' 1 *JURA* 2010; and A. Kecskés 'Részvényárak mindenek felett? Érdekszférák a vállalatirányítás jogában' *Emlékkönyv Román László születésének 80. évfordulójára* (Pécs 2008) pp. 215-234.

[15] J. Barde, 'National and International Policy Alternatives for Environmental Control and Their Economic Implications', in I. Walter, ed., *Studies in International Environmental Economics* (New York, John Wiley and Sons 1976) p. 138.

[16] Kettlewell, loc. cit. n. 10, at pp. 431-433.

The principle of polluter liability had been adopted as international law in the well-known Trail Smelter arbitral award, which compelled Canada to pay compensation for damages in the United States caused by a Canadian source of air pollution. The award also required Canada to take steps, under obligation of international law, to abate the pollution to avoid further damage. [17] The Council of Europe expressed a similar liability-based doctrine when it declared, in 1968, that the costs of pollution control should be borne by whoever causes the pollution.[18] In environmental cases, the law must balance the right to live in an environment free from pollution against the countervailing right to undertake lawful activities that may generate some pollution. The liability principle not only imposes on the source of pollution a legal liability to pay for the damage caused to innocent victims, but may also require the source, at its own expense, to abate the pollution in order to reduce its effects on innocent neighbors to a socially and legally acceptable level.[19]

Because private liability becomes inefficient and inadequate if the pollution problem is widespread, governments generalize the legal obligation of abatement to all sources through laws and regulations setting limits on pollution. In moving from individual cases to national programs, the question of cost becomes a matter of cost allocation within the national economy: who pays for pollution control? One obvious answer is for each polluter to bear its own abatement costs as part of its cost of doing business. This is the classic model of cost internalization: The producer's investment in pollution control brings within its own accounts the cost of the pollution it had previously inflicted without charge on external parties. Cost internalization is far from being the only answer, however. For a variety of reasons, countries may, and repeatedly do, decide that the public should bear all or part of the costs of pollution control, or at least that they aid polluters with some form of technical or financial assistance. The 1968 Council of Europe resolution cited above, declaring that sources should bear the costs of pollution control, further states, "*(t)his does not preclude aid*

[17] Trail Smelter (*United States v Canada*), Special Arbitral Tribunal 3 U.N. Representative International Arbitral Awards 1905 (1941) (final decision).

[18] Council of Europe, Declaration on Air Pollution Control, 8 March 1968, Resolution (68) 4, Strasbourg, 1968.

[19] Gaines, loc. cit. n. 11, at pp. 468-469.

from Public Authorities."[20] It is exactly this point to which the polluter pays principle gives the opposite answer. In most circumstances, it precludes public aid and opts instead for a 'strict' policy of cost internalization.[21]

Considering the global nature of pollution issues, the predominant view is no longer that governments merely determine the degree to which abatement and residual pollution costs should be internalized. Instead, a growing number of scholars believe that governments should demand the internalization of costs by polluters that achieves the 'optimal level of pollution'.[22]

2. The polluter pays principle and EU law

The European Union has grown equally clear in its call for the adoption and implementation of the polluter pays principle. The European Union is calling on those responsible for pollution to bear the abatement costs, declaring that

> 'environmental protection should not in principle depend on policies which rely on grants or aid and place the burden of combating pollution on the Community'.[23]

The European Union believes that allocating environmental waste abatement costs to the private sector will force market prices to represent more closely the social costs of production. This phenomenon will tend to encourage pollution abatement by reducing the consumption of pollution intensive products.

2.1. White Paper on environmental liability

The European Commission moved forward in developing the Community's environmental liability regime by adopting a White Paper that addresses environmental liability.[24] One of the goals of the White Paper is to determine how the polluter pays principle can best be used to promote the Community's environmental policy.[25]

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[20] See n. 18.
[21] Gaines, loc. cit. n. 11, at p. 469.
[22] Larson, loc. cit. n. 8, at p. 548.
[23] Council Recommendation of 3 March 1975 regarding Cost Allocation and Action by Public Authorities on Environmental Matters, 1975 OJ L 194.
[24] European Commission on the Environment, White Paper on Environmental Liability, COM(2000) 66 final (hereinafter: White Paper).
[25] Larson, loc. cit. n. 8, at p. 555.

In May 1993, the Commission published its Green Paper on Remedying Environmental Damage. In April 1994, the European Parliament adopted a Resolution calling on the Commission to submit '*a proposal for a directive on civil liability in respect of [future] environmental damage*'.[26] Since that time, the issue of environmental liability has arisen before the Parliament. In early 1997, the Commission determined that a White Paper on environmental liability and the polluter pays principle should be prepared, and it began doing so in consultation with Member States, national experts, and interested parties.[27]

The White Paper proposed the introduction of strict liability under the polluter pays principle for polluters of the environment. This is expected to generate more preventative and cautious conduct on behalf of economic actors concerning the unprotected environment. The Commission asserts that codifying an environmental liability regime represents a way of implementing the main principles of environmental policy enshrined in the European Community Treaty, Article 174(2) [TFEU Article 191(2)], which emphasizes the polluter pays principle. The Commission's primary objective, then, focuses on ensuring that the polluter liable for the damage pays for the harm. The Commission opines that if liable polluters are required to pay for the remediation of their damage, they will reduce their polluting at least to the point where the marginal cost of abatement exceeds the compensation avoided. Consequently, a polluter pays environmental liability regime should result in the prevention of further damage and in the internalization of environmental costs by the polluter himself. [28]

The Commission has approached the scope of the regime from two different perspectives: '*first, the types of damage to be covered, and second, the activities, resulting in such damage, to be covered*'.[29] Above all, environmental damage should be covered by the new environmental liability regime. In the Commission's view, environmental damage constitutes harm caused by activities that are considered harmful to the environment, or damage that is caused by effects that result in traditional

[26] European Parliament Resolution of April 20, 1994 OJ C 128/165.
[27] White Paper; see also Larson, loc. cit. n. 8, at pp. 556-557.
[28] Furthermore, the Commission expects the polluter pays principle to lead to more precaution, resulting in the avoidance of risk and damage, as well as generating additional investment in research and development to improve knowledge and technologies. See White Paper, at p. 9, 11-12, 14; Larson, loc. cit. n. 8, at p. 557 p.
[29] White Paper, at p. 14.

damage to the environment, i.e., pollution of air or water. The Commission also proposes that the environmental liability regime cover damage to health and property, damage that it calls 'traditional damages'.[30] The Commission argues that if the traditional damage is caused by a dangerous activity, it is often caused by the same event that causes environmental damage. The Commission is concerned that if only environmental damage were covered by the new environmental liability regime and traditional damage were left entirely to the Member States, inequitable results might arise. For instance, remedies might be much less available for health damage than for environmental damage caused by the same event. Moreover, human health is an important policy objective in its own right and is closely connected with environmental protection, enacted in Article 174(1) of the European Community Treaty, which states that the Community's policy concerning the environment shall contribute to the pursuit of protecting human health.[31]

Nearly all national environmental liability regimes strive to cover activities that carry an inherent risk of causing damage to the environment. Many of these activities are currently covered by Community environmental legislation. The Commission determined that to be the most effective, the new environmental liability regime in the European Community should be linked to the relevant European Community legislation on the protection of the environment. If the current European Community legislation does not cover environmental protection, the new environmental liability regime will ensure restoration and encourage compliance with national laws that implement European Community environmental legislation. The Commission proposes that the new environmental liability regime cover, and the polluter pays principle apply to, the following categories of European Community legislation: legislation that governs discharge or emission limits for hazardous substances into water or air; legislation addressing dangerous substances and preparation with a view to protecting the environment; legislation designed to prevent and control the risks of accidents and pollution; legislation regulating the production, handling, treatment, recovery, recycling, reduction, storage, transport, trans-

[30] White Paper, at p. 15; see also: Larson, loc. cit. n. 8, at p. 558.
[31] White Paper, at p. 15.

frontier shipment, and disposal of hazardous and other waste; and legislation in the field of the transportation of hazardous substances.[32]
The Commission notes that fault-based (subjective) liability may appear more economically efficient than strict liability because fault-based liability prevents abatement costs from exceeding the benefits of the resultant reduced environmental pollution. But recent national and international environmental liability regimes are based on the principle of strict liability because the achievement of environmental cleanup pursuant to the polluter pays principle is better accomplished this way. One of the primary reasons for the increased opportunity for achievement is that it is very difficult for plaintiffs to establish fault on the part of the defendant in an environmental liability case. Furthermore, the Commission argues, the polluter pays principle demands that the actor whose conduct is inherently dangerous to the environment bear the risk of damage caused by their conduct, rather than the victim of the damage or society at large.[33]
The introduction of liability for damage to the environment, as proposed by the White Paper, is expected to generate a change of attitude in the European Community that should result in an increased level of prevention and precaution. The new environmental liability regime aims at making the polluter pay for remediating the damage that he has caused. Environmental regulations aim at establishing norms and procedures through which the environment is preserved, and it will allow the European Community to challenge potential polluters to comply, or to restore and compensate for, the damage that they have caused according to the polluter pays principle.[34]

2.2. Directive 2004/35/EC on environmental liability

In April 2004, after more than 2 years of drafting work, the European Parliament and the Council adopted Directive 2004/35/EC (21 April 2004) on environmental liability with regard to the prevention and remedying of environmental damage.[35]

[32] White Paper, at pp. 9, 15-16.
[33] White Paper, at p. 9, 16.
[34] White Paper, at pp. 2-11; P. Sands, *Principles of International Environmental Law* (Cambridge, Cambridge University Press 2003) at p. 279 et seq.
[35] The European Parliament and the Council Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of

The Directive establishes a framework for environmental liability based on the polluter pays principle, with a view to preventing and remedying environmental damage. Environmental damage under the terms of the Directive is defined as (I) direct or indirect damage to the aquatic environment covered by Community water management legislation; (II) direct or indirect damage to species and natural habitats protected at Community level by the 1979 „Birds" Directive[36] or by the 1992 'Habitats' Directive[37]; (III) direct or indirect contamination of the land which creates a significant risk to human health.[38]

The principle of liability applies to environmental damage and the imminent threat of damage resulting from occupational activities, where it is possible to establish a causal link between the damage and the activity in question. The Directive therefore distinguishes between two complementary situations, each one governed by a different liability scheme: occupational activities specifically mentioned in the Directive and other occupational activities.

The first liability scheme applies to the dangerous or potentially dangerous occupational activities listed in Annex III to the Directive. These are mainly agricultural or industrial activities requiring a license under the Directive on integrated pollution prevention and control, activities which discharge heavy metals into water or the air, installations producing dangerous chemical substances, waste management activities (including landfills and incinerators) and activities concerning genetically modified organisms and micro-organisms. Under this first scheme, the operator may be held responsible even if he is not at fault.

The second liability scheme applies to all occupational activities other than those listed in Annex III to the Directive, but only where there is damage, or imminent threat of damage, to species or natural habitats protected by Community legislation. In this case, the operator will be held liable only if he is at fault or negligent.

environmental damage, OJ L 143, 30.4.2004, pp. 56-75 (hereinafter: Environmental Liability Directive).

[36] Council Directive 79/409/EEC (2 April 1979) on the conservation of wild birds, OJ L 103, 25.4.1979, p. 1.

[37] Council Directive 92/43/EEC (21 May 1992) on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7.

[38] Environmental Liability Directive, Preamble (3).

The Directive provides for a certain number of exemptions from environmental liability. The liability scheme does not apply in the case of damage or imminent damage resulting from armed conflict, natural disaster, activities covered by the Treaty establishing the European Atomic Energy Community, national defense or international security activities or activities covered by the international conventions listed in Annex IV.

In the field of preventing and remedying environmental damage, the Directive builds up a monitoring and measuring mechanism relying on Member State authorities. Where there is an imminent threat of environmental damage, the competent authority designated by each Member State may require the operator (the potential polluter) to take the necessary preventive measures or take the necessary preventive measures and then recover the costs incurred. Where environmental damage has occurred, the competent authority may require the operator concerned to take the necessary restorative measures (determined on the basis of the rules and principles set out in Annex II to the Directive) or take the necessary restorative measures and then recover the costs incurred. Where several instances of environmental damage have occurred, the competent authority may determine the order of priority according to which they must be remedied. Environmental damage may be remedied in different ways depending on the type of damage.[39]

If the competent authority has carried out preventive and remedial actions itself, the authority may recover the costs it has borne from the operator responsible for the damage or imminent threat of damage. The same principle applies to environmental assessments carried out to determine the extent of damage and the action to be taken to repair it. The competent authority must initiate cost recovery proceedings within five years of the date on which the remediation and repair measures have been completed or the date on which the liable operator, or third party, has been identified, whichever is the later. If several operators are jointly responsible for damage, they must bear the costs of repair either jointly and severally or on a proportional basis. The Directive does not oblige operators to take out a financial security, such as insurance, to cover their potential insolvency. However, Member States are required to encourage operators to make use of such mechanisms.[40]

[39] Environmental Liability Directive, Articles (5), (6), (7).
[40] Environmental Liability Directive, Articles (8), (9), (10), (11).

Natural or legal persons who may be adversely affected by environmental damage and environment protection organizations may, subject to certain conditions, ask the competent authorities to act when faced with damage. Persons and organizations requesting action may bring legal action before a court or an ad hoc body for review of the lawfulness of the decisions and actions of the competent authority, or of its failure to act.[41]
Where damage or a threat of damage may affect more than one Member State, the Member States concerned must cooperate on the preventive or remedial action to be taken.[42]

III. Legal settlement of cross border environmental damage cases

1. Legal sources to cross border environmental damage settlement

Provisions to settle various issues pertaining to international environmental damage can derive from unified substantive law, either universal or regional. We may mention several instruments pertaining to the corpus of unified substantive law: the Council of Europe Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (1993); the Convention on Third Party Liability in the Field of Nuclear Energy (1960); the Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal (1999). If we take a look at the EU, in late 1970s Europe proved its commitment to the environment in various sectoral areas (protection of air and water quality, conservation of resources and protection of biodiversity, waste management and control of activities which have an adverse environmental impact).[43] European environment policy, which is, following the Lisbon Treaty, based on Article 3 of the Treaty on European Union and Article 191-192 of the TFEU,[44] functions through corrective measures relating to

[41] Environmental Liability Directive, Article (13).
[42] Environmental Liability Directive, Article (15); T. S. Hardman Reis, *Compensation for Environmental Damages under International Law: The Role of the International Judge* (Kluwer Law International, 2011) p. 162. et seq.
[43] Ch. Knill and D. Liefering, 'Establishment of EU environmental policy', in A. Jordan and C. Adelle, eds., *Environmental Policy in the EU: Actors, Institutions and Processes* (Oxon, Routledge 2012) at p. 15.
[44] Previously Article 174 of the Treaty establishing the European Community. More on Treaty bases of EU environmental policy in A. Farmer, *Manual of European*

specific environmental problems or by means of cross-cutting measures that are integrated in other policy areas. In the sphere of environmental liability, Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (ELD)[45] is the focal secondary law instrument that establishes a framework to prevent and remedy environmental damage.

Law is a regulatory mechanism to enable just satisfaction and the punishing of polluters. It is inherent for environmental issues that they are mostly dealt with by administrative and criminal branches of law. Yet, there is another dimension of environmental damage that cannot be overlooked, and that gains ever more attention: civil liability and the civil branch of law. If more states are connected to an environmental harmful event, we first must resolve which of the laws concerned applies to a case. If we focus on cross-border environmental damage, we realize that the settlement of civil liability claims of cross-border nature is to be done in accordance with the rules of private international law and provision of international civil procedure.[46] Rules pertaining to these disciplines can derive from national sources (autonomous national law), or they can derive from various international sources: multilateral or bilateral international conventions, or regional international organizations such as the EU. Since we are most concerned with the legal settlement of environmental damage in the regional context of Hungary and Croatia, it is the EU that provides uniform rules. Thus we will analyze the provisions of the Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation).[47] Since we will make some remarks on international civil procedure as well, provisions of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, now revised by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement

Environmental Policy (London, Taylor & Francis 2011), available at *www.europeanenvironmentalpolicy.eu* (10.6.2013.).

[45] OJ L 143, 30.4.2004.

[46] K. F. Gomez, 'Law applicable to cross-border environmental damage: from the European autonomous systems to Rome II' 6 *Yearbook of Private International Law* (2004) p. 292.

[47] OJ L 199, 31.7.2007, p. 40.

of judgments in civil and commercial matters[48] (Brussels I Regulation recast) will also be addressed.

2. Choice of law in environmental damage disputes

National private international law acts in general did not acknowledge separate choice of law rules regarding environmental damages. Therefore standard tort / non-contractual liability rules were applied to environmental torts and consequent dispute settlement as well.[49] National private international law rules employ in some cases the *lex fori* approach, but are rather unified in their dedication to the connecting factor of *lex loci delicti* – the place where the harmful event occurred.[50] Yet, a simple standing solution becomes more complicated as this connecting factor leads us to several events involved in the tort. It can either relate to a law of a State of a place where the harmful act was performed, or to a law of a State of place where the damage or injury occurred or is likely to occur.[51] The involvement of these two elements in defining the *lex loci delicti* has been observed by German doctrine which has developed a *Günstigkeitsprinzip*:[52] it is either the law in force at the place where the damage is suffered (State where the emission causes its effects, *Erfolgsort*) or the law in force at the place where the wrongful act was committed (State of the emission, *Handlungsort*) that applies, depending on which law is more favorable to the injured party. Depending on how the principle is put into operation, the choice may be made by the victim or *ex officio* by the court. The *Günstigkeitsprinzip* or 'most favorable law' has been widely employed for regional environmental settlement regimes as well.[53]

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[48] OJ L 351/1, 20.12.2012.

[49] E. Guinchard and S. Lamont-Black, 'Environmental Law – the Black Sheep in Rome II's Drive for Legal Certainty?' 11 *Enviropnmental Law Review* (2009) at p. 166.

[50] M. Fallon, 'The Law Applicable to Specific Torts in Europe', in J. Basedow, et al., eds., *Japanese and European Private International Law in Comparative Perspective* (Tübingen, Mohr Siebeck 2008) p. 270.

[51] For the first attitude we find examples in Article 31 Polish PIL Act or Article 1129 Belarus PIL act; for the later example is with Article 99 of Belgian PIL act. See also: Gomez, loc. cit. n. 46, at pp. 296-297.

[52] J. Von Hein, *Das Günstigkeitsprinzip im Internationalen Deliktsrecht* (Tübingen, Mohr Siebeck 1999) at pp. 124-126.

[53] We may find it in Article 4(3) of bilateral agreement of 19 December 1967 between Germany and Austria on nuisances generated by of the operation of the

Even though the Hague Conference on Private International law (HCCH) has been attempting to unify certain legal aspects of trans-frontier environmental damage settlement,[54] there has never been an attempt to unify choice of law rules. Even the initiatives relating to jurisdiction and recognition and enforcement were dropped.[55] The significance of the EU enacting the Rome II Regulation is twofold: it was the first uniform choice of law instrument on European territory, and it prescribed several specific torts with uniform choice of law rules, environmental tort being one of them! The Rome II Regulation is applied in all EU Member States except for Denmark ever since 11 January 2009. It is the applicable regime for Hungary and for Croatia as a new full member state of the EU as well. Concerning scope of application, it is notable that Rome II gives precedence to international treaties containing choice of law rules; still such application is almost impossible as conventions in this field relate mainly to unification of substantive law.[56]

If we now turn to concrete choice of law rules, we will face both subjective and objective connecting factors. The subjective choice of law rule relates to party autonomy. According to Article 14, parties may agree to submit non-contractual obligations to the law of their choice.[57] They can do so by an agreement entered into after the event giving rise

Salzburg Airport on the territory of Germany It is also applied in Nordic Convention of 1974 on the Protection of the Environment: the applicable law is chosen through private international law rules of the forum (which under the Convention is the State from which the pollution emanates), but then the court must compare the result with that which would be obtained under the law of the State where the activity was exercised and if that is more favorable, to apply that law.

[54] C. Bernasconi, 'Civil liability resulting from transfrontier environmental damage: a case for the Hague Conference?' *Hague Yearbook of International Law* (1999) p. 39 et seq.

[55] Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001, Interim Text, prepared by the Permanent Bureau and the Co-reporters, in particular Article 10; available at *http://www.hcch.net/e/workprog/jdgm.html* (10.6.2013.)

[56] X. E. Kramer, 'The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: The European private international law tradition continued. Introductory observations, scope, system, and general rules' 4 *Nederlands Internationaal Privaatrecht* (2008) pp. 416-418.

[57] P. R. Beaumont and P. E. McEleavy, *Anton's Private International Law* (Edinburgh, W. Green 2011) pp. 624-634; A. Dickinson, *The Rome II Regulation: A Commentary* (New York, Oxford University Press 2009) paras 13.01. et seq.

to the damage occurred. If all of the parties are pursuing a commercial activity, they can enter a freely negotiated agreement even before the event giving rise to the damage occurred. The Rome II Regulation prescribes that a manner of choice of contractual law can either be express or demonstrated with reasonable certainty by the circumstances of the case. The regulation takes care of third parties, so that their rights may not be endangered by such a choice of law agreement. Rome II provides for a customary safeguard of party autonomy[58] by the provision of mandatory rules.[59] Yet, regarding environmental torts there are no further limitations to party autonomy, although in some cases public interests might as well be involved.[60] It is also notable that the Rome II Regulation contains rules on safety of conduct stating that the court should take into account the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability assessing the conduct of the person claimed to be liable. But, this does not mean that such a polluter can be exempted from civil liability if he has complied with safety rules of that place. So even if such a polluter has the permission of public authorities to act in a manner that led to environmental damage, it will not necessarily protect him for being liable to compensate the damage to the victims![61]

[58] Th. M. de Boer, 'Party Autonomy and its Limitations in the Rome II Regulation', 9 *Yearbook of Private International Law* (2007) pp. 22-29.; I. Kunda, 'Policies underlying conflicts of law choices in environmental law', in V. Sancin, ed., *International environmental law: contemporary concerns and challenges* (Založba, Ljubljana 2012) p. 516.

[59] Limitations of Article 14(2) are copies of limitation of Article 3(2) and 3(3) of Rome I Regulation. If all the elements relevant to the situation at the time when the event giving rise to the damage occurs would be located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

[60] De Boer, loc. cit. n. 58, at p. 25; Kunda, loc. cit. n. 58, at pp. 523-526.

[61] Article 17 Rome II Regulation. See M. Bogdan, 'Some Reflections Regarding Environmental Damage and the Rome II Regulation', in G. Venturini and S. Bariatti eds., *Nuovi Strumenti del diritto internazionale private* (Milano, Giufre Editore 2009) p. 103.

The objective choice of law rule of Article 4 relies on a connection to the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.[62] Concretely this means that the "law of the country in which the damage occurs" is normally a country where a person claimed to be liable committed the harmful act or omission causing damage. Yet, application of a principle of the law of the country of direct damage has a disadvantage when the same harmful event causes damage in more than one country. Here is a very expressive example: if a chemical factory contaminates air in the border region of several countries of a region, victims of such event suffering damage in various countries would receive varying legal protection.[63]
In some cases the Regulation departs from this default rule with 'consequence based"' exceptions.[64] The environmental damage rule of Article 7[65] is one of the most prominent examples. The regulation differentiates environmental tort from other torts that are as default regulated *via* Article 4 by authorizing a person seeking compensation for damage to choose to base his or her claim on the law of the country in which the event giving rise to the damage occurred![66] Arguments have been put forward that this possibility of choice embodied in Article 7 is rather narrow; other possibly connected laws have been excluded from the list of legal systems eligible for choice: the law of habitual residence

[62] Beaumont, op. cit. n. 56, at p. 634 et seq.; Dickinson, op. cit. n. 57, paras 4.21. et seq.
[63] Bogdan, op. cit. n. 61, at p. 103.
[64] R. J. Weintraub, 'The Choice-of-Law Rules of the European Community Regulation on the Law Applicable to Non-Contractual Obligations: Simple and Predictable, Consequences-Based, or Neither?', 44 *Texas International Law Review* (2008) p. 407.
[65] The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred. Art. 7 Rome II Regulation.
[66] G. Betlem and C. Bernasconi, 'European private international law, the environment and obstacles for public authorities', *Law Quarterly Review* (2006) pp. 124-151.

of a victim presents a solid example.[67] It must be emphasized that special rule on environmental damage departs from the default rule of Article 4 regarding its other objective connecting factors: common habitual residence of the parties and law that is manifestly more closely connected.[68]

The possibility of a party suffering damage to choose between *locus damni* and *locus actus* is a materially oriented rule that fulfills the *favor laesy* function. Such party cannot perform 'cherry picking' to combine distinctive provisions of these substantive laws. Nevertheless, a party can choose different laws for different parts of the damage: it can choose the application of Art 4(1) for personal damage and choose country of harmful event for the damage to property.[69] This rule automatically raises the question of when is the pursuer entitled to make this selection. The Rome II Regulation does not provide an answer, but its recital again gives a clear guidance that the answer is to be sought in the law of the forum.[70]

The notion of environmental damage has been narrowed down in comparison to its definition in the original Rome II Proposal. Accordingly, 'environmental damage' encompasses adverse change in a natural resource (water, land or air), impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.[71] Besides this definition, the notion of environmental damage is to be perceived from the perspective of Article 1 which states that the Rome II Regulation shall not apply to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*) nor does it apply to non-contractual obligations arising out of nuclear damage. The rules of Rome II therefore cover damage to public goods to the extent that under the applicable law, civil liability can be incurred, and damage to person or private property that is a result of such damage. It is therefore argued that damages to property, private economic loss and personal injuries

[67] O. Bošković, 'The Law applicable to violations of the environment – regulatory strategies', in F. Cafaggi and H. M. Watt, eds., *The Regulatory Function of European Private Law* (Cheltenham, Edward Elgar Publishing 2009) p. 198.
[68] Article 4(2) and Article 4(3); Beaumont and McEleavy, op. cit. n. 57, at p. 670.
[69] Bogdan, op. cit. n. 60, at p. 98-99.
[70] Recital 25: The question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is seized. Dickinson, op. cit. n. 57, paras 7.25-7.26.
[71] Recital 24, Rome II regulation.

come under Article 7 if they result from damage to the environment.[72] Although it does not derive clearly from the wording of Rome II, commentators suggest that the law applied in accordance with Article 7 should also govern the 'pure economic loss' as a consequence of environmental damage. The only other option would be the application of the default Rome II Regulation rule of Article 4, but such an approach would not coincide with the overall attitude of EU legislation towards the environment.[73] 'Compensation' in Article 7 means both reparation for damage occurred and injunctions intended to prevent potential damage.[74]

3. Litigation in cross-border environmental claims

Environmental claims with cross border implications have been occupying both legal scholars and practitioners for centuries.[75] Yet, modern times face huge dimensions of such claims often relating to multimillion amounts (of various money units), and wide media coverage.[76] In general we find two basic heads of jurisdiction relevant for trans frontier environmental disputes: a) place of a defendant's habitual residence/domicile; and b) place of the harmful event, which encompasses both the place where defendant acted and the place where the impact of the damage occurred.[77] It is notable that national jurisdictional rules have been replaced in Europe in the late 60s: first by

[72] F. J. G. Alferez, 'The Rome II Regulation: On the way towards European Private International Law Code' 3 *The European Legal Forum* (2007) at p. 87.
[73] Dickinson, op. cit. n. 57, at paras. 7.12-7.13.
[74] Bogdan, op. cit. n. 61, at p. 98.
[75] C. O. Garcia-Castrillón, 'International Litigation Trends in Environmental Liability: A European Union–United States Comparative Perspective', 3 *Journal of Private International Law* (2011) p. 551.
[76] Recent example of January 2013 is the famous Shell Nigeria case decided in front of Dutch courts. Read more in: M. Alizade and E. A. Hosseini, 'Litigation Procedure in Oil Pollution Incidents', 1 *International Journal of Social Science and Humanity* (2013) pp. 5-8.
[77] C. Bernasconi and G. Betlem, Second Report of International Law Association: Transnational Enforcement of Environmental Law (2004) p. 3, available at *https://www.google.hr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCoQFjAA&url=http%3A%2F%2Fwww.ila-hq.org%2Fdownload.cfm%2Fdocid%2FDDDBD783-4062-4227-96F2BAA582F1524A&ei=s_E1Ut_xNMfwhQf99oHICg&usg=AFQjCNHNNVrQ1-JcFNSBfhvv1FfrQK3hCQ&sig2=BySKsBxO0QvdzuQNImpNhQ&bvm=bv.52164340,d.bGE&cad=rja* (10.6.2013.).

uniform conventional rules (1968) and later regulations (2001, 2013). Following the previous chapter on choice of law, the first part of the rule embodied in Article 7 of the Rome II Regulation is in line with Article 5(3) of the Brussels I Regulation that determines the jurisdiction to hear an environmental tort claim.[78] The alternative to the place where the defendant acted and the place where the impact of the damage occurred has first been confirmed by the European Court of Justice in famous Reinwater case.[79]

IV. In place of a conclusion: the polluter pays principle in European environmental conflict of laws

The victim of trans frontier pollution benefits from the law that is more favorable to him or her, and if that victim is acquainted with substantive solutions of both states, she can benefit much more than any victim making a purely national claim ever could![80] From a methodological point of view, the preferential treatment of plaintiffs is not compatible with traditional European choice-of-law rules.[81] Drafters of the Rome II Regulation intended to apply as much as possible of the USA's open and flexible method of achieving justice in each individual case.[82] The Commission still felt rather uncomfortable to depart more significantly from Savingy's traditional European approach claiming it would go beyond the victim's legitimate expectations and result in reintroducing legal uncertainty.[83] Despite objections that this method is not flexible and open in total, it is obvious that is departs from traditional European choice of law rules in many aspects. It has been argued that distinctive values such as legal predictability, fairness and neutrality, which are being promoted by traditional European choice of law rules "should be sacrificed, at least to some degree in the limited area of environmental

[78] A. Brigs and P. Rees, *Civil jurisdiction and judgments* (London, Norton Rose 2005) pp. 188-196.
[79] *Bier v Mines de Potasse D'Alsace* (C-21/76) (1976) ECR 1735.
[80] Bogdan, op. cit. n. 61, at p. 99.
[81] R. Michaels, 'The New European Choice-of-Law Revolution', 5 *Tulane Law Review* (2008) pp. 1622-1623.
[82] S.C. Symeonides, 'Rome II and Tort Conflicts: A Missed Opportunity', *The American Journal of Comparative Law* (2008) pp. 173-222.
[83] Explanatory Memorandum to the Commission Proposal of 22 July 2003, COM(2003)427 final pp. 11-12.

tort."[84] It derives therefrom that the advantage should be given to the distinguished principle of substantive justice that would in this particular case ensure that the polluter pays and that a high level of environmental protection is set and is preserved. All of the above confirm that the provisions of the Rome II Regulation truly accomplished the polluter pays principle!

> 'The fact that the victim may choose the law which ensures him or her maximum recovery should in fact dissuade the operator of a polluting enterprise situated near a frontier from preferring profitability to good maintenance of his or her installations Under these circumstances, the principle favouring the injured party (*favor laesi*) has thus a completely desirable and welcome corollary: favouring nature (*favor naturae*).'[85]

Taking account only of the law of the place of dangerous activity that causes environmental damage hides a clear risk, as states could try to protect their industry by prescribing low standards and liability rules favorable to the industry ('race to the bottom'). Such a limitation of liability would endanger victims of environmental pollution living in the neighboring countries. In the end, this attitude would open a road towards the breach of the polluter pays principle.[86] On the opposite, rule embodying the principle of ubiquity:

> 'forces the operators of ecologically dangerous activities, established in a country with a low level of civil law protection of the environment, to abide by the higher levels prevailing in neighboring countries, while discouraging operators established in high protection countries from placing their facilities at the border, for example in order to discharge toxic substances into river carrying the toxic waste into neighboring country with laxer civil liability rules.'[87]

The substantive justice and substantive EU environmental policy concern was clearly reaffirmed in the wording of the Rome II Regulation recital 25: Regarding environmental damage, Article 174 of

[84] P. Beaumont, 'Private International Law of the Environment', 28 *Juridical Review* (1995) p. 36.
[85] Bernasconi and Betlem, op. cit. n. 77, at p. 11.
[86] Ibid.
[87] Bogdan, op.cit. n. 61, at p. 97.

the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage.

It in the end this means that the person suffering damage is in a position to use the law of the country with higher environmental standards! According to the European Commission, the victim's option to select the law of the place where the tortfeasor had acted (or to 'select' the law of the place of impact/damage by relying on the general rule) contributes to raising the general level of environmental protection.[88] The added distinctive novelty of such an approach is that substantive policy interests are not found in domestic law but in the *acquis* – it is the environmental protection and its precautionary principle listed in article 174 of the EU Treaty![89] As an EU instrument, it stands in connection with the substantive policies of the European Union and these are often opposed to those of the individual states. It all in the end helps in the establishment of a common market. In the end it is paradoxical that even though it basically copies existing domestic choice of law rules, EU choice-of-law rules become instruments of substantive Union policies![90]

[88] Bernasconi and Betlem, op. cit. n. 77, at p. 11.

[89] J. Meeusen, 'Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?', 9 *European Journal of Migration & Law* (2007) pp. 290-291.

[90] J. Basedow, 'Spécificité et coordination du droit international privé communautaire' *Droit International Privé, Travaux du Comité Français de Droit International Prive* (2005) pp. 283-284.

Gergely Czoboly*
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The procedural aspects of environmental protection in the Hungarian and the Croatian legal system

I. Introduction

In the last few decades, environmental protection has been recognized as an important social, political and legal question on the national as well as on the European Union level. The right to adequate legal protection in the field of environmental protection is considered as an individual right, according to some even as a third generation human right. At the same time, environmental protection poses an interest to the state and it is considered a public interest. Recently, environmental protection has been recognized as a collective interest, even as an interest pertaining to all citizens (*actio popularis*, *quivis ex populo*). The national legislature is faced with a challenge of finding a balance between these interests and at the same time it is required to harmonize national legislation with EU legislation.

Effective protection of the environment requires effective realization of environmental law. To overcome the shortcomings of the national systems, it is necessary to deal with the procedural issues of environmental law. In the first part of the paper, the authors review the policies and legal norms of the EU and the jurisprudence of the European Court of Justice concerning the procedural aspects of environmental protection. In the second part, the authors examine the system of individual and collective redresses in the national laws and they give a brief overview of the national solutions. Finally, in the third part of the paper the authors examine the statutory provisions on environmental protection at the national level. The national reports deal with the same procedural topics, in particular with the existing individual and collective actions and try to identify the shortcomings of these solutions.

The authors of the paper, having in mind the similarities of the national legal regulations of Hungarian and Croatian legal system in the field of

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civil law examine and analyze the existing procedural solutions in the field of environmental protection of both the Hungarian and the Croatian legal system, in order to detect open issues, doubts, and perspectives which the national legislators encounter while accomplishing these tasks.

II. An overview of the development of EU environmental policy

Although from the current perspective it might seem as if the normative activity of the EU in the field of environmental protection is rather intense[1] it is interesting that in the founding treaties (Treaty of Rome[2]) there is no mention of environmental protection. It was only after the OUN Conference on Human Environment in Stockholm in the 70's that the Commission, at the initiative of the European Council, issued the Action Programme on the Environment[3] which marks the beginning of the dedicated work on the development of EU environmental policy.
In the earliest stage of development, EU environmental policy was pretty unsystematic and consisted of occasional (*ad hoc*) interventions of the EU in the resolution of controversies in the field of environmental protection, mostly at the initiative of the EU Member States at the time. The influence of the EU Member States was extremely strong and the possibility of double veto which pertained to EU Member States with regard to the adoption of certain measures and their implementation in national legislation was complicated and decelerated process of the shaping of EU environmental policy. Although at this stage, national environmental policies of EU Member States were heavily influenced

[1] Environmental policy in the European Union consists of approximately 300 different legal acts and norms in a number of fields-waist management, air pollution, protection and direction of the waters, protection of nature and biological diversity, protection of the soil, noise pollution, chemicals and climate changes.
Zaštita okoliša-jedna od najzahtijevnijih politika EU [Environmental protection-one of the most challenging EU policies] Eučionica [EU class room], available at *http://www.vecernji.hr/vijesti/* (14.5.2013). S. Scheuer, *EU Environmental Policy Handbook, A critical analysis of EU Environmental Legislation, Making it accessible to environmentalists and decision makers* (Brussels, European Environmental Bureaue (EEB) 2005) p. 158.
[2] With the Treaty of Rome whiched was signed in Rome in 1957 the European Economic Community (EEC) and European Atomic Energy Community (Euratom) were established, available at *http://eur-lex.europa.eu/en/treaties/index.htm* (14.5.2013).
[3] Programme of Action on the Environment (for the period of 1973-1976), OJ C 112, 20.12.1973.

by the political stance, economic conditions and the level of the development of social conscience, the first step towards their integration was nevertheless taken.

The second stage of development (the 80's) brought through changes regarding the strengthening of the initiative of some of the EU Member States[4] and the engagement of the EU legislator in the development of environmental policy.

The adoption of the Single European Act (SEA)[5] in 1987, which is considered to be the legal basis of EU legislation on environmental protection, marked the beginning of the third stage. With the adoption of the SEA, conditions have been formulated for a stronger integration of EU environmental policy and the setting of higher standards in that field. According to some, the SEA can even be seen as the act which incorporated environmental law into the *acquis communitaire*.[6]

The trend continued with the adoption of the Maastricht Treaty in 1993[7] and the Amsterdam Treaty in 1999.[8]

[4] The strengthening of the notion of the need for a more concrete involvement in environmental protection matters started in Germany, the Netherlands and Denmark and soon after that spread over all other EU member states. A. Jordan, 'Introduction: European Union Environmental Policy-Actors, Institutions and Policy Process', in A. Jordan, ed., *Environmental Protection in the European Union: Actors, Institutions, and Processes* (London, Earthscan Publications Ltd.) p. 4.

[5] The Single European Act was signed in Luxembourg on 17 February 1987 and The Hague on 28 February 1986 and came into force on 1st July 1987. It was the first modification of the founding treaties of the European Communities, the Treaty of Paris from 1951 and the Treaties of Rome from 1957. The intention was to make the existing system of decision making faster and more efficient.

[6] A. Bačić, 'Ustavni temelji i problemi zaštite okoliša u hrvatskom i europskom pravu [Constitutional foundations and problems of environmental protection in Croatian and European law]', 45 *Zbornik Pravnog fakulteta u Splitu* (2008) p. 738.

[7] The Maastricht Treaty (Treaty on European Union) was signed on 7 February 1992 and came into force on 1 November 1993. Its main purpose was to prepare for European Monetary Union and to introduce elements of political union such as citizenship, common foreign and internal affairs policy, and it also provided for new forms of cooperation among EU governments. Available at *http://eur-lex.europa.eu/en/treaties/index.htm* (14.5.2013).

[8] The Amsterdam Treaty was signed on 2 October 1997 and came into force on 1 May 1999. Beside the fact that it amended Maastricht treaty (Treaty on European Union) and the Treaties establishing the European Communities, it was also used for the creation of necessary conditions (political and institutional) for the globalization of economy, suppression of corruption and solving problems in the field of

Seemingly, the adoption of the Nice Treaty in 2003 as the beginning of the fourth stage brought no significant changes in the EU environmental policy. However, changes in the decision making process in the light of the enlargement of the EU caused uneasiness among some authors who seem to think that the earlier balance may alter and that the number of EU Member States which favor *status quo* could increase in comparison to the number of EU Member States which welcome the adoption of new environmental policies.[9] Independent of the fact if it is even likely that something like that could happen; the expressed concern is relevant inasmuch as it reflects a consciousness of the importance which is given to environmental protection by the EU Member States and by the EU in the last decade. In the EU Strategy for Sustainable development[10] accompanied by the sixth Environment Action Programme (EAP) environmental policy, that is, its compatibility with the EU goals in the field of economic development and promotion of social cohesion is put in the center.[11]

Obviously, EU environmental policy from the adoption of the first Environment Action Programme in 1972 up to the adoption of the sixth Environment Action Programme in 2001 (which was intended to be in force till 2012) has gone through an enormous transformation. Although environmental law started to develop within secondary legislation, international treaties and court decisions, today it is a part of EU substantial law via Articles 174, 175 and 176 based on Article 6 of the Treaty of Nice.[12] [13]

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environmental protection. Available at *http://eur-lex.europa.eu/en/treaties/index.htm* (14.5.2013).

[9] See also Jordan, loc.cit. n. 4, at p. 5.

[10] Communication from the Commission: A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development) COM(2001)264 final 15.5.2001.

[11] 'Sustainable development offers the European Union a positive long-term vision of a society that is more prosperous and more just, and which promises a cleaner, safer, healthier environment – a society which delivers a better quality of life for us, for our children, and for our grandchildren. Achieving this in practice requires that economic growth supports social progress and respects the environment, that social policy underpins economic performance, and that environmental policy is cost-effective.' Communication from the Commission: A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development) COM(2001)264 final 15.5.2001.

[12] The Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 80, 10 March

There is an on-going consultation on the Commission's proposal of the seventh Environment Action Programme under the title 'Living well within the limits of our planet' for the period up to 2020. The EAP combines the accomplishments of the EU legislator in the last forty years as well as the current questions among which we highlight the improvement of the efficiency of the EU in solving regional and global challenges concerning changes in the environment and climate change and the insurance of better implementation of EU environmental legislation.[14,15]

The obligation of the implementation of EU environmental legislature has several dimensions according to the Commission so that along with the adoption of acts which integrate the environmental laws of the EU in the national legal system, the EU Member States should ensure their adequate enforcement by the executive branch of the government, and they should also prepare the means for investments in the system and

2001. It was followed by the Reform Treaty or Lisbon Treaty which was signed on 13 December 2007.

[13] Bačić, loc.cit. n. 6, at p. 739.

[14] 'Urges the Commission, in cooperation with Member States, and as appropriate regional, local authorities as well as other stakeholders, to enhance efforts to achieve the objectives set out in existing environment policy and legislation in areas such as air, water, the marine environment, waste, biodiversity, health protection, chemicals, industrial installations, climate and energy.' Conclusions on setting the framework for a Seventh EU Environment Action Programme, Environment Council meeting Luxembourg, 11 June 2012, available at *http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/envir/130788.pdf* (14.5.2013).

[15] In the beginning of 2012 it was estimated that inefficient implementation of the EU legislature in the field of environmental protection costs the EU up to 50 billion euro *per annum*. Therefore on 7th March 2013 the Commission released a Communication on better implementation of EU environment law. The main goal was to accomplish a more efficient fulfillment of the task of implementation and realization of EU environmental protection legislature which is common to national, regional and local bodies. A more intense oversight was suggested, criteria by which the EU Member States should resolve environmental disputes are given, ensuring better *access of justice* in the environmental disputes is advised and support for the European network of environmental professionals is requested. The idea was to use the Communication to induce a debate within EU bodies which could serve as a preparation for adoption of the seventh Action Programme. European Commission press release from 7th March 2012: Environment: Better implementation will lower the costs and improve the environment, available at *http://europa.eu/rapid/press-release_IP-12-220_en.htm* (14.05.2013).

foresee measures for elimination of difficulties and solving problems which could occur during the enforcement of the law.[16]

The case law of the CJEU contributes significantly to the harmonization process of national legislation with the *acquis communitaire*.[17] In its decisions in the field of environmental protection, the CJEU takes into account that the task of the EU Member States does not consist solely of the incorporation of EU environmental legislation into the national system but of the maximum efforts of each of the EU Member States in ensuring efficient procedural mechanisms and providing access to justice and efficient legal protection in environmental disputes for every citizen as well. In this sense, there are several important decisions of the CJEU which show that Member State action in the area of access to justice in environmental matters will be necessary, even if Member States would remain reluctant to accept proposal COM(2003) 624 expanding access to justice beyond Directive 2003/35/EC.[18]

In the *Janecek*[19] case, the CJEU took a different position than the usual and instead of accepting the principle of procedural autonomy, it put certain limitations on it. The significance of this particular case is in the fact that the CJEU widened the scope of applicants who can claim a right to access to justice and included concerned individuals.

In the *Trianel*[20] case, the CJEU also widened the scope of applicants who can claim the right to access to justice, only this time, it recognized this as a right of non-governmental organizations promoting environmental protection.

The *Djurgården*[21] case is considered important since in its decision the CJEU held that members of the public concerned 'must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent' and also that the amended EIA Directive 'precludes a provision of national law which reserves the right

[16] European Commission press release from 7th March 2012: Environment: Better implementation will lower the costs and improve the environment, available at *http://europa.eu/rapid/press-release_IP-12-220_en.htm* (15.5.2013).

[17] Bačić, loc. cit. n. 6, at p. 740.

[18] Maastricht University Faculty of Law, *Possible initiatives on access to justice in environmental matters and their socio-economic implications, DG ENV.A.2/ETU/2012/0009rl Final Report* (Maastricht 2013) p. 10.

[19] Case C-237/07/Janacek [2008] ECR I-6221 of 25 July 2008.

[20] Trianel judgement (C-115/09), consideration 59.

[21] Case C-263/08 DjurgĺÍrden-Lilla Värtans [2009] ECR I 9967 of 15 October 2009.

to bring an appeal against the decision on projects which fall within the scope of that directive, as amended, solely to environmental protection associations which have at least 2,000 members', since that would impair the essence of the objectives of Directive 85/337.

Interpretation of CJEU case law shows that, in spite of the position of the EU Member States on the proposal COM(2003)624, broader access to justice in environmental matters in national legal systems will to some extent be accomplished through the obligation of the EU Member States to ensure conformity of national legislation and court practice with the judgments of the CJEU. However, complete adjustment of national law to the requirements of the CJEU in all EU Members States regarding broader access to justice in environmental matters should not be expected.[22]

In spite of the situation that the Aarhus convention[23] is an international treaty signed equally by the EU and non-EU Member States, the fact that the Aarhus Convention regulates environmental protection which is considered a third generation human rights provides a connecting point of the meaning of Article 9 of the Aarhus Convention (on access to justice in environmental matters) and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[24] Also, it gives rise to the consideration of the rich jurisprudence of the ECHR on environmental protection.[25]

III. Procedural aspects of EU environmental policy

Since the EU puts a lot of weight on the organization of an efficient court system and on establishing the necessary prerequisites for providing an equal level of legal protection in all EU Member States, in the field of environmental protection it started by signing and ratifying

[22] Possible initiatives on access to justice in environmental matters and their socio-economic implications. See n. 18, at p. 12

[23] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). available at *http://www.unece.org/env/pp/treatytext.html* (15.5.2013).

[24] J. Ebbeson, 'Comparative Introduction', in J. Ebbeson ed., *Access to Justice in Environmental Matters in the EU* (The Hague, Kluwer 2002) p. 15.

[25] Although the European Convention does not directly provide for the right to environmental protection, the ECHR case law reflects the efforts of the Court to at least ensure indirect environmental protection. See also Steel and Morris v the United Kingdom, judgment of 15 February 2005; Öneryıldız v Turkey, judgment of 30 November 2004, Guerra and Others v Italy, judgment of 19 February 1998.

the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) and went on with the introduction of two Directives which regulate the subject-matter regulated by the Aarhus Convention (Directive 2003/4/EC[26] and Directive 2003/35/EC[27]) and Regulation 1367/2006,[28] all with the goal of enhancing access to justice. The scope of Directive 2003/35/EC is rather limited since its goal is to guarantee access to justice in two areas of environmental law: in cases where impact assessment (EIA) is necessary, as regulated within Council Directive 85/337 of 27 June 1985;[29] and in cases related to integrated pollution prevention and control (IPPC), as regulated by Directive 96/61.[30] Around the time of the promulgation of the Directive 2003/35/EC, a proposal by the Commission on a Directive on access to justice in environmental matters[31] was adopted. It establishes a set of minimum requirements on access to administrative and judicial procedures in environmental matters with the purpose of providing broader access to justice in environmental proceedings for members of the public and for qualified entities.[32] [33] Although the Commission was

[26] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC. OJ L 41/26 14.2.2003.

[27] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

[28] Regulation 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. OJ L 264/13 25.9.2006.

[29] OJ L 175 of 5.7.1985, amended by Directive 97/11/EC, OJ L 73, of 14.3.1997 and now revised and superseded by Directive 2011/92/EU, OJ L 26, of 13.12.2011.

[30] OJ L 257, of 10.10.1996, now Directive 2008/1/EC, OJ L 24 of 15.1.2008.

[31] The Commission Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters COM(2003)624 of 24 October 2003.

[32] Article 1 (Subject and scope) of the proposed Directive: The proposed directive grants legal standing to certain members of the public, enabling them to have access to judicial or administrative proceedings against the actions and omissions of public authorities which contravene environmental law. This approach incorporates the Aarhus Convention and is based on the administrative and judicial proceedings existing in Member States. The Commission Proposal for a Directive of the

not successful in conveying the meaning and significance of the proposed directive to the EU Member States[34] and it seemed as if the proposal failed to come through, lately there are incentives for its reconsideration. Namely, there are several reports by the Commission on the implementation of EU environmental law which highlight the importance of access to justice as a tool of enforcing European environmental law. Also, recently the European Parliament and the Council have taken initial positions on the proposal.[35]

The European Parliament resolution of 20 April 2012 on the review of the sixth Environment Action Programme and the setting of priorities for the seventh Environment Action Programme[36] emphasizes the importance of the full implementation of the Aarhus Convention. In that sense, the European Parliament proposed the adoption of the Directive on access to justice in environmental matters. Furthermore, the Council conclusions on the seventh EAP also underline the importance of the improvement of access to justice in line with the Aarhus Convention.[37]

Article 9(2) of the Aarhus Convention is considered to be a fundamental provision on access to justice, that is, the entitlement to access (*locus standi*) and conditions of access as it provides that each Party shall, within the framework of its national legislation, ensure that members of

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European Parliament and of the Council on access to justice in environmental matters COM (2003)624 of 24 October 2003.

[33] This can be derived from the General considerations given at the beginning of the Proposal of the Directive on access to justice in environmental matters. See COM (2003)624.

[34] The concerns of the EU Member States regarded mostly the requirement to provide standing to groups without legal personality, giving standing according to pre-defined criteria for qualified entities and administrative requirements. Possible initiatives on access to justice in environmental matters and their socio-economic implications, n. 18, at p. 7.

[35] Possible initiatives on access to justice in environmental matters and their socio-economic implications, n. 18, p. 9.

[36] European Parliament Resolution of 20 April 2012 on the review of the sixth Environment Action Programme and the setting of priorities for the seventh Environment Action Programme – A better environment for a better life (2011/2194 (INI), 68).

[37] Conclusions on setting the framework for a Seventh EU Environment Action Programme, 3173rd ENVIRONMENT Council meeting Luxembourg, 11 June 2012, available at *http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/envir/130788.pdf* (17.5.2013).

the public concerned having a sufficient interest or, alternatively, maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6. assessment on what constitutes a sufficient interest and impairment of a right shall be made in accordance with the requirement of national law. Article 9(4) provides that the procedures referred to shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

The first two pillars of the Aarhus Convention were incorporated in the two Directives, Directive 2003/4/EC and Directive 2003/35/EC. Article 6 of Directive 2003/4/EC which regulates *access to justice* requires of the EU Member State to ensure that every applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority overviewed administratively by an independent and impartial body established by law. According to the Directive, the applicant also has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final.[38,39]

In line with Article 15 of Directive 2003/35/EC Member States shall ensure that in accordance with the relevant national legal system, members of the public concerned having a sufficient interest, or alternatively maintaining the impairment of a right, where

[38] Art. 6 of the Directive 2003/4/EC.

[39] Art. 2 of the Directive 2003/4/EC: Public authority shall mean government or other public administration, including public advisory bodies, at national, regional or local level, any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment and any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of an aforementioned body or person.

administrative procedural law of a Member State requires this as a precondition have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.[40]

Obtaining legal standards adopted via the implementation of EU environmental legislation process into the national legislation entrusted to the EU Member State depends wholly on the protective activity of the national judicial system. However, a relatively large number of EU Member States have, besides civil procedures which provide protection of infringed rights of individuals, some kind of a collective redress mechanism which provides for the protection of rights which belong to a group of individuals (group interests). Obviously, the existing legal framework provided by the EU legislator which prescribes *access to justice* exclusively for individuals whose rights in the field of environmental protection have been infringed needs to be adjusted.

Originally, the intention was to introduce a collective redress mechanism for breaches of EU anti-trust rules. Until now, collective redress has been introduced in the field of consumer protection[41] and the newest tendencies of the Commission seem to go in the direction of introducing a common European model of collective redress for different fields among which is environmental protection. In this regards, the European Parliament adopted the resolution 'Towards a Coherent European Approach to Collective Redress'[42] in which it states

[40] Art. 15 of the Directive 2003/35/EC: What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organization meeting the requirements referred to in Article 2(14) shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

[41] After consultations which went on for several years were finished, the European Commission adopted a Green paper on antitrust damages action in 2005 and a White paper in 2008 both of which, among other things, include collective redress. In the same year, a Green paper on consumer collective redress was also adopted.

[42] European Parliament Resolution 'Towards a Coherent European Approach to Collective Redress' (2011/2089 (INI)) of 2 February 2012 .

that there is a need for improvement of injunctive relief remedies in the area of environmental protection.[43]

Thereby, since the differences among mechanisms of collective redress in the EU Member States are substantial, the European Commission directed its endeavors primarily to detecting principles common to the institutions of collective redress in all EU Member States. It is expected that this could provide a clearer vision on how a common European collective redress mechanism should look like to fit the requirements of all EU Member States. Achieving a consensus among all participants (European Commission, Parliament, EU Member States) on the question whether the European model of a collective redress procedure should be bases the Anglo-American class action and to what extent that agrees with the European legal tradition, or should some of the models distinctive for Continental European legal systems be used where the right to submit a lawsuit and commence a procedure for the protection of rights of a group of individuals is entrusted on a person (legal person, non-governmental organization) which conducts civil proceedings in its own name but on the behalf of third persons, represents an additional challenge. Should the second option be chosen, there would be no possibility of seeking damages.

IV. System of judicial redresses in environmental protection

It was referred to that significant differences exist between the national judicial redress mechanisms in the field of environmental law. There are various forms of judicial procedures which include indirect processes to review administrative decisions and direct actions against polluters. Some of the procedures include injunctive, others compensatory reliefs and there are individual and collective forms of redresses.

In this part of the paper we are going to examine both individual and collective forms of these procedures and try to identify the model solutions and give a brief overview. In this context, collective redress can be defined "as a concept encompassing any mechanism that may

[43] Soon after the EU Parliament Resolution, a public consultation was launched on 4 February 2011 and finished on 30 April 2011 under the title 'Towards a Coherent European Approach to Collective Redress'. It was of great importance. Its goal was to establish common principles of collective redress, verify to what extent they could be integrated into EU legislation and in which fields it would be significant to introduce a common European collective redress mechanism. Available at *http://ec.europa.eu/justice/news/consulting_public/* (19.5.2013).

accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices. There are two main forms of collective redress: by way of injunctive relief, claimants seek to stop the continuation of illegal behavior; by way of compensatory relief, they seek damages for the harm caused. Collective redress procedures can take a variety of forms, including the entrustment of public or other representative entities with the enforcement of collective claims."[44]
The examination will only involve various forms of civil, or in some cases administrative court proceedings, but not administrative and criminal procedures. However, to some extent, we indirectly have to deal with administrative procedural rules too, because they – in some cases – inseparably connect to judicial procedures.

1. Judicial review of administrative decisions

According to Owens, to respond to the challenges of the environmental pollution 'modem governments worldwide have come to rely on administrative agencies to resolve crucial problems',[45] but 'once they appear to have breached this duty the people should be permitted to call upon the courts to check that abuse of power'.[46] It is beyond dispute that societies have great interest in a healthy environment, but it sometimes conflicts with other interests, such as to encourage economic growth or to create new jobs. In this situation, the state and its administration balances between these interests and in some cases the latter interests prevail over the previous one. The function of judicial review is to provide external control over the not, or not effectively working administration, where the court is the counterweight and the supervisor of the administrative bodies.[47] But in modern civil procedures, courts usually cannot initiate a case *ex officio*, there has to be someone to sue. Traditionally, the owner of the land affected by pollution, or the ones whose property is in danger have standing in these procedures, but as

[44] M. Maciejewski, *Overview of existing collective redress schemes in EU Member States* (Brussels, European Parliament 2011) p. 6.
available at *http://www.europarl.europa.eu/activities/committees/studies.do?language =EN* (14.5.2013)
[45] J. Owens, 'Comparative law and standing to sue: a petition for redress for the environment', 7 *The Environmental Lawyer* (2000-2001) p. 325.
[46] Owens, loc. cit. n. 45, at p. 326.
[47] L. Sólyom, *Környezetvédelem és polgári jog* [Environmental protection and private law] (Budapest, Akadémiai Kiadó 1980) p. 121.

Pánovics highlights 'environmental issues simply cannot be reduced to private or public interests, because environmental interests are collective, diffuse and fragmented to a large extent'.[48]
Due to the fact that the European Union and its Member States are parties to the Aarhus Convention, this kind of procedure is granted in the national laws, however, they differ greatly with respect to some important issues, such as the right to sue (*locus standi*) or the need to exhaust administrative remedies before contesting the decision in court. 'Among the Member States, there are great variations between those systems which allow anyone to challenge administrative decisions and omissions on environmental matters (*actio popularis*) and those which restrict the possibility for judicial review only to those members of the public who can show that their individual rights have been affected.'[49]
The national solutions can be placed on a scale and classified in three groups. The first, which is on one side of the scale, is the 'rights-based' group. It is based on the protective norm theory (*Schutznormtheorie*), also known as 'impairment of rights doctrine'.[50] In the middle group we find those legal systems which are 'interest-based' when determining standing. Finally on the other side of the scale are those, which grant to anybody the standing in this type of case (*actio popularis*).
The protective norm theory is applied in many countries. For example, it is used in the German and Austrian legal system. However, the extent of application of this theory differs between them. In some countries, the concept of 'the impairment of right' is interpreted very restrictively.[51] In Germany 'the theory means that in order to be allowed to bring a case to the administrative court, the applicant has to show that the decision or

[48] A. Pánovics, 'The Need for an EU Directive on Access to Justice in Environmental Matters' 147 *Studia Iuridica Auctoritate Universitatis* (2010) p. 137.
[49] J. Darpö, *Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union* (2012) p. 11, available at *http://ec.europa.eu/environment/aarhus/pdf/2012_access_justice_report.pdf* (14.5.2013).
[50] P. Černý, *Practical application of Article 9 of the Aarhus Convention in 10 EU countries – comparative remarks. Report on Access to Justice in Environmental Matters, Justice and Environment* (Justice and Environment 2010) p. 6, available at *http://www.justiceandenvironment.org/_files/old-uploads-wordpress/2010/05/JE-Aarhus-AtJ_Report_10-05-24.pdf* (14.5.2013).
[51] Černý, loc. cit. n. 50, at p. 6.

omission may concern his or her individual or subjective public right'.[52] In Austria, 'legislation usually expressly defines which specific rights can be impaired with respect to certain parties (e.g. usually neighbours concerning noise, smell, property; municipalities concerning their finances)'.[53]

Most of the Member States belong to the middle group which is more or less '*interest-based*' when determining standing.[54] The Milieu Report stated that, in general, individuals need to show that they have a sufficient interest (e.g., geographic vicinity) to be granted standing. In some cases, NGOs meeting certain criteria are considered 'privileged applicants' and do not have to show an interest to challenge acts or omissions before administrative boards or courts. In other cases, associations and organizations (including NGOs) have to show the impairment of a right or an interest, as any other individual, the interpretations given by courts to the concept of 'interest' differing from one Member States to another.[55] Some legal systems require that the statute of the organization should cover environmental protection. This criterion is sometimes replaced or complemented by a requirement for activity in this area of law.[56] 'The criteria differ from country to country but in general they require some years of existence (3 or 5) and the protection of the environment as the main purpose laid down in their statutes'[57] or others like in some cases democratic rules or a sufficient number of members.

In some cases not the legislators, but the courts developed criteria to avoid abuse of procedural rights and to prevent frivolous proceedings. Owens highlights that the British courts now appear to apply the threshold standing requirement as a means to filter out frivolous litigation 'by busybodies, cranks and other mischief-makers'.[58] In Her Majesty's Inspectorate of Pollution and Ministry of Agriculture,

[52] Darpö, loc. cit. n. 49, at p. 11.
[53] Černý, loc. cit. n. 50, at p. 6.
[54] Darpö, loc. cit. n. 49, at p. 12.
[55] E. P. Vera, *An inventory of EU Member States' measures on access to justice on environmental matters. The Aarhus Convention: how are its access to justice provisions being implemented?* (hereinafter: Milieu Report) (Belgium, Milieu Environmental Law and Policy 2008) p. 4.
[56] Darpö, loc. cit. n. 49, at p. 13.
[57] Vera, loc. cit. n. 55, at p. 6.
[58] Owens, loc. cit. n. 45, at p. 345.

Fisheries and Food v. Greenpeace Ltd.[59] 'a British court held that the Greenpeace organization had a "sufficient interest" for standing to challenge an agency's decisions regarding the discharge of radioactive wastes. […] [T]he court focused on whether the applicant for standing was a serious litigant rather than a "mere" or "meddlesome busybody". Recognizing the national and international integrity of Greenpeace, the court refused to consider it to be a mere "busybody".'[60]

Finally, there are some countries where theoretically anybody can initiate a claim against the administration (*actio popularis*). The Milieu Report mentions Portugal, where the Constitution recognizes *actio popularis* in environmental matters. It also mentions that in some countries, like Spain, an *actio popularis* is possible for specific cases, like land use planning.[61] "Also in Romania, both the legislation and jurisprudence recognize standing to sue of all persons, directly or through environmental NGOs, in environmental matters. Theoretically, the general rule of the Environmental Protection Act shall also be applicable for granting standing based on the *actio popularis* principle in civil procedures, whenever environmental rights are infringed upon."[62]

In some countries, administrative remedies must be exhausted before contesting the decision in court. 'Elsewhere, individuals and associations have the choice between administrative remedies (appeals before the authority who issued the decision and/or its hierarchical superior) or going directly to court.'[63]

A specific issue is the omission of the administration. Černý highlights that 'in most countries, there is a possibility of court protection when an authority in a procedure, once initiated, does not issue a decision in the prescribed time limit. More problematic is, however, a situation when the authority fails to start the procedure itself (*ex officio*), under occasions when a law requires it to do so.'[64] Also Darpö refers to this problem and states that in some countries 'there seem to be concerns

[59] Regina v Inspectorate of Pollution & Another ex parte Greenpeace Ltd. (No. 2) 4 All E.R. 329, 349-51 (Eng. C.A. 1993) (Otton J.).
[60] Owens, loc. cit. n. 45, at p. 346.
[61] Vera, loc. cit. n. 55, at p. 4.
[62] Černý, loc. cit. n. 50, at p. 10.
[63] Vera, loc. cit. n. 55, at p. 3.
[64] Černý, loc. cit. n. 50, at p. 14.

about the lack of possibilities to challenge administrative omissions, and alternatively, the lack of effectiveness when doing so'.[65]

2. Injunctive reliefs in environmental litigation

In environmental protection it is necessary for courts to have power to order to stop or to undertake certain action in order to avoid or mitigate irreversible damage. 'Injunctive relief is an important instrument for effective justice in actions against violations of law, especially in environmental matters, where the execution of a decision very often produces irreparable damages.'[66] In different legal systems the possibility of using injunctive relief varies greatly. Traditionally it is used in individual redresses, but 'existing EU legislation and international agreements require Member States to provide for collective injunctive relief in certain areas. As a consequence, all Member States have procedures in place which grant the possibility to seek an injunction to stop illegal practices.'[67]

On the one hand it is an important issue in the judicial review procedure. 'In the area of environmental law, the Aarhus Convention requires Member States to ensure access to justice against infringements of environmental standards. All Member States have implemented this by introducing some form of collective injunctive relief, whereby non-governmental organisations are given standing to challenge environmental administrative decisions.'[68] The Milieu report states that in most countries 'the possibilities of obtaining interim relief and interim measures will depend on whether the appeal has a suspensive effect. In general, administrative review procedure has suspensive effect whereas judicial review procedures do not have suspensive effects with some exceptions.' In general, the conditions in order to be granted relief are similar in all Member States: *periculum in mora*, which means that the danger that the execution of the decision may produce irreparable damages or would make the final judgment difficult to enforce and *fumus boni iuris* which means that it is a reasonably well founded case.[69]

[65] Darpö, loc. cit. n. 49, at p. 15.
[66] Vera, loc. cit. n. 55, at p. 7.
[67] European Commission, *Towards a Coherent European Approach to Collective Redress. Commission staff working document public consultation* (Brussels, European Commission 2011) p. 3.
[68] European Commission, loc. cit. n. 67, at p. 4.
[69] Vera, op. cit. n. 55, at p. 7.

On the other hand, national laws grant different kinds of individual actions against polluters, where the plaintiff asks the court to enjoin the defendant to refrain from the unlawful conduct or operation. Such actions can be brought to court for example based on trespass or nuisance. And finally, different kind of provisional measures exist in national civil procedures, which can be used by parties in compensatory actions too.

3. Compensatory reliefs in environmental litigation

The aforementioned actions aim to prevent harmful conduct before it causes damage in the environment, whereas compensatory actions can be initiated after the damage has occurred. Although it is applied after the harm is caused, its purpose is not just to compensate, but to prevent the harm by deterrence. Traditionally, legal systems grant individual actions, but lately collective forms are available in some cases too. The need for collective redresses was 'first observed in the field of consumer protection but soon similar trends were also detected in the fields of environmental protection, competition and industrial law'.[70] Maciejewski makes the finding that although every national system of compensatory redress is unique and no two national systems are alike, generally four types of collective redress schemes are used: group and representative actions, test case procedures and procedures for skimming off profits.[71]

In this part of the paper we can't show these models, but can give some general remarks on these redresses from the aspect of environmental protection and we will give detailed description about the Croatian and Hungarian solutions later.

Where the same breach of law harms a large group of citizens and businesses, 'individual lawsuits are often not an effective means to stop unlawful practices or to obtain compensation for the harm caused by these practices'.[72] However, the reasons of low efficiency differ greatly depending on the type of the damage. Wagner distinguishes between the different kinds of damages and argues that 'problems posed by

[70] L. Király and P. Stojčević, 'Multi-party actions and the legal aid', in T. Drinóczi et al., eds., *Cross-border and EU legal issues: Hungary-Croatia* (Pécs – Osijek, University of Pécs, Faculty of Law, J.J. Strossmayer University of Osijek Faculty of Law 2011) p. 301.

[71] Maciejewski, loc. cit. n. 44, at p. 38.

[72] European Commission, loc. cit. n. 67, at p. 3.

collective redress cannot be resolved through a single, "one size fits all" remedy. Rather, three types of cases must be distinguished, namely, damage to common goods, mass torts and scattered loss.'[73] Mass torts and scattered loss have in common that the same wrongful behavior or source of danger causes harm to a large number of individuals, while in the case of scattered loss, the individual victims suffer trivial harm only; in mass torts each and every individual is significantly harmed and suffers damage of a considerable amount.[74] While the difference between the aforementioned two is the size and severity of the harm suffered by a single victim, damages to common goods differ in the subject of the loss. 'Damage to common goods denotes harm to interests that are not subject to property rights regimes. They do not belong to any individual, group or state but are commonly held by society or even by mankind as a whole.'[75]

Environmental pollution generally causes damages to common goods, or, if individual property is harmed, the size and severity of this damage is usually relatively high. These two cases have to be examined separately. In the event of the prior one, the environment itself is harmed and the society has suffered a loss. For this purpose, as it is stated in the Darpö report, 'in some of the studied countries, the ENGOs are equipped with the possibility to sue the operator of a hazardous activity in court for damages on behalf of the environment, although in some cases, any award of money will be paid to the state budget'.[76]

In the latter case, a large number of individuals suffer a loss due to the same wrongful behavior. Most of the legal systems handle this situation by joinder of claims; however, in some countries mass tort actions are available too.

[73] G. Wagner, 'Collective redress – categories of loss and legislative options', 127 *Law Quarterly Review* (2011) p. 61.
[74] Wagner, loc. cit. n. 73, at p. 62.
[75] Wagner, loc. cit. n. 73, at p. 61.
[76] Darpö, loc. cit. n. 49, at p. 10.

V. Judicial redresses in environmental protection in Croatia and Hungary

1. Judicial redresses in environmental protection in Croatia

1.1. Sources of environmental law in the Croatian legal system

In last two decades, Croatian environmental legislation has undergone significant changes, this is in part due to the fact that Croatia has acquired state sovereignty and the right to organize its legal system and in part it can be attributed to the process of harmonization of Croatian legislation with EU legislation.

Under Article 3 of the Constitution of the Republic of Croatia[77] environmental protection is considered as one of the highest values of the Croatian constitutional order and serves as a basis for interpretation of the Constitution. The rights and obligations implied under the term "right to environment" is regulated at the constitutional level, since Article 69(1) of the Constitution of the Republic of Croatia regulates that everyone in the Republic of Croatia shall have a right to a healthy life, para. 2 states that the state shall ensure conditions for a healthy environment and that everyone shall, within the scope of their powers and activities, accord particular attention to the protection of human health, nature and the human environment (para. 3).

Although the Declaration on Environmental Protection in the Republic of Croatia was adopted on 5 June 1992[78] it should not be regarded as a direct legal source[79] of environmental law in the Croatian legal system. Its significance is in the fact that it has served as a basis for the adoption of the Environmental Protection Act in 1994.[80] The Environmental Protection Act is a general Act that, among other things, regulates environmental protection in the Republic of Croatia and environmental

[77] Constitution of the Republic of Croatia-consolidated text, NN 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10.

[78] Declaration on the protection of environment in the Republic of Croatia, NN 34/94.

[79] A Declaration is not a direct legal source since it serves the Chamber of Deputies to declare its general position on certain matters, such as matters of foreign and domestic policy. However, the adoption of a Declaration in certain field stresses the need for its detailed regulation.

[80] Environmental protection Act, NN 110/07.

pollution liability.[81] Besides, a new Act on air protection was adopted in 2011[82] as a special Act which regulates matters of air and airspace protection.

Apart from a range of individual acts[83] which regulate, for example, the declaration of national park or nature park areas, a large number of special acts containing provisions on environmental protection,[84] as well as acts which do not contain provisions on environmental protection, have application in the field of environmental protection.[85] Also, a great number of subordinate acts[86] which regulate certain aspects of environmental protection in detail are of importance for environmental law organization.

As a signatory to the Convention on the Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)[87] the Republic of Croatia integrated the Convention and both the Directive 2003/4/EC and Directive 2003/35/EC. The subject matter of the Aarhus Convention in Croatian legislation was regulated through the adoption of the Act on the ratification of the Convention on the Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,[88] the Environmental Protection Act,[89] Act on

[81] With the adoption of Environmental protection act in Croatian legal system once fragmented substance in the field of environmental protection, which was regulated by numerous regulations, finally became edited in a systematic and clear fashion.

[82] Act on air protection, NN 130/11. Before the new Act on air protection was introduced, Act on air protection from 2004, NN 178/04, 60/08 was in force.

[83] Among these acts are the Act on nature park Kopački rit, NN 45/99, and the Act on establishment of Plitvice Lakes as a National park, NN 29/49.

[84] One of such acts is Act on space planning and building-consolidated text, NN 76/07, 38/09, 55/11, 90/11, 50/12, 55/12.

[85] An example of such an act is Act on general administrative procedure, NN 47/09.

[86] For example, Strategy of sustainable development of the Republic of Croatia, NN 30/09, Regulation on the determination of liability for environmental damages**,** NN 139/08, and Rules on recognitions and awards for accomplishments in the field of environmental protection, NN 31/10.

[87] The Republic of Croatia signed the Convention on the Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus convention) on 25 June 1998 and ratified it on 8 December 2006.

[88] Act on the ratification of the Convention on the Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, NN – International treaties No. 01/07.

the Right of Access to Information,[90] the Regulation on the Information and Participation of the Public and the Interested Public in Environmental Protection Matters,[91] the Regulation on Environmental Impact Assessment of Operations[92] and the Regulation on Strategic Environmental Impact Assessment of 'the Plan and Programme'.[93] Also, with the adoption of these regulations the Republic of Croatia took upon itself the task of ensuring the right to access to justice in environmental matters. The analysis of the procedural aspects of Croatian environmental legislation below offers an answer to the question whether this task is (and if yes, to what extent) successfully accomplished.

1.2. Judicial review of administrative decisions

Since the Environmental Protection Act currently in force was adopted as a general legal source of Croatian environmental law after the ratification of the Aarhus Convention, the Croatian legislator concentrated on harmonization with the provisions of Article 9 of the Aarhus Convention in the process of the adoption of legal provisions on the right to access to justice in environmental matters.

Accordingly, the Environmental Protection Act regulates, in the framework of the regulation of access to justice within the provision of Article 145, proceedings initiated by an administrative action, a claim or a legal remedy submitted by a person in the capacity of interested public in order to contest an administrative decision brought by a public body.

Article 144 defines the scope of persons having the right to participate in proceedings regulated by the Act in the capacity of interested public. This right is attributed to every natural and legal person who because of the location of the operation and/or nature and influence of the operation can, in accordance with the law, maintain impairment of its right. In the proceedings regulated by the Environmental Protection Act which

[89] Environmental protection Act, NN 110/07. In July 2013 a new Environmental protection Act was adopted (NN 80/2013), but since a great part of legislation in the field of environmental protection should be adopted in next two years, current legislation adopted together with the Environmental protection act is still in force.

[90] Act on the Right of access to information, NN 25/13.

[91] Regulation on the information and participation of public and interested public in the environmental protection matters, NN 64/08.

[92] Regulation on the environmental impact assessment of operations, NN 64/08.

[93] Regulation on strategic environmental impact assessment of the plan and programme, NN 64/08.

provide for the participation of the interested public, sufficient interest is also recognized to a civil non-governmental organization which acts in the field of environmental protection if 1) it is registered in accordance with the special regulations on non-governmental organizations and the protection and enhancement of the environment, including protection of human health and the protection or rational use of natural resources are defined as its goal; 2) it is registered in the sense of point 1 of this paragraph for a period of at least two years prior to the filling of the request for which it maintains legal interest for the commencement of the administrative proceedings and if it is able to prove that in that period it actively participated in activities related to environmental protection in the city or community of its registered office in accordance with its statute.

Furthermore, Article 18(1) of the Environmental Protection Act prescribes the principle of right to access to justice in the fashion similar to the diction of Article 9(1) of the Aarhus Convention. Article 18(2) of the Environmental Protection Act defines the circle of persons to which a right to access to court or access to review procedure before a court of law or other impartial body is recognized for the purpose of the protection of a right to a healthy life and sustainable environment and for the purpose of environmental protection and the protection of some components of the environment para. 2 recognizes the right to commence the proceedings of citizens and other natural and legal persons, their classes, non-governmental organizations and organizations; if they can prove legal interest, or a person[94] (natural or legal) which because of the location of the operation, nature or influence

[94] According to some, sufficient legal interest in the proceeding in which the right to access to justice is recognized to the interested public implies also to a civil non-governmental organization which acts in the field of environmental protection, if it is registered in accordance with special provisions on non-governmental organizations and if protection and enhancement of environment, including protection of human health and the protection and rational use of natural resources are defined as its goal, and respectively that it was registered for the period of at least to years prior to the commencement of the procedure by a public body on the request for which it maintains legal interest and if it can prove that in that period it has actively participated in activities related to environmental protection in the city or the community where it has registered office in accordance with its statute. D. Gračan and S. Vizjak, 'Pravo na pristup sudu u pitanjima okoliša [Right to access to court in ecological matters]', 47 *Zbornik radova Pravnog fakulteta u Splitu* (2010) p. 185.

of the operation can, in accordance with the law, maintain impairment of its right.

From the cited provision it can be deducted that a party in the sense of Article 18(2) of the Environmental Protection Act is a person who can prove sufficient interest (party in the formal sense) and a person who can prove impairment of its right because of the location of the operation, nature or influence of the operation (party in the material sense).

Beside the relatively new solutions in the Environmental Protection Act, in the Croatian legal system there are other legal remedies for civil environmental protection regulated in subsidiary legal sources which have been adopted earlier.

Since civil environmental protection and liability for environmental damage is not entirely regulated by the Environmental Protection Act and other regulations on environmental protection, provisions of the Ownership and Other Proprietary Rights Act,[95] Civil Obligations Act[96] and Civil Procedure Act[97] are used on a regular basis. Thereby, filing a claim according to the provisions of the Ownership and Other Proprietary Rights Act, Civil Obligations Act and Civil Procedure Act at the same time serves for the realization of direct private legal protection of injured or threatened rights of an individual as well as for indirect environmental protection.

1.3. Injunctive relief in environmental litigation

Pursuant to Article 110(2) of the Ownership and Other Proprietary Rights Act, a property owner who is exposed to excessive indirect emissions is entitled to request elimination of the causes of such emissions and compensation for damages caused by these emissions from the owner of the property which the emissions originate from. The owner of the damage property may also ask the polluting property to refrain in the future from acts which cause emissions until necessary measures are taken to prevent excessive emissions.

[95] The Ownership and Other Proprietary Rights Act-consolidated text, NN 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12.

[96] Civil Obligations Act-consolidated text, NN 35/05, 41/08, 125/11.

[97] Civil Procedure Act-consolidated text, NN 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08, 57/11, 148/11, 25/13.

For the purpose of direct protection from emissions and indirect environmental protection, the property owner is entitled to submit a claim (*actio negatoria*) pursuant to Article 167(1) of the Ownership and Other Proprietary Rights Act. Thereby, Article 167(2) of the Ownership and Other Proprietary Rights Act recognizes the right to commence the proceedings of the property owner who can prove that the object is in his property, and that another person disturbs the owner in the execution of his power over property.

The holder of the property realizes the right to direct protection against non-allowed emissions by submitting a claim of trespass according to Chapter 28, Article 440-445 of the Civil Procedure Act. Pursuant to Article 441 of the Civil Procedure Act, during the hearing, discussion is limited to the facts of the last state of the tenement, and the act of the intrusion. Consequently, the right to submit a claim for trespass is recognized to the last holder, whether direct or indirect.

The question of liability for damage caused by pollution of the environment is an important part of civil environmental protection. Along with the provisions on general damage liability pursuant to Article 158 of the Environmental Protection Act, the Civil Obligations Act (as a general legal source of civil obligations law in the Republic of Croatia) also contains provisions of Article 1047 on the claim for elimination of danger of damage (for the environment).[98]

In comparison, the circle of persons to which a right to submit a claim for civil proprietary environmental protection is attributed is significantly narrower than the circle of persons who have a right to submit a claim for civil contractual environmental protection. Namely, pursuant to Article 1047(1) of the Civil Obligations Act, every person (even ones not directly endangered) shall be able to request that the other person eliminates the source which may cause substantial damage to him or to another person, and also to refrain from any action which may cause disturbance or danger of damage if the disturbance or damage cannot be prevented by using appropriate measures.[99] This is

[98] For more on the environmental claim pursuant to the provisions of Article 156 of Civil Obligations Act from 1978 see V. Rakić-Vodinelić, 'Ekološka tužba [Ecological claim]', II *Zbornik radova o zakonu o obligacionim odnosima* (1988).

[99] In the doctrine, dispute whether a person requesting elimination of the source of danger which poses a threat of causing significant damage from another person should also be exposed to that danger dates back to the time environmental claim was introduced in provision of Article 156 Civil Procedure Act from 1978.

the so-called environmental claim (*actio popularis*). The width of the circle of persons to which the right to submit environmental claim is attributed makes it an extremely interesting remedy for environmental legal protection. However, there are certain limits to its application. First of all, these limits refer to cases pursuant to Article 1047(3) of the Civil Obligations Act where, in cases where environmental damage is caused by an action in the public interest approved by a competent body, only compensation of excessive damage shall be requested.

Furthermore, although difficulties regarding the submission of a claim pursuant to the provision of Article 186(1) of Civil Procedure Act according to which a claim has to be defined have been removed by the adoption of Article 49 of the Environmental Protection Act,[100] the question of high cost incurred during the gathering of facts and evidence necessary for defining the claim which burden the potential plaintiff and make him unwilling to submit an environmental claim remains.[101]

In the Croatian legal system, the environmental claim is a specific example of the recognition of the right to submit a claim for injunctive relief to those who are able to prove their legal interest. Its careful consideration has induced the doctrine to explore a possibility of introducing other similar remedies for the protection of diffuse, fragmented or collective interests in the Croatian legal system, including the field of environmental protection. But, although analysis of the environmental claim has shown that the request for the elimination of the source of danger pursuant to Article 156 of Civil Obligations Act from 1978 (Article 1047 of Civil Obligations Act from 2005) combined with certain procedural mechanisms [undivided joinder (*litis consortium*)], the possibility of recognizing the status of party to certain proceedings to an organizational form which is not a legal person

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Affirmative answer would correspond to the case of class action while negative answer would correspond to the case of environmental claim (*actio popularis*). Rakić-Vodinelić, loc. cit. n. 98, at p. 442.

[100] Prior to the adoption of Environmental protection Act there were difficulties regarding determination of measures for prevention of damage or disturbance necessary for definition of the claim. Namely, earlier the plaintiff had no knowledge of the facts relevant for the choice of measures and without the statement of measures the court was not able to proceed because the decision would be beyond the boundaries of the claim. N. Gavella et al., 'Zaštita subjektivnih građanskih prava i građansko parnično pravo u Jugoslaviji [Protection of subjective civil rights and civil procedural law in Yugoslavia]', 9-10 *Naša zakonitost* (1989) p. 1018.

[101] Ibid.

(*standing* recognized to an organizational form which is not a legal person), by inquisitorial powers of the judge, opens the possibility of the application of an institution which resembles the American *class action*[102] institution – such an institution has not found place in Croatian legal system.[103] [104]

However, many years after the adoption of the environmental claim, a collective claim which may be used as a claim for protection of environmental collective interests and rights has been adopted within the provisions of Article 502a of the Act on amendments to the Civil Procedure Act from 2011.[105] Pursuant to Article 502a(1) of the Civil Procedure Act, the right to submit a claim is recognized if:

- the legal persons and entities are established in accordance with the law (non-governmental organizations, bodies, institutions or other organizations established in accordance with the law);

[102] Class action is a legal procedure which enables the claims (or part of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons (representative plaintiff) may sue on his or her own behalf and on behalf of other persons (the class) who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff (common issues). Only the representative plaintiff is a party to the action. The class members are bound by the outcome of the litigation on the common issues, whether favorable or adverse to the class, although they do not, for the most part, take any active part in that litigation. R. Mulheron, *The Class Action in Common Law Legal System: A Comparative Perspective* (Portland, Hart Publishing 2004) p. 3.

[103] V. Filipovac and M. Dika, 'Transfrontier pollution-liability for harmful consequences and class actions in Yugoslavia', in C.C.A. Voskuil, ed., *Hague-Zagreb-Ghent essays 8 colloquium on the law of International trade: Hague-Zagreb-Ghent colloquium in the law of international trade* (Apeldoorn, Maklu Publishers 1991) p. 13.

[104] Analyzing the provisions of the newly introduced claim for the protection of collective interests and rights Dika concluded that, since the right to submit a claim is not recognized to natural persons, Croatian law has not opted for a class action system. M. Dika, 'Nova procedura za zaštitu kolektivnih interesa i prava [A new procedure for the protection of collective interests and rights]', in I. Crnić, ed., *Novosti u parničnom postupku: Zakon o izmjenama Zakona o parničnom postupku* [Novelties in civil procedure: Act on Amendments to the Civil Procedure Act] (Zagreb, Organizator 2011) p.141.

[105] Act on Amendments to the Civil Procedure Act, NN 57/11.

- the legal persons and entities within their registered activity or activity determined by regulation deal with protection of legally determined collective interest and rights;
- the legal persons and entities are explicitly determined by law for the protection of certain collective interests and rights.

Pursuant to Article 502b of the Civil Procedure Act, a claim for the protection of collective interests and rights may contain:

- a request to determine that certain acts, including omissions of the defendant have caused violation or vulnerability of environmental collective interest and rights;
- a request for injunction against acts which cause violation or vulnerability of environmental collective interests and rights;
- a request to order the defendant to take necessary action to eliminate the inflicted consequences or possible harmful consequences of prohibited actions of the defendant, including restoration of previous state;
- a request for the publication of a judgment favorable to the plaintiff in the media.

1.4. Compensatory relief in environmental litigation

Along with the right to access to court, or access to a review procedure before a court of law or other impartial body for the purpose of the protection of a right to a healthy life and sustainable environment and for the purpose of environmental protection and the protection of some components of the environment the provisions of the Environmental Protection Act as a general legal framework for environmental protection also regulate the right to compensation for damages and litigation costs.

According to Article 157(1) of the Environmental Protection Act, a claim for compensation of damage and litigation cost includes only environmental damage and the cost of the elimination of immediate danger of damage and damage and immediate danger to protected species. For all other damages to natural and legal persons which occurred together with environmental damage or damage to protected species caused by an activity in the sense of Article 150(1) and (2) of the Environmental Protection Act (that is, pollution by the polluter, and compensation of the damage to the property of these person or any kind of economic loss or any kind of right, according to the Article 158 of Environmental Protection Act) is realized pursuant to the provisions of a

special regulation on civil obligations, which applies to these cases as *lex specialis*.
Since the Croatian legal system does not provide for the possibility of submitting a collective claim for compensation pursuant to Article 502c of the Civil Procedure Act, natural and legal persons in special proceedings for compensation of damage shall be able to invoke the verdict of a judgment favorable to the plaintiff in the proceedings commenced by a claim for the protection of environmental collective interests and rights. In that case, the court shall be bound by these determinations in the proceedings in which a person shall invoke them.

2. Judicial redresses in the environmental protection in Hungary

2.1. Judicial review of administrative decisions

In the previous chapter, three groups were distinguished in connection with the standing in judicial review procedures. The Hungarian system can be considered as 'interest-based' and the 'rules ensure a wide access to administrative procedures for members of the public and organisations even if they do not have a direct material legal interest in the case'.[106]
According to Article 327(1) of Act III of 1952 on the Code of Civil Procedure (hereinafter: HCPC), administrative actions may be brought by the client or any other party to the proceeding concerning provisions expressly pertaining to him. This means that the standing in the judicial procedure depends on the concept of the client in the administrative procedure.
According to Article 15(1) of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services (hereinafter: Ket.), the client shall mean any natural or legal person and any association lacking the legal status of a legal person whose rights or lawful interests are affected by a case. However, this concept is broadened by Article 15(3) Ket as, all owners of real estate properties located in the impact area specified in the relevant legislation, as well as any person whose right related to such properties has been registered in the real estate register shall also be treated as clients. This means a broad perspective to individuals to participate in the administrative procedure and right to sue in court. In

[106] S. Fülöp, 'Measures on access to justice in environmental matters (Article 9(3)). Country report for Hungary' (Belgium, Milieu Environmental Law and Policy 2008) p. 7, available at *ec.europa.eu/environment/aarhus/pdf/studies.zip* (14.5.2013).

addition, Article 15(5) Ket makes possible for NGOs to have standing in judicial review procedures: accordingly, in certain specific cases, the rights of clients may be vested upon, or client status may be granted to, non-governmental organizations whose registered activities are oriented for the protection of some basic rights or the enforcement of some public interest by legal regulations. Article 98(1) of Act LIII of 1995 on the General Rules of Environmental Protection (hereinafter: Kvt.) gives client status to NGOs. According to it, associations formed to represent environmental interests, other than political parties and interest representations – which are active in the impact area – (hereinafter referred to as organizations) shall be entitled in their areas of operation to the legal status of a party in state administration procedures regarding environmental protection. 'Requirements for standing under Hungarian general administrative law and connected environmental administrative law are not specific about the registration details (where and when an NGO was established), active membership or any other similar issues for NGOs. NGOs must be environmental and operate on the territory of the environmental effects of the planned or performed challenged activity.'[107]

According to these rules, NGOs have standing in judicial review procedures if the administrative case is an environmental protection case, a concept that was interpreted by the Supreme Court in a decision to provide uniformity in administrative matters no. 4/2010. (X. 20.). The court stated that NGOs have standing in cases where the environmental authority decides as an authority in the merit of the case within its jurisdiction, or gives a special assessment to another authority, where the jurisdiction is actually divided between the two authorities. In other environmental cases – apart from nature protection, where Act LIII of 1996 on nature protection provides the same status – NGOs don't have client status and consequently no standing in judicial procedure.

In Hungary, administrative remedies must be exhausted before contesting the decision in court. According to Article 109 of the Ket, a petition for the judicial review of the decision may be lodged if either of the persons entitled to appeal has exhausted the right of appeal in the proceedings of the authorities.

In the case of an omission of the authority, NGOs have standing too. According to Article 99(1) of the Kvt, in the event that the environment

[107] Fülöp, loc. cit. n. 106, at p. 11.

is being endangered, damaged or polluted, organizations are entitled to intervene in the interest of protecting the environment, and may request a government agency or local government to take appropriate measures within their jurisdiction.

2.2. Injunctive reliefs in environmental litigation

In Hungary, both individual and collective forms of injunctive actions are available. These actions are provided by different sources of law and their scope differs too, but they all aim to stop unlawful action and provide injunctive relief. Act IV of 1959 on the Civil Code (hereinafter Civil Code) provides different actions to individuals on various legal bases.

One of them is trespass. According to Articles 188-192 of the Civil Code, if a possessor is deprived of his possession without legal grounds or is restrained in maintaining such possession, he shall be entitled to protection of his possession. A person who is deprived of his possession or is restricted in its enjoyment shall, within one year, be entitled to file a request with the town clerk for the restoration of the original state of possession or for the discontinuation of restriction. The party who finds the decision of the town clerk prejudicial may appeal to the court within fifteen days of receipt of the decision to have the decision overturned. After one year, a possessor shall be entitled to request the restoration of the original state of possession or the discontinuation of restraint directly from the court. The practice of the courts showed that in most cases where environmental pollution (mostly air pollution) restrained the possessor in the enjoyment of possession, they chose this action.[108]

Legal action on the right of the neighbors is provided by Article 100 of Civil Code. It stipulates that an owner is obliged, while using a thing, to refrain from any conduct that would needlessly disturb others, especially his neighbors, or conduct that would jeopardize the exercise of their rights. If this obligation is violated by environmental pollution, the neighbors can sue on this basis too.

And finally, the Civil Code gives an injunctive action to individuals on the basis of tort liability too. According to Article 341 of the Civil Code, in the event of the presence of imminent danger, the endangered person shall be entitled to request the court to restrain the person imposing such

[108] J. Farkas, Gy. Gátos and Gy. Tarr, *A környezetkárosításból eredő igény érvényesítésének bírói gyakorlata* [The court practice of the actions in environmental damages] (Budapest, Láng Kiadó 1991) p. 62.

danger from continuing such conduct and/or to order said person to take sufficient preventive measures and, if necessary, to provide a guarantee.
In addition to these individual redresses, a collective injunctive action exists as well in Hungary. According to Article 99 of the Kvt, NGOs are entitled to intervene in the interest of protecting the environment, and may file a lawsuit against the user of the environment if the environment is being endangered, damaged or polluted. In this case, the party in the case may request the court to enjoin the party posing the hazard to refrain from the unlawful conduct (operation), or compel the same to take the necessary measures for preventing the damage. In the event of endangerment to the environment, the prosecutor is also entitled to file a lawsuit to impose a ban on the activity, according to Article 109 of the Kvt. In connection with the relationship of the two collective redresses, the order of the Chief Prosecutor of Hungary no. 3/2012. (I. 6.) states that public prosecutors shall cooperate with NGOs in order to coordinate their activities.
NGOs can generally sue the polluter directly independently of an administrative procedure, so even in the omission of the authority.[109] However it does not mean an alternative and fully independent action from the judicial review procedure. The Supreme Court stated in its decision (BH2008.46) that if the activity was permitted in an administrative procedure and the NGO did not participate in that procedure and did not object to the decision, and then on the same factual ground they have no right to sue against the polluter on this legal basis. So it does not give an alternative possibility to question the rightfulness of an administrative decision.

2.3. Compensatory reliefs in environmental litigation

In the case of environmental damages, individuals can sue against the polluter on the basis of tort liability. However, very few and limited collective actions are available in Hungary.
As we have mentioned, in the case of environmental pollution, two kinds of damages occur generally. Damages to common goods mean that the environment itself is damaged and by this, the society has suffered losses. In Hungary, the public prosecutor is entitled to sue in this case. According to Article 109 of the Kvt, in the event of endangerment to the environment, the prosecutor is entitled to elicit

[109] Gy. Bándi, *Környezetjog* [Environmental law] (Budapest, Szent István Társulat 2011) p. 81.

compensation for the damage caused by the activity endangering the environment. 'Although it is not written in the law, prosecutors usually require the damage payment directly to the Central Environmental Fund, a fund handled by the Ministry of Environment and Water Management that shall be spent on primary environmental protection purposes and on supporting NGO activities.'[110]

In the case of mass torts, Hungarian law only provides joinder of claims to the parties and no collective action is provided to them. Article 51 of the HCPC states that two or more plaintiffs may unite in an action and two or more defendants may be jointly charged if the claims under litigation involve the same cause of action and legal basis.

A special collective redress is granted by Article 103 of the Kvt. It states that if the injured party does not wish to enforce its claim for damages against the party causing the damage – on the basis of a statement pertaining to this made by the injured party within the period of limitation – the Minister may enforce said claim to the benefit of the environmental protection fund special appropriations chapter.

VI. Concluding remarks

It seems that the first part of the task of ensuring access to justice in environmental matters which the Republic of Croatia and the Republic of Hungary have undertaken by signing and ratifying the Aarhus Convention has been accomplished by a series of interventions and corrections in the sense of changes being made to the existing regulations and adoption of new legislation in the field of environmental protection. In this sense, the adoption of a new Environmental Protection Act in Croatian legislation which contains provisions on ensuring access to justice in environmental matters to the interested public was of special importance.[111]

In light of the announcement of the adoption of the Directive on access to justice in environmental matters in EU legislation and of the Seventh Environmental Action Programme, which has among its goals the determination of the compliance of the legislative framework of the EU in the field of environmental protection with emerging needs, and

[110] Fülöp, loc. cit. n. 106, at p. 23.

[111] See The Final Draft of the Environmental Protection Act of the Government of the Republic of Croatia from September 2007, available at *www.vlada.hr/hr/content/download/28579/389172/file/259-5.pdf* (27.5.2013).

ensuring better implementation of EU legislation in the EU Member States and enhancing access to justice in accordance with the Aarhus Convention, it is obvious that Croatia[112] [113] and Hungary will need to continue working on ensuring access to justice in environmental matters in order to reach the level required by EU legislation.

However, as the EU legislator has emphasized, ensuring access to justice cannot be done by implementation of the EU legislation in the national legal system alone. The other part of the task is more complex and long-term because it requires efforts in eliminating practical (procedural) obstacles to ensuring access to justice and efficient legal protection in the field of environmental protection. In this sense, special attention should be given to matters of standing, procedural cost, duration of the proceedings, initiative for gathering of facts and evidence, informing the public on the right to environmental protection and providing effective legal institutions for the realization of legal protection.

In order to acquire standing in collective proceedings in the Croatian legal system, associations must be established in accordance with the law, within their registered activity or activity determined by regulation they must deal with protection of legally determined collective interests and rights and they must be explicitly determined by law for the protection of certain collective interests and rights. In the Croatian legal system, along with few other legal systems of EU Member States, the objectives and purpose of the association laid down in its statute is a prerequisite for granting standing. The Hungarian legal system on the

[112] A Draft of the new Environmental Protection Act of the Ministry of Environmental and Nature Protection was published in April 2012, available at *http://www.mzoip.hr/doc/Propisi/Nacrt_Zakon_o_zastiti_okolisa.pdf* (27.5.2013). A Report on the Consultations with the interested public on the Draft of Environmental protection act published on 17 May 2013, available at *http://www.mzoip.hr/doc/Propisi/Izvjesce_17_05_2013_2.pdf* (27.5.2013).

[113] The Draft states its compliance with the provisions of the Directive 2003/35/EC of the European Parliament and the Council from 26 May 2003. (SL L 156, 25.6.2003) which provides for participation of the public in the development of plans and programmes which apply to environment and provides for amendments regarding participation of the public and access to justice of the Council Directive 85/337/EEC i 96/61/EC (SL L 257, 10.10.1996). See the Draft of the Environmental Protection Act of the Ministry of environmental and nature protection from April 2012, available at *http://www.mzoip.hr/doc/Propisi/Nacrt_Zakon_o_zastiti_okolisa.pdf* (27.5.2013).

other hand belongs to the group of countries in which geographical criterion is significant for the recognition of standing attributed to NGO's. The Hungarian legal system is criticized for not providing adequate access to justice because of the attempts of the administration to limit actions by members of the public by restricting public participation in cases where previously this participation was required.[114]

Unlike court proceedings, administrative review proceedings usually do not produce very high procedural costs. Exceptions are proceedings in which there is a need for lawyer representation and expert testimonies. Namely, high costs of court proceedings are largely attributable to their duration and generated by lawyers' and experts' fees. Since the Croatian legal system does not provide for an adequate system of legal aid, individuals often refrain from initiating such proceedings due to inability of bearing the cost of the proceedings. A better system of legal aid and consulting would definitely stimulate citizens to use the institutions for environmental protection more often. Exemption from bearing court fees in environmental protection proceedings would also be favorable. Although a complex system of legal aid exists in the Hungarian legal system, procedural costs are still serious obstacles to access to justice in environmental matters which will need to be removed in the future.

Apart from the fact that this would be in accordance with the provision of Article 9(4) of the Aarhus convention pursuant to which proceedings should be fair, equitable, timely and not prohibitively expensive, it could additionally also be justified by the fact that in certain cases, environmental protection proceedings are conducted in public interest. In the Croatian legal system, these proceeding are initiated by submitting an environmental claim (*actio popularis*) pursuant to Article 1047 of Civil Obligation Act and a claim for the protection of (environmental) collective interests and rights pursuant to Article 502a of the Civil Procedure Act. In the Hungarian legal system, NGOs are entitled to intervene in the interest of protecting the environment according to Article 99 of the Kvt.

[114] E. Pozo Vera, *An inventory of EU Member States' measures on access to justice on environmental matters. The Aarhus Convention: how are its access to justice provisions being implemented?* (Belgium, Milieu Environmental Law and Policy 2008) p. 6.

The question of the duration of the proceedings is not only relevant for procedural costs. Pursuant to Article 9(4) of the Aarhus Convention, proceedings should be timely. The urgency of environmental proceedings is provided by Article 174 of the Book of Rules for Courts.[115] A proceeding for trespassing is also urgent pursuant to Article 440 of the Civil Procedure Act which states that the court assesses the need for urgent proceeding in each case. Providing for the urgency of the proceedings contributes to the efficiency of legal protection in the field of environmental protection, especially in cases where the delay may affect the possibility of the reparation of damage.

In the Croatian legal system, the fact that the proceedings initiated by an environmental claim or a claim for the protection of environmental collective interests and rights serve for realization of public interest requires consideration of the strengthening of the inquisitorial powers of the judge. Namely, while the adversarial powers of the parties to the proceedings correspond to the fact that the proceedings are initiated for the realization of rights and interests of an individual, strengthening of the inquisitorial powers of a judge would correspond better to environmental proceedings for the realization of public interest. Apart from the fact that the parties would in this way not be required to bear the cost of the gathering of facts and evidence, it would also prevent the possibility of abuse of procedural powers (abusive litigation) and greater legal certainty in the proceedings would be accomplished.

Finally, providing information to the public on matters of environmental protection and adopting legal remedies for its realization enhances the efficiency of the legal system in providing access to justice in environmental matters. Namely, the insufficient familiarity of the public with legal remedies available in the field of environmental protection so far should be equally attributed to the fact that a series of regulations in the field of environmental protection have been introduced in Croatian legal system during a short period of time and to the fact that some of the regulations are still going through a process of change and harmonization with EU legislation. Hungarian environmental law was harmonized with EU legislation 9 years ago, in 2004, but lack of sufficient information may still be a problem. Therefore, raising public awareness on environmental protection is very important and it can be accomplished by conducting campaigns in the media, organizing

[115] Book of Rules for Courts-consolidated text, NN 158/09, 03/11, 34/11, 100/11, 123/11, 138/11, 38/12, 111/12, 39/13, 48/13 and 59/13.

consultations and enabling the public to participate in discussions on the drafts of regulations that need to be adopted.

Any effort in providing better access to justice in environmental matters is not only an effort to ensure the standards in environmental protection required by the EU legislator, it is more importantly an effort made in creating a society in which a human right to a healthy environment is respected and protected.

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Criminal law protection of the environment in Hungary and Croatia in the context of harmonization with the regulation of European Union

I. Introductory remarks

Life in a healthy and clean environment is one of the fundamental human rights today. It belongs to the so-called third generation human rights. The protection of this right is among the primary achievements of the modern age. It is multidisciplinary in a way that represents a combination of standards from different branches of law. The first step is the *ante delictum* protection, outside the sphere of criminal law, through administrative, civil, commercial and financial law regulations with their own sanctions. Then follows protection through criminal law, which is the *ultima ratio societatis*. The concept of criminal law protection of the environment means a complex system of ethical, criminological, criminal, penological and other content that is linked to the global effort of environmental protection.[1] The offences in this sphere have a specific structure that shifts the need for protection to a very early stage. Such structure is necessary if we want it to be effective. Croatia was faced with a number of necessary reforms within its legislation thus including the field of environmental offenses. Today it is obvious that environmental pollution is a paradox situation in its nature – the most severe cases of environmental pollution are mainly the result of the human desire for ever faster, better and stronger technological progress while this pollution is becoming the biggest obstacle to further

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[1] L. Cvitanović, 'Kaznenopravna zaštita okoliša [Criminal law protection of environment]', in O. Lončarić, et al., eds., *Pravo okoliša* [Environmental law] (Zagreb, Organizator 2003) p. 205.

progress.[2] On the verge of joining the European Union, the requirements of environmental protection were focused on improving and standardizing existing offenses but also on creating new ones. Having this in mind, the authors will present and analyze the previous and the current state of environmental crimes in Croatia and Hungary.

II. Criminal law protection of the environment in Croatia

1. The need for reform in the field of environmental crimes in Croatian criminal law

The previous standardization of environmental offenses (under the Criminal Code from 1997, hereinafter: CC/97)[3][4] was not *a limine* eliminated because it had its good sides, but the whole chapter was indeed reformed by taking into account the relevant provisions of the preceding regulation. The first question that had to be resolved was the question of choosing a model of this new regulation so that we could *de lege ferenda* talk about a satisfactory normative framework of environmental protection within criminal law. Approaching this legal regulation, the legislator had to choose between three possible models. The first of these models is the so-called anthropocentric model, which puts emphasis on the protection of human rights and the society. Anthropocentric choice was present in the earlier theory and practice but it is still not completely abandoned. Its remains are visible in some of the positive provisions. It implies that the environment is a synonym for "human environment" and suggests the subordination of the environment to society in every aspect. The environment is seen through the prism of satisfying human needs. Carić wrote that the environment under this concept is a second best good which receives indirect protection through the protection of the classic legal goods: life and health.[5] Having this in mind, it is useful to note that the Croatian

[2] B. Herceg and I. Ilić, 'Onečišćenje/Zagađenje okoliša/životne sredine kroz prizmu hrvatskog i srpskog kaznenog/krivičnog zakonodavstva [Environmental pollution in the Croatian and Serbian criminal legislation]', in thematic collection of papers *Ecology and Law* (Niš, Pravni fakultet 2011) p. 258.

[3] Official Gazette, Narodne novine, NN 110/1997, 27/1998, 50/2000, 129/2000, 84/2005, 51/2001, 111/2003, 190/2003, 105/2004, 71/2006, 110/ 2007, 152/2008, 57/2011, 77/2011, 125/2011, 143/2012. This Act is out of force.

[5] A. Carić, 'Ugrožavanje čovjekove okoline i krivično pravo" [Endangering human environment and criminal law]', 1-2 *Zbornik radova Pravnog fakulteta u Splitu* (1991) p. 36.

Constitution still needlessly maintains this concept. For example, in Article 3 and Article 50 it uses expressions such as 'human environment'.[6] The second model, biocentric, prioritizes the protection of plants and animals. As it can be seen, these two models provide protection for the environment only indirectly. The third concept is the ecocentric model which provides direct environmental protection, putting it in the forefront. Here, the environment is the main object of protection and society has the duty and responsibility, including criminal law responsibility, to safeguard it from pollution.[7] Therefore, such a model is considered in theory to be the most sophisticated, and legislation that accepts it is the most advanced when it comes to the criminal law protection of the environment. Having this in mind, we should welcome the fact that the Croatian legislator has accepted this last model in the new Criminal Code (hereinafter: CC/13),[8] which entered into force on 1 January 2013. With this option, Croatia has embraced the contemporary European and international trends when it comes to environment.[9]

The object of legal protection is determined in accordance with the Croatian Environment Protection Act,[10] as Article 3(1)1 sec. 22 states that the environment is the natural environment and communities, including human beings, that makes their existence and their further development: air, water, soil, the earth's crust, energy and material resources and cultural heritage as part of the environment that is created by man; all in all its diversity and complexity of their mutual action.

The CC/97 had dedicated the entire chapter XIX to environmental protection and had a total of 13 criminal offenses that had the environment as an object of legal protection. The decision for such standardization was important for two reasons. First, this complete and precise way of regulation represented a novelty. The German and Austrian legislation was followed as a model. Until then, there were certain environmental incriminations but they were located within

[6] Ustav Republike Hrvatske [Constitution of Republic of Croatia] NN 56/1990, 135/1997, 113/2000, 28/2001, 76/2010.

[7] Herceg and Ilić, loc. cit. n. 2, at p. 256 at p. 257.

[8] NN 125/2011, 144/2012.

[9] About the intention of the legislator to follow the ecocentric approach see K. Turković, et al., *Komentar Kaznenog zakona* [Commentary on the Criminal Code] (Zagreb, Official Gazette 2013) p. 263.

[10] NN 110/2007.

various chapters of the penal code, and also some new incriminations were added. Second, these environmental offenses have been placed before some other legal objects such as general safety of people and property, security of payment and business operations, public order or official duties, which speaks volumes about the attention that this protection has received for the first time.

These incriminations were largely designed in accordance with the ecocentric concept, but some of them unjustifiably retained the anthropocentric approach, for example the incrimination of endangering the environment by noise from Article 251 CC/97 or the importation of radioactive or other hazardous waste into the Republic of Croatia under Article 253 CC/97. Also, we could find some incrimination that served to protect the environment under other chapters.

Croatian environmental offenses have a specific structure. All, except of the qualified forms, are shaped as *abstract endangerment offenses*, which mean that they penalize the very dangerous behavior in order to prevent not only injury but also a concrete threat. These offenses are called *formal offenses*. Thus, the protection of the environment is shifted to a very early stage, which is justified, because otherwise, the punishment of the concrete threat only would be inadequate in terms of any kind of criminal law protection.

The basic offense of this chapter is contamination of the environment, which was introduced by the Croatian Criminal Code in 1977 under the name "environmental pollution". Then it was a novelty in the criminal law, as in previous criminal law regulations there were only some incriminations that protected the environment indirectly as a secondary object (with primary attention being paid to the economy, public health, and public safety). Since then, this incrimination was changed in both name and formulation, it has modified object of protection, but it has retained its place as the central offence in the entire chapter of environmental protection. *Ratio legis* of this provision is to prevent a breach of natural balance and genetic modification.[11] In the CC/97, this conduct was regulated in Article 250, but certain deficiencies remained. For example, the basic flaw was the need for refining actions via which it was possible to commit an offence and it was necessary to define the term 'considerable damage'.

[11] For a detailed analysis of this incrimination and each paragraph see Herceg and Ilić, loc. cit. n. 2, at p. 264.

Relating to environmental offenses, in the Croatian literature we can usually find data that the number of environmental offences in relation to the total number of crimes in Croatia does not exceed 1.5-2%. Of course, this fact does not fit the actual situation. These offences are by no means reduced to a minimum, especially if you take into account the environmental offenses in Croatia during the summer months (pollution, arson, deforestation). Another major problem is latency and the very weak motivation of citizens to report these crimes. They are traditionally considered to be 'victimless' and if a victim does exist, it is not a direct one. In most EU countries, crimes against the environment are considered not to be relevant for investigation because it directly favors financial interests and power centers that avoid the use of technology that is ecofriendly, illegally dispose waste, overexploit natural resources, smuggle protected species and thus increase their profits. This was confirmed by Friz Krois from the Austrian Environment Agency (*Umweltbundesamt*) in Zagreb tin 2010, when talking about the new Austrian legislation in this area. In countries outside the EU, the situation is even more serious. For example, in 2009 in Serbia there were no convictions for environmental crimes, while in 2008 there was only one single verdict. [12]

2. The new Croatian criminal law protection of environment

The new regime of criminal law protection of environment in Croatia is much more complete than the old one. The best argument to that claim is the fact that the new chapter of criminal offences against environment (chapter XX.) contains twenty criminal offences and very precisely regulates almost all imaginable forms of severe endangerment of the environment. Seven offences are completely new in Croatian system. Those are: polluting from floating objects (Article 194.), endangering the ozone layer (Article 195), destroying protected natural values (Article 200), natural area destruction (Article 201), trading in protected natural values (Article 202), illegally introducing wild species or GMOs into the environment (Article 203) and alteration of water regime (Article 210).

Besides complexity, another characteristic of the new legislation is, without any doubt, the fact that it is significantly stricter when compared to the old legislation. That brings us to the conclusion that the legislator

[12] Herceg and Ilić, loc. cit. n. 2, at p. 261.

has given much more gravity and attention to this area of criminal law than before. The legislator has obviously recognized the great social danger of such behaviors and also the necessity for their appropriate prevention. The tightening of the new regime is based on at least five reasons.

First of all, after analyzing and comparing old and new provisions, one can conclude that the new CC/11 has significantly increased the largest possible punishment for this kind of offences. Instead of ten years, the new maximum sentence is now fifteen years of incarceration for most serious forms of environment endangerment. Also, the possibility of parole is generally narrowed down and is no longer possible in such cases.

Second, we have already mentioned that the new CC/11 has introduced seven new criminal offences. Besides that, it also modified 'old' offences in the sense of introducing new forms or modalities of conducts that were not punishable before. In that way, the legislator has significantly extended the criminalized zone and also harmonized Croatian legislation with relevant international documents, especially with Directive 2008/99/EC of the European parliament and of the Council on the protection of the environment through criminal law.[13] A detailed analysis of these changes would be beyond the limits of this paper. Instead, we will remain focused only on what we consider to be the main characteristics of the new regime.[14]

Third, most criminal offences in this chapter are constructed as a criminal offence of endangerment, which means that actual extirpation of the protected object is not *conditio sine qua non*. That also spreads the zone of criminalization.[15] Thus there is a domination of so-called criminal offences of abstract endangerment. The legislator has chosen such concept because it intended to ensure as complete a realization of the above mentioned ecocentric approach as possible.[16]

Fourth, in most criminal offences from this chapter even the attempt of criminal offense is punishable. In criminal law, the attempt is not always punishable, only in situations in which the legislator estimates that it is

[13] OJ L 328, 6. 12.2008, pp. 28-37.

[14] Details about these changes can be found in Turković op. cit. n. 9, at p. 284.

[15] More about criminal offences of endangerment in P. Novoselec and I. Bojanić, *Opći dio kaznenog prava* [General part of Criminal law] (Zagreb, Pravni fakultet 2013) p. 134.

[16] Turković, et al., op. cit. n. 8, at p. 263.

necessary to also punish early stages of criminal conduct. According to the attempt provision in the general part of the Croatian CC/11 (Article 34), attempt is always punishable if the commission of a criminal offence is punishable by at least five years of imprisonment. If this is not the case, the attempt is only punishable if it is specially regulated (in the special part of the CC/11). However, such cases are not abundant. In chapter XX the attempt is punishable in most cases on the basis of the abovementioned general rule with five or more years of imprisonment (Article 34), but the legislator has also used the other mentioned option and prescribed the punishability of the attempt in cases where the maximum sentence is three years (Article 210/4).[17]

Fifth, almost all of these offences are punishable in negligent form. It is a well-known fact that the intentional commission of crime is always punishable. Negligence is punishable only if it is specially regulated as such. Legislator decides to punish negligence only in very severe cases of the endangerment of legal goods. This is also one of the reasons that make obvious that the Croatian legislator emphasizes environmental protection. In practice, negligence can be easier to prove and the perpetrator will not avoid criminal responsibility because the prosecutor is not able to prove intentional form of criminal conduct.

We will give special attention to the provision of Article 213 that includes a possibility for the court to release a perpetrator of criminal offences regulated in Articles 194-198 from punishment if he or she voluntarily eliminates the endangerment before serious damage occurs. It is a case of so-called *effective remorse* (that is also the title of this provision) for those perpetrators who minimize the consequences of their acts after they have formally finished them. That can be a huge privilege. However, it is only an option for the court, not an obligation. This provision is inspired by the endeavor of the legislator to stimulate perpetrators to remove consequences before severe consequences occur.[18] In our opinion, this provision deserves criticism. The explanation of the legislator indicates that the provision is based on so-called criminal policy theories from old German theory, according to which provisions should motivate perpetrators to abandon their efforts to conclude criminal offences. However, in new German criminal law literature, these theories are considered to be outdated because they are based on the wrong premise that every perpetrator is familiar with

[17] Alteration of water regime, Art. 210.
[18] Turković, op. cit. n. 9, at p. 263.

criminal provisions and knows about such possibility. Since that is usually not the case, it is wrong to claim that this provision will 'motivate' the perpetrator to abandon his actions.[19] Besides, it is not justified to equalize the perpetrator who shows effective remorse (but has already formally finished his criminal act) with the perpetrator who voluntary abandons the attempt (Article 35 CC), and that is exactly what the legislator does. We also fear that this provision could serve for misuse in practice as an unjustified privilege for powerful companies who pollute the environment most often. That is why we think that this provision should be erased *de lege ferenda*.

III. Criminal law protection of the environment in Hungary

1. Regulatory antecedents and the characteristics of Hungarian environmental crime

The protection of the environment has a strong tradition in Hungarian criminal law. The statutory definition of environmental protection was already included in the first codified Hungarian Criminal Code (Act V of 1878) which enforced actions to be taken against the pollution and poisoning of wells and waters.

Chapter XII of Act V of 1961 included a separate statutory definition named as 'well poisoning'. The 'hidden' amendment of the Criminal Code in Act II of 1976 on the Protection of the Human Environment made Hungary one of the first countries to step up against environmental crimes, however, the statutory definition of 'the crime against the environment'[20] had already suggested that it would be unsuitable to fulfill its desired function, since it was general to the point of being inapplicable[21] and hence there was no doubt why not a single proceeding or lawsuit was reported during the effect of the law.

Modern Hungarian environmental criminology dates back to the approval of Act IV of 1978. The legislature aimed at protecting the environment and nature with two statutory definitions (environmental harm and offences, harm to nature). In those times, university textbooks

[19] For critics of criminal-policy theories in German literature see C. Roxin, *Strafrecht, Allgemeiner Teil Band II* (München, Verlag C. H. Beck 2006) § 30, p. 17.

[20] N. Nagy, 'A környezetvédelem büntetőjogi szabályozása hazánkban [The criminal law regulation of environmental protection in our country]', 12 *Cég és Jog* (2003) p. 17.

[21] F. Márkus, 'Az emberi környezet büntetőjogi védelme [The criminal law protection of the human environment]', in L. Trócsányi, eds. *Környezetvédelem és jog* (Budapest, Akadémiai Kiadó 1981) p.187.

of criminal law did not even discuss these crimes, showing how environmental crimes were treated as' 'stepchildren'.[22]

In 1996, the crime named 'the illegal placement of environmentally hazardous waste' was codified into Hungarian criminal legislation. This crime has been included in the Criminal Code since 2005 as 'the violation of the order of waste management'. In order to identify[23] the characteristics of Hungarian environmental crime, several comprehensive empirical research were carried out – with the help and assistance of the researchers[24] of the National Institute of Criminology[25] – in the past decade. Based on criminal statistics, Hungarian environment criminology could be labeled as 'symbolic'[26] in the 1980s, because there were hardly any crimes reported. The registered environmental crimes started to increase from the early years of 1990. This practically meant that for example the registered environmental offences passed the '10-limit' in 1994. Nowadays, registered environmental crimes have been around a few hundred annually.

The perpetrators of environmental crimes are mostly first-time offenders, while the rate of higher-educated people within the perpetrators is significant. The sanctions against the criminals are usually financial penalties, however it could be seen in the past few years that the imposition of penalties has become more strict and severe, and it also happened that the Court imposed imprisonment on the perpetrators. In case of harm or damage to nature, 1/3 of the perpetrators are foreign citizens, of which the number of Italians is the highest (2/3 of the foreign perpetrators). The accused foreigners also include: German, Romanian, Bulgarian, Austrian and French perpetrators.

[22] J. Földvári, '*Büntetőjog Különös Rész* [Criminal Law Special Part] (Budapest, Tankönyvkiadó 1972) p. 50.

[23] I. Görgényi, 'The protection of the Environment by Criminal Law', 3-4(37) *Acta Juridica Hungarica* (1995/96) pp.189-99.

[24] K. Tilki, 'A környezetkárosítás és a természetkárosítás jogalkalmazói gyakorlata [The legal praxis of environment and natural damaging]', in F. Irk, szerk. *Kriminológiai Tanulmányok 41*. (Budapest, Országos Kriminológiai Intézet 2004) pp. 217-248; Sz. Dunavölgyi and K. Tilki, 'A környezeti szabálysértések vizsgálata a környezetvédelmi szakhatóságok tevékenységén keresztül [Survey of the environment offences trough the activity of the environment service]', 9 *Rendészeti Szemle* (2008) pp. 71-92.

[25] J. Horváth, 'Környezeti bűnözés – környezetvédelmi nézőpontból [Environment crime from the environment viewpoint]', 11 *Belügyi Szemle* (2005) pp. 17-36.

[26] Tilki, op. cit. n. 24, at p. 217.

Merely a few accused individuals were in pre-trial detention. In the case of environmental crimes, environmental protection authorities have a significant role, since they can usually identify and detect the perpetration of environmental crimes.

The national park-directorates (of Hortobágy, Őrség, etc.) should be mentioned since their 'people' (rangers, biologists) are 'out there' protecting and wandering around the nature conservation areas, forests, etc., and they therefore witness environment harms in the first place.

In connection with the official persecution of environmental crimes, the high quality professional work of the customs officers[27] of the National Tax and Customs Administration of Hungary (NTCA) must be mentioned as well.[28] The customs officers – like the rangers – are in a special position, because they can be the first to potentially detect environmental crimes.

Customs officers apply a special method of risk analysis, which means that under specific circumstances, the shipment is subject to customs examination and clearance even when everything seems legal. These events include incriminating moments or the suspicion of environmental harm.[29]

In the literature, we can read about a proposal to effectively detect environmental crimes according to which an environmental investigative body should be established.[30]

The only thing that has been implemented from this proposal is that under the Economic Security Department of the National Police Headquarters, the Environmental Crimes Unit has been established.

However, such a unit can only function effectively when it possesses professional environmental experience and databases which are prerequisites of successful findings; moreover it has to possess such operative reconnaissance capabilities and criminal records that would provide support and would mean a solution to the currently lacked procedural options.

[27] Dunavölgyi and Tilki, op. cit. n. 24, at p. 79.

[28] K. Tilki, 'Új jelenségek a környezeti bűnözés körében [New phenomena in the environment crime]', in K. Gönczöl et al., szerk. *A bűnözés új tendenciái a kriminálpolitika változásai Közép-és Kelet-Európában. Kriminológiai Közlemények Különkiadása a Nemzetközi Kriminológiai Társaság 65. Nemzetközi Kongresszusának előadásai 2003.mácius.11-14*. (Miskolc, Bíbor Kiadó 2004) p. 335.

[29] Tilki, op.cit. n. 28, at p. 337.

[30] Horváth, loc. cit. n. 25, at p. 33.

The problem with pursuing environmental crimes is that nowadays there are no such polymaths (”renaissance men”) who could hold different professions at a high level. It is unnecessary to retrain environmental specialists to detectives, and professional policemen cannot be expected to be naturalists or study plant anatomy in their free time either.
The solution would be to establish a group of professionals (policeman, biologist, zoologist, etc.) and if their work was supported by up-to-date information and communication devices and technologies.
Organizing quick and mobile scout units with lab and reconnaissance cars would be an effective tool to catch or surprise someone in the act as well as to scout.[31] Establishing an independent detective unit for pursuing environmental crimes is not on the agenda. First of all it has organizational barriers (professional jealousy, rivalry, etc.); secondly it lacks the commitment of the political elite.

2. The current Hungarian criminal legislation

Act C of 2012 on the Criminal Code of Hungary came into effect on July 1, 2013. Chapter XXIII of the new Criminal Code regulates „The crimes against the environment and the nature”.[32] According to the legislature nowadays there is a demand for the autonomous protection of the environment, therefore it is justifiable to include a statutory definition of environmental protection separately from all other statutory definitions of public health in a separate chapter within the law.
The statutory definitions within this chapter are multiple and diverse, but they have mutual characteristics that make them belong to the same chapter. The crimes that belong to this chapter are:

- damage to the environment,
- damage or harm to nature,
- animal cruelty,
- poaching,
- netting,
- organizing illegal animal fighting,
- the violation of the order of waste management,
- ozone-depleting substance abuse,
- radioactive substance abuse,
- operation of nuclear installations abuse,

[31] Ibid.
[32] R. Román, ‘Crimes against the Environment and the Nature in the New Criminal Code’ 14 *Journal of Agricultural and Environment Law* (2013) pp.74-98.

- misuse or abuse of nuclear energy.

The inclusion of crimes like animal cruelty and the illegal organizing of animal fights within the chapter of environmental protection is reasoned by the same legal subject, the animal care, and the humanitarian treatment towards them. This shows a strong relation to the nature and wildlife that is subject to environmental crimes and harm to the nature, as well as being related to the protection of the respective flora and fauna. This also requires the creation of new statutory definitions, namely the statutory definitions of poaching and netting.

The inclusion of statutory definitions related to nuclear energy within the chapter for environmental crimes is reasoned by the fact that the European Union[33] considers the misuse and abuse of nuclear energy as an environmental crime (see Directive 2008/99/EC on the protection of the environment through criminal law).[34]

The two 'most important' statutory definitions of this chapter are environmental damage (Criminal Code Article 241) and the damage to nature (Criminal Code Articles 242-243).

The statutory definition of environmental damage is a framework disposition. The content of this statutory definition are the so-called field specific laws like the statutes and measures for the protection of the air and land. The subjects of environmental crimes are land, air, water, flora and fauna, and their components. The definition of specific subjects of perpetration is given by the environmental protection law.

The criminal conducts of the crimes are the significant pollution or other hazardous acts (endangering) and harm or damage to land, air, water, and to the flora and fauna. Pollution in itself is not as high-level a threat to the society as to consider it a criminal act.

This requires a significant amount of pollution. The definition of significant amount – since it differs in every case – is up to professionals to decide. Due to the fact that the hazard and toxicity of different chemicals are distinct, the culpability of the act cannot be tied to specific multipliers of a threshold limit. That is why the law ties the criminal ascertainment to the 'significant amount' of pollution.

[33] L. Fodor, *Integratív környezetjog az Európai Unióban és Magyarországon* [Integrative Environmental Law in the European Union and in Hungary] (Miskolc, Bíbor Kiadó 2000) pp. 50-70.

[34] OJ L 328, p. 28-37.

The basic and specific cases of harm to the environment can be committed as negligent acts. The penalties for environmental crimes as a result of negligent acts are in level with the results occurred.
The statutory definition of harm to the nature is systematically articulated in two separate Sections, the first being individual protection (Article 242), while the second includes regulations related to natural assets and territories (Article 243).
The statutory definition of harm to nature is a framework disposition as well. The content of the statutory definition includes field-specific statutes and measures as well as Union norms. In case of crimes that harm the nature, the subject of perpetration is first the highly protected being of a living colony, secondly the beings of the protected living colonies. In the latter case the harm to the nature implies a criminal threat only when the value (that is defined in the statute and measured in money) of these beings of the protected living colonies reaches the pre-determined minimum value that is measured in money.
Furthermore, the subject of the perpetration is the being of a living colony that is defined in Appendix A and B of Regulation 338/97/EEC of the Council of the European Communities on the regulation of the trade and protection of the species of the wild (both flora and fauna).[35]
The criminal conducts for the aforementioned perpetration subjects are: acquisition, keeping, releasing, and importing into the country, exporting from it, transit through the country, trade, impairment and destruction. The legislation also regulates the specific cases of harm to nature. The culpability of the negligent act is exclusive to the specific case, while the basic case can only be carried out deliberately.
Section 243 includes provisions related to the protection of natural assets and territories. The perpetration subject of the criminal act is the Natura 2000 territory, the protected cave, the ecosystem of the protected nature conservation areas, and its habitat. The definitions of the specific categories are given by the environmental protection law. The statutory definition takes into consideration Directive 2009/147/EC on the protection of wild birds[36] (bird protection guideline), and Directive 92/43/EEC on the protection of natural habitats, plants and wild animals[37] (habitat protective guideline).

[35] OJ L 61, 3.3.1997, pp. 1-69.
[36] OJ L 20, 26.01.2010.
[37] OJ L 206, 22.07.1992.

The criminal conduct of the crime is realized by 'changing and altering'. The result of the altering is such a change that causes real damage or detriment, therefore any kind of activity that is against those is included in the environmental protection law. The altering is therefore the change of the nature, aspects of it, the use and characteristics of the territory, which is a broad definition also including the change in the size of the territory. Assessing the significant amount or size is always a question for the professionals.
The law orders the negligent perpetration of the crime to be punishable.

3. The regulatory dilemmas of environmental criminology

When analyzing the criminally relevant conducts that harm nature, it should be clear from the start that there is no such production that does not harm the environment: it is only a possibility in some fields,[38] without the knowledge of a concrete solution.[39]
The – criminal law – protection of the environment is a reflection of the social image of a democratic state, since environmental protection should be a part of democratic (and humanist) national activities.[40]
Environmental protection requires money, a lot of money. Criminal law can function effectively only when the tools and systems (the environmental protection services, different air quality meters, etc.) of other fields of law (civil law, administrative law, etc.) are provided with serious financial background. Those social and economic policies which aim at economic growth and temporary social welfare and result in a worse condition of the environment are wrong. It must be seen that the legal regulation of environmental protection is inseparable from the regulation of the economy as a whole.[41]

[38] J. Vigh, 'Környezetvédelem a neopozitivista kriminológia szemszögéből [Environment protection from the viewpoint of the neo-positivist criminology]', 12 *Rendészeti Szemle* (1991) pp. 17-18.
[39] A. Tamás, 'Büntetőjogi felelősség a környezetvédelmi törvények megszegéséért [Criminal liability due to offenses against environmental rules]', in G. Kilényi and A. Tamás, eds., *A környezetvédelmi jogi szabályozás fejlesztésének egyes kérdései* (Pécs, MTA Dunántúli Tudományos Intézet – Országos Környezetvédelmi és Természetvédelmi Hivatal 1980) p. 104.
[40] Ö. Zoltán, 'A környezetvédelemről és szabályozásáról [About environmental protection and its regulation]', 6 *Magyar Jog* (1994) p. 206.
[41] A. Sajó, 'Az alkotmányosság és lehetőségei a gazdaságban, különös tekintettel a környezetvédelemre, mint gazdaságilag releváns tevékenységre [The

In the case of a market economy – due to its characteristics – government intervention must be considered for the protection of the environment.[42] This is especially true if the given state aims at establishing a social market economy since then the social image of the economy itself demands the protection of the environment.[43]

In environmental criminology, one of the biggest problems is that it is hard to identify the legal subject of environmental crimes.

Environmental crimes are often realized not as the threatening or harm of it, but rather as the satisfaction of human needs.[44]

According to some theorists – with whom we fully agree – environmental crimes could be classified as economic crimes. The reason is that those crimes that seriously damage the environment are usually related to production. If manufacturers want to comply with the continuously stricter environmental protection requirements, then it would demand additional investments that would affect their economies of scale and profitability. The modernization could drive those manufacturers that possess outdated technology and use outdated methods out of the business, and therefore they face the choice of either closing their activities and quitting doing business or – taking the risk involved – keeping on producing and polluting the environment. The Hungarian practice shows that due to the unacceptable criminal protection of the environment, many people do so. Therefore it should be wise to consider that in order to ensure more effective protection, environmental crimes should be transferred to the category of economic crimes.[45]

Punishing environmental criminals is not a solution for the environmental damage, and in turn the reparative approach (e.g. in

constitutionality and its eventuality in the economy, with environmental protection as economy relevant work in view]', 3-4 *Állam- és Jogtudomány* (1987-88) p. 474.

[42] M. Julesz, 'Környezetjogi értékelemzés [Value analysis in environment law]', 4 *Magyar Jog* (2008) p. 194.

[43] Zoltán, loc. cit. n. 40, at p. 207; Julesz, loc .cit. n. 42, at p. 194.

[44] Tamás, loc. cit. n. 39, at p. 103.

[45] L. Pusztai, 'Gazdasági büntetőjog a változó társadalomban" [Economic crime in an altering society]', in L. Pusztai, ed. *II. Német-Magyar Büntetőjogi és Kriminológiai Kollokvium* (Budapest, Közgazdasági és Jogi Könyvkiadó – Országos Kriminológiai és Kriminalisztikai Intézet 1994) pp. 141-142; M. Tóth, *Újabb szempontok a gazdasági bűncselekmények értelmezéséhez* [Novel viewpoints to the interpretation of economic crimes] (Budapest, Igazságügyi Minisztérium Oktatási és Továbbképzési Főosztály 1998) p.115.

integrum restituio) should be prioritized more widely when applying sanctions.

One of the main objectives of criminal law in capitalist societies is to enforce the market rules, and thus to prevent the possible avoidance of the market laws.[46]

Most of the 'market avoider' businesses cannot be threatened with different civil law sanctions (like compensations and remedies).[47] The so-called optimal compensation amount that is necessary for deterrence usually exceeds the ability of the delinquent to pay, and normally community sanctions or imprisonment penalties would be appropriate.

IV. Concluding remarks

Bearing in mind all that has been said, we can conclude that the new legislative changes have significantly modernized Croatian criminal law when it comes to environmental protection. All the relevant international standards from Directive 2008/99/EU and international conventions have been fully accomplished.[48] Besides that, the legislator has also decided to follow the German model.[49] The scope of criminalization has been significantly spread out by introducing seven new Croatian offences, adding new modalities to the old ones, dominated by abstract endangerment and by punishability of negligence and attempt. The legislator has given more gravity to this area of criminal law and this is a more appropriate solution if one bears in mind their great social danger. Environmental protection has a relevant tradition in Hungarian criminal law. The two most important statutory definitions are: environmental damage and damage to nature. Criminal law can function effectively only when other fields of law (civil, administrative...etc.) are given serious financial background. Social and economic state policies which aim at economic growth and temporary social welfare mainly result in environment damage. It must be seen that the legal regulation of environmental protection – including protection by criminal law – is inseparable from the regulation of the economy as a whole.

[46] M. Julesz, 'Environmentalism in Today's Eastern Europe', 5 *The Open Law Journal* (2013) p. 11.

[47] R. A. Posner, 'An economic theory of the criminal law', 6/85 *Columbia Law Review* (1985) pp. 1193-1194.

[48] See more about that in Turković, op. cit. n. 9, at p. 284.

[49] Ibid.

Igor Bojanić*

The protection of the environment through criminal law in the Republic of Croatia and its harmonization with European standards

I. Introduction

The basis of legal protection of the environment results from the respective constitutional provisions on fundamental freedoms and the rights of man and of the citizen (economic, social and cultural rights). The provision of Article 3 of the Constitution of the Republic of Croatia affirms nature and human environment as the highest values of the constitutional order.[1] The protection of the environment through criminal law is of subsidiary nature because such protection should be *ultima ratio*; namely, when the environment as particularly important legal goods cannot be protected in a milder way. Environmental protection is primarily achieved outside criminal legislation, by non-criminal and non-repressive measures (branches of law). From the criminal law and political point of view, criminal law builds on the system of environmental law or environmental protection law, which further implies the fragmentation of legal protection achieved only in the fragment of the most important environmental values and only in respect of the most hazardous forms of its breach or violation.[2] Accessoriness of the protection of the environment through criminal law also originates from such features since environmental law includes dozens of laws and hundreds of by-laws directly or indirectly referred to by criminal charges. Criminalisation of endangerment and threat to the environment over the last forty years has become an important part of criminal law, as well as the subject of an increased interest in criminal law theory. In modern criminal law, there are various models of regulating environmental crimes stemming from the corresponding theories. These are anthropocentric, ecocentric, compromise and

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[1] Constitution of the Republic of Croatia, Official Gazette, Narodne Novine, NN 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10.

[2] L. Cvitanović, 'Kaznena djela protiv okoliša' [Environmental crimes], in: P. Novoselec, ur., *Posebni dio kaznenog prava* [Special part of criminal law] (Zagreb, 2007) p. 269.

administrative management theory.[3] Anthropocentric theory focuses on the protection of individual interests. Environmental endangerment is relevant to criminal law because it endangers people. Environmental endangerment that does not pose a serious threat to the well-being of individuals should not be considered an illegal activity that should be sanctioned by criminal law. In contrast, proponents of ecocentric theory point out that the environment itself deserves protection through criminal law. Such approach justifies extensive environmental protection through criminal law. Compromise theory justifies environmental protection with respect to its function and importance for the population. Although this approach seems to be appropriate, just as any compromise position, it can be argued that it lacks criteria of demarcation between sharply opposed positions of ecocentric and anthropocentric theory. For example, how can we justify the punishment of environmental pollution that does not endanger people if we assume the protection of the environment (nature) as a means of achieving well-being of individuals? In addition, compromise theory does not provide guidance for distinguishing necessary and permitted use of natural resources, on the one hand, and harmful and illegal exploitation of the environment on the other. Finally, proponents of the theory of administrative management believe that the only possible way of demarcation between legal and illegal exploitation of the environment lies in reliance on the management of natural resources by the state authorities. A potential ultimate consequence of this view is that it allows impunity in relation to harmful effects on the environment based on the authorisation of the state authority (agency), regardless of the possible disruptive effects on the environment. The ecocentric model is considered to be the highest system of environmental protection since the environment is not protected indirectly (by protecting people, plants or animals), but rather directly.[4] In modern legislation, criminal offences against the environment are predominantly regulated as endangerment offences in which it is not necessary that in a particular case protected legal good (environment) is harmed, but the risk of harm itself is

[3] B. Schünemann, 'Principles of Criminal Legislation in Postmodern Society: The Case of Environmental Law', 1 *Buffalo Criminal Law Review* (1997) pp. 181-183.
[4] K. Turković, P. Novoselec, V. Grozdanić, A. Kurtović Mišić, D. Derenčinović, I. Bojanić, M. Munivrana Vajda, M. Mrčela, S. Nola, S. Roksandić Vidlička, D.Tripalo and A. Maršavelski, *Komentar kaznenog zakona* [Commentary on the Criminal Code] (Zagreb, Narodne novine 2013) p. 263.

sufficient. Endangerment offences usually appear as specific endangerment offences that consist of endangering the object of the activity so that the absence of harm depends only on the happy combination of circumstances. The key concept of all of them is danger. For a danger to exist there must be an object in the field of activity of the perpetrator and there must exist a possibility of harming that object. Abstract endangerment offences are also possible. These are offences characterised by a typical way of causing actual danger, even though such actual danger is not typical of them. By incriminating certain particularly dangerous conduct as such, the legislator wants to prevent not only violation, but also the occurrence of specific hazards.[5] Striving for the fullest possible realisation of an ecocentric model implies overcoming of abstract endangerment offences. Such tendency is also followed in the Croatian Criminal Code (hereinafter the Code), which prescribes certain criminal offences against the environment in its Title XX.[6] In relation to the Criminal Code of 1997 (hereinafter the Code/97),[7] the new Criminal Code contains a number of new provisions that, *inter alia*, contribute to further harmonisation of the Croatian criminal legislation with European standards. In the last thirty years, the protection of the environment through criminal law has been the subject of intense debates before various international and European authorities. At this point, we have to place special stress on activities of the European Commission to propose a large number of directives relating to environmental law that requires effective implementation. Directive 2008/99/EC on the protection of the environment through criminal law is definitely the most important legal document in the field of the criminal law protection of the environment.[8] The Directive contains minimum requirements (standards) that should be applied to national criminal jurisdictions. It primarily provides for a list of offences against the environment that Member States should consider criminal when committed intentionally or by gross negligence (serious carelessness). In

[5] P. Novoselec and I. Bojanić, *Opći dio kaznenog prava* [General part of criminal law] (Zagreb, Faculty of Law, University of Zagreb 2013) pp. 132-133.
[6] Criminal Code, NN. 125/11 and 144/12.
[7] Criminal Code, NN. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, and 57/11.
[8] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, Official Journal of the European Union of 6 December 2008, pp. 91-100.

addition, encouraging and assistance in environmental crimes must also be punishable. Furthermore, liability of legal persons should also be guaranteed. Member States shall also prescribe appropriate sanctions that should be effective, proportionate and dissuasive. Sanctions for legal persons may be non-criminal in nature. Finally, the Directive does not prescribe measures relating to the rules of criminal procedure, or those relating to the powers of prosecutors and judges. The adoption of the Directive was preceded by an extremely important decision of the European Court of Justice of 13 September 2005 in Case C-176/03 which expressed the view that although 'neither criminal law nor the rules of criminal procedure fall within the Community's competence' (paragraph 47), this 'does not prevent its legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective' (paragraph 48).[9] This decision of the European Court of Justice is considered to be the most far-reaching one in the area of criminal law in the earlier development of the European Union since for the first time it established criminal jurisdiction of the EC. The Community, in fact, gained the competence to harmonise descriptions of environmental crimes for which sanctions shall be prescribed.[10]

II. Criminal offences against the environment

As already mentioned, criminal offences against the environment are regulated in a separate title of the Criminal Code. In what follows, they will be presented and briefly commented on, and the commentary, *inter alia*, would also refer to the harmonisation of Croatian criminal law with Directive 2008/99/EC.[11] Regarding current practice in the application of

[9] Case C-176/03 *Commission v. Council* (2005) ECR I-7879.

[10] H. E. Zeitler, 'Environmental Criminal Law', 77 *Revue Internationale de Droit Pénal* 1 (2006) p. 257; Z. Đurđević, 'Lisabonski ugovor: prekretnica u razvoju kaznenog prava u Europi [Lisbon Treaty: a milestone in the development of criminal law in Europe]', 15 *Hrvatski ljetopis za kazneno pravo i praksi* (2/2008) pp. 1100-1101.

[11] A review and commentaries of particular provisions mainly rely on the contents of the Commentary on the Criminal Code, Turković et al., op. cit. n. 4, at pp. 263-284.

legal provisions on criminal offences against the environment, it should be noted that, according to data for the year 2012, these offences make up 1.28% of the total crime in the Republic of Croatia.[12]

1. Environmental pollution

Criminal offences against the environment are regulated in Article 193 of the Code. The basic form of this criminal offence is made by a person who, contrary to regulations, discharges, introduces or emits a quantity of materials or ionising radiation into the air, soil, underground, water or sea, which can over a longer period of time or to a considerable degree jeopardise their quality or to a considerable degree or over a wider area jeopardise animals, plants or fungi, or the lives or health of people. Such offence is punishable by imprisonment from six months to five years [Article 193(1)].[13] Imprisonment from one to eight years is prescribed for any perpetrator who discharges, introduces or emits materials or ionising radiation into air, soil, underground, water or sea and thereby jeopardises the lives and health of people [Article 193(2)]. The aforementioned criminal offences are punishable when committed through negligence [Article 193(3)], though with a milder punishment (for a criminal offence referred to in paragraph 1, by imprisonment for a term not exceeding two years, and for a criminal offence referred to in paragraph 2, by imprisonment for a term not exceeding three years). Environmental pollution is a blanket norm that involves conduct contrary to regulations on environmental protection and in the Republic of Croatia this is the Environmental Protection Act.[14] The specified criminal offence follows primarily the ecocentric model in

[12] In 2012, there were 20,548 adult perpetrators of criminal offences in the Republic of Croatia, 263 of whom committed offences against the environment. *Državni zavod za statistiku Republike Hrvatske, Statistička izvješća, 1504, Punoljetni počinitelji kaznenih djela, prijave, optužbe i osude u 2012.* [Central Bureau of Statistics of the Republic of Croatia, Statistical Reports, 1504, Adult Perpetrators of Criminal Offences Reports, Accusations and Convictions in 2012] (Zagreb, 2013) pp. 112-114.

[13] With respect to the special maximum penalty prescribed for this criminal offence, it is punishable even if attempted. Namely, according to the provisions of the general part of the Criminal Code, an attempt to commit those offences is punishable for which a person may be sentenced to a term of imprisonment of five years or more, and for other offences only when explicitly stipulated by the law [Article 34(1) of the Criminal Code].

[14] Nature Protection Act, NN 110/07.

environmental protection against pollution because endangerment of the environment (air, soil or water) in a way which can over a longer period of time or to a considerable degree jeopardise the quality of air, soil, underground, water or sea, without jeopardising people, animals and plants is sufficient and abstract. A biocentric approach and an anthropocentric model come to the fore only alternatively and secondarily through abstract endangerment of animals, plants and fungi (a probability of occurrence of substantial damage) and abstract endangerment of the lives or health of people [the basic criminal offence referred to in Article 193(1)], respectively. The act of committing the offence referred to in Article 193(1) is concretised in accordance with Article 3(a) of Directive 2008/99/EC on the protection of the environment through criminal law. This provision requires substantial damage for such criminal offence, but it lets the Member States themselves interpret that term. With respect to the environment, the Croatian legislator interpreted this as permanent endangerment of the quality, when it comes to animals, plants and fungi as endangerment of a wider area, and when it comes to people as endangerment of life or health. In any case, a probability of occurrence of endangerment is sufficient. These are so-called eligibility torts as a subtype of abstract endangerment offences.[15] In this way, stronger protection is provided than required by the Directive. Serious consequences referred to in Article 3(a) of Directive 2008/99/EC are provided under Article 214 of the Code (serious criminal offences against the environment). Article 193(2) of the Code is formulated along the lines of Article 2a of the Council of Europe Convention on the Protection of Environment through Criminal Law of 1998. What is looked for here is specific endangerment of life and health of people. In this provision, the legislator waives accessoriness of the protection of the environment through criminal law so there is no blanket disposition. Article 193(3) prescribes punishment of perpetrators under paragraphs 1 and 2 if they acted negligently.

[15] A. Maršavelski, 'Komentar sudske prakse: "Delikt podobnosti kao podvrsta delikta apstraktnog ugrožavanja. Ugrožavanje okoliša otpadom." [*Commentary on the court practice*: 'Eligibility torts as a subtype of an abstract endangerment offence. Endangerment of the environment with waste"]', 18 *Hrvatski ljetopis za kazneno pravo i praksu* (1/2011) pp. 292-294.

2. The discharge of polluting substances from a vessel

The criminal offence covering the discharge of polluting substances from a vessel is prescribed in Article 194 of the Code. This criminal offence is basically committed by whoever, contrary to regulations, discharges polluting substances from a maritime object into the sea or from a vessel into fresh water and thereby deteriorates their quality. They shall be punished by imprisonment for a term not exceeding three years (Article 194(1) of the Code). The same punishment shall be inflicted on whoever, contrary to regulations, discharges smaller quantities of polluting substances from a maritime object into the sea or from a vessel into fresh waters, which may ultimately result in the deterioration of their quality [Article 194(2) of the Code]. Whoever commits the aforementioned criminal offences through negligence shall be punished by imprisonment for a term not exceeding one year [Article 194(3) of the Code]. Prescription of this criminal offence takes into account the International Convention for the Prevention of Pollution from Ships 1973/78 (the so-called MARPOL Convention) and the International Convention for the Control and Management of Ships' Ballast Water and Sediments of 2004.[16] It is coordinated and harmonised with the relevant EC directives.[17] Indeed, this real ecological offence incriminates any water pollution that caused deterioration of its quality. Such deterioration may be caused by one or multiple discharges of small amounts of contaminants that only taken together leads to water quality deterioration. Although the given consequence is a result of endangerment, here it is believed to be in the background, because any deterioration in water quality (even by 1‰) counts, so that it should be taken into account that it is actually a criminal offence of abstract endangerment.[18] When it comes to this

[16] Odluka o objavljivanju mnogostranih međunarodnih ugovora kojih je Republika Hrvatska stranka na temelju notifikacije o sukcesiji [Decision on publication of multilateral international treaties to which the Republic of Croatia is a party based on the notification of succession], Official Gazette – Multilateral Treaties No. 1/92 and Zakon o potvrđivanju Međunarodne konvencije o nadzoru i upravljanju balastnim vodama i talozima iz 2004. godine [Act approving the International Convention for the Control and Management of Ships' Ballast Water and Sediments of 2004], Official Gazette – Multilateral Treaties No. 3/2010.

[17] Directive 2005/35/EC of 7 September 2005, as amended by Directive 2009/123/EC of 21 October 2009.

[18] Turković, et al., op. cit. n. 4, at p. 266.

criminal offence, it is typically pollution from ships. Given that, according to the Maritime Code, a ship is a vessel exceeding 12 meters in length, this provision also predicts other vessels by means of which an act is committed, as well as floating objects and fixed offshore structures.[19] According to Article 5 of the Maritime Code, the term 'maritime vessel' includes a vessel, floating craft and a fixed offshore structure. For the act to be committed, the flag state does not matter. When the offense is committed, both the owner and the captain of the ship, the cargo owner, as well as the classification society are held liable. The term sea shall be interpreted in accordance with Article 3(1) of Directive 2005/35/EC of 7 September 2005, as amended by Directive 2009/123/EC of 21 October 2009, to include the internal waters, including ports, of a Member State, in so far as the Marpol regime is applicable, the territorial sea of a Member State, straits used for international navigation subject to the regime of transit passage, to the extent that a Member State exercises jurisdiction over such straits, the exclusive economic zone or equivalent zone of a Member State, established in accordance with international law and the high seas. Serious consequences of this criminal offence are set out in Article 214 of the Code.

3. Endangering the ozone layer

Article 195 of the Code regulates the criminal offence referring to endangering the ozone layer. Imprisonment for a term not exceeding three years is prescribed for any perpetrator who, contrary to regulations, produces, imports, exports, puts in circulation or uses substances that deplete the ozone layer [Article 195(1) of the Code]. If the offence is committed through negligence, the prescribed penalty is imprisonment for a term not exceeding one year [Article 195(2) of the Code]. Compared to the Code/97, this is a new criminal offence of endangering which penalise any action in relation to substances that deplete the ozone layer. The ozone layer is thus recognised as a special value that deserves legal protection through criminal law. The Croatian legislator recognises that the ozone layer is increasingly threatened, and that life on earth is impossible without it. This provision of the Code is designed along the lines of Article 3(i) of Directive 2008/99/EC on the criminal protection of the environment and with respect to terminology;

[19] Maritime Code, NN 181/04.

it is in line with the Air Protection Act.[20] This provision is also of blanket nature since the substances that deplete the ozone layer were laid down by the Montreal Protocol on Substances that Deplete the Ozone Layer, which the Republic of Croatia ratified with all amendments thereof.[21]

4. Endangering the environment with waste

The criminal offence of endangering the environment with waste is laid down in Article 196 of the Code. Imprisonment for a term not exceeding two years is prescribed for any perpetrator who, contrary to regulations, performs transport of waste in a non-negligible quantity, whether in a single shipment or in several shipments that appear to be linked [Article 196(1) of the Code]. This provision was introduced for the purpose of harmonising Croatian legislation with Article 3(c) of Directive 2008/99/EC. Unauthorised shipment is the one that is contrary to the Regulation on the control of trans-border transport of waste[22] and Regulation 1013/2006/EC and its amendments that is applied as of the date of accession of the Republic of Croatia to the EU. For any perpetrator who, contrary to regulations, discards, disposes of, collects, stores, processes, imports, exports or transports waste, or mediates in such an activity, or in general, manages or handles waste in a manner that may over a longer period of time or to a considerable degree jeopardise the quality of air, soil, underground, water or sea, or to a considerable degree or over a wider area jeopardize animals, plants or fungi, or the lives or health of people, shall be punished by imprisonment from six months to five years [Article 196(2) of the Code]. If the criminal offence referred to in paragraph 2 is committed through negligence, the perpetrator shall be punished by imprisonment for a term not exceeding two years [Article 196(3) of the Code]. This is the case of abstract endangerment of the environment (the so-called eligibility tort), which represents the highest level of protection under the ecocentric concept. At the same time, it provides for abstract endangerment in relation to people and the biological world. This

[20] Air Protection Act, NN 178/04, 110/07 and 60/08.

[21] Act approving the Montreal Protocol on Substances that Deplete the Ozone Layer, Official Gazette – Multilateral Treaties Nos. 11/93, 12/93, 1/96, 8/96, 10/00 and 12/01.

[22] Regulation on the control of cross-border transport of waste, NN 69/06, 17/07 and 39/09.

facilitates the process of proving this crime because it is sufficient to prove the possibility of endangering the environment, people or the biological world, and it is not necessary that there exists specific endangerment.

5. Endangering the environment with plants

According to Article 197 of the Code, endangerment of the environment with a plant is punishable. Imprisonment from six months to five years is prescribed for any perpetrator who, contrary to regulations, operates a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used, which can, outside the plant, over a longer period of time or to a considerable degree jeopardise the quality of air, soil, underground, water or sea, or to a considerable degree or over a wider area jeopardise animals, plants or fungi, or the lives or health of people [Article 197(1) of the Code]. If the criminal offence of endangering the environment with a plant is committed through negligence, the prescribed penalty is imprisonment for a term not exceeding two years [Article 197(2) of the Code]. The forms (modalities) of the commission of the intentional criminal offence of endangering the environment with a plant are in line with Article 3(d) of Directive 2008/99/EC. According to the Environmental Protection Act, a plant is a technical, organisational unit used for the performance of an activity by a company managed or supervised by the operator, which includes devices, equipment, structures, pipes, machines, tools and other parts used for operation. It may consist of several independent units situated at the same location [Article 3(1)(36)].[23] Here we also deal with an abstract endangerment tort. It is sufficient to prove the possibility of endangering the environment, people and the biological world, and it is not necessary that there exists specific endangerment. Serious consequences of this criminal offence are set out in Article 214 of the Code.

6. Endangering the environment with radioactive substances

Article 198 of the Code regulates endangerment of the environment with radioactive substances. Imprisonment from six months to five years is prescribed for any perpetrator who, contrary to regulations, produces, processes, handles, uses, possesses, stores, transports, imports, exports

[23] Nature Protection Act, NN 110/07.

or disposes of nuclear material or other hazardous radioactive substances which can over a longer period of time or to a considerable degree jeopardise the quality of air, soil, underground, water or sea, or to a considerable degree or over a wider area jeopardise animals, plants or fungi, or the lives or health of people [Article 198(1) of the Code]. If the criminal offence of endangering the environment with radioactive substances is committed through negligence, the prescribed penalty is imprisonment for a term not exceeding two years [Article 198(2) of the Code]. Article 198 of the Code complies with Article 3(e) of 2008/99/EC and Article (2)(1)(e) of the Council of Europe Convention on the Protection of Environment through Criminal Law. Radioactive material is only one type of ionising substances pursuant to the Radiological and Nuclear Danger Act.[24] This criminal offence also deals with abstract endangerment. Liability for serious consequences thereof is foreseen in Article 214 of the Code.

7. Endangering the environment with noise, vibrations or non-ionising radiation

Article 199 of the Code regulates the criminal offence of endangerment of the environment with noise, vibrations or non-ionising radiation. Imprisonment for a term not exceeding three years is prescribed for any perpetrator who, contrary to regulations, produces noise, vibrations or non-ionising radiation and thereby endangers the lives or health of people [Article 199(1) of the Code]. In contrast to the aforementioned criminal offences, this offence is designed (formulated) as an act of specific endangerment because such high degree of protection is not necessary here. Serious consequences of this criminal offence are set out in Article 214 of the Code.

8. Destruction of protected natural values

Article 200 of the Code regulates the criminal offence of the destruction of protected natural values. Imprisonment for a term not exceeding three years is prescribed for any perpetrator who, contrary to regulations, kills, destroys, possesses, captures or takes a specimen of a protected species of an animal, plant or fungus or other protected natural value [Article 200(1) of the Code]. Imprisonment for a term from six months to five years is prescribed for any perpetrator who commits the criminal

[24] Radiological and Nuclear Danger Act, NN 28/10.

offence referred to in paragraph 1 of this Article against a highly protected wild species of an animal, plant or fungus [Article 200(2) of the Code]. If the said criminal offences are committed through negligence, the prescribed penalty is imprisonment for a term not exceeding two years [Article 200(3) of the Code]. The described offence was introduced to comply with Article 3(f) of Directive 2008/99/EC. By the time the new Criminal Code entered into force this was partially covered by illegal hunting and illegal fishing which were not sufficiently protected through criminal law. All protected species are protected, unless there is a very small quantity of members of the species and if this has a negligible impact on the conservation of species. Therefore, there shall be no criminal offence of the destruction of protected natural values where it is committed against a negligible quantity of members of a species or other protected natural value and has had a negligible impact on the preservation of this species or other protected natural value [Article 200(4) of the Code]. Cases that are excluded by virtue of this provision will constitute an offence under Articles 195 and 196 of the Nature Protection Act. Given that here we deal with a blanket criminal offence, its interpretation and proper application fall within the scope of the relevant Nature Protection Act.[25] Serious consequences of this criminal offence are set out in Article 214 of the Code.

9. Habitat destruction

Article 201 of the Code regulates the criminal offence of habitat destruction. Imprisonment for a term not exceeding three years is prescribed for any perpetrator who, contrary to regulations, destroys or causes significant deterioration of the habitat of a protected species of an animal, plant or fungus, or destroys or causes significant deterioration of a habitat type [Article 201(1) of the Code]. If the perpetrator commits the offence referred to in paragraph 1 against a habitat or a breeding, rearing, migration or hibernation site of a highly protected wild species of an animal, plant or fungus, the prescribed penalty is imprisonment from six months to five years [Article 201(2) of the Code]. The same penalty is prescribed for any perpetrator who destroys or causes significant deterioration of a habitat in a protected natural area or in an ecologically important area [Article 201(3) of the Code]. If the

[25] Nature Protection Act, NN 70/05, 139/08 and 57/11.

aforementioned criminal offences are committed through negligence, the perpetrator shall be punished by imprisonment not exceeding two years [Article 201(4) of the Code]. This criminal offence was introduced to comply with Article 3(h) of Directive 2008/99/EC. Its qualified forms provided for in Article 214 of the Code.

10. Trade in protected natural values

Article 202 of the Code regulates the criminal offence of trade in protected natural values. Imprisonment for a term not exceeding three years is prescribed for any perpetrator who, contrary to regulations, trades in, imports, exports or transports alive or dead specimen of a protected species of an animal, plant or fungus or other protected natural value, parts or derivatives thereof, or transfers a protected natural value from the Republic of Croatia without authorisation or does not return it to the Republic of Croatia within the time limit set out in the authorisation [Article 202(1) of the Code]. If the perpetrator commits this offence against a highly protected wild species of an animal, plant or fungus, the prescribed penalty is imprisonment from six months to five years [Article 202(2) of the Code]. If the aforementioned criminal offences are committed through negligence, the perpetrator shall be punished by imprisonment not exceeding two years [Article 202(3) of the Code]. The criminal offence of trade in protected natural values was introduced to comply with Article 3(g) of Directive 2008/99/EC. Serious consequences of this criminal offence are set out in Article 214 of the Code. The legislator took into account the fact that also in this criminal offence there are criminal amounts that do not deserve the protection through criminal law. Therefore, there shall be no criminal offence of trade in protected natural values where it is committed against a negligible quantity of members of a species or other protected natural value and has had a negligible impact on the preservation of this species or other protected natural value [Article 202(4) of the Code]. In this way, a distinction is made in relation to the corresponding violations of the Nature Protection Act.

11. Illegal introduction of wild species or GMOs into the environment

Article 203 of the Code regulates the criminal offence of illegal introduction of wild species or GMOs into the environment. Imprisonment from six months to five years is prescribed for any

perpetrator who, contrary to regulations, transports across a border a live genetically modified organism or introduces a live genetically modified organism or an alien wild species of a microorganism, fungus, plant or animal into an environment which it does not naturally inhabit and causes thereby considerable or permanent damage to nature. This criminal offence is formulated in line with Article 25 of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity recommends the states to punish illegal trans-border transport of live genetically modified organisms (GMOs).[26] Due to the uniform application of indeterminate character values to certain offences by all courts, the Criminal Department of the Supreme Court of the Republic of Croatia issued a legal opinion at its session held on 27 December 2012 (No. Su-IV k-4/2012-57) that the legal character of 'substantial damage' in the criminal offence of illegal introduction of wild species or GMOs into the environment referred to in Article 203 of the Code exists when the value of the damage exceeds HRK 60,000.

12. Poaching of game and fish

Article 204 of the Code regulates the criminal offence of poaching of game and fish. Imprisonment for a term not exceeding one year is prescribed for any perpetrator who hunts game during the close season or in an area in which hunting is prohibited, or hunts without having passed the hunting examination [Article 204(1) of the Code]. Imprisonment for a term not exceeding three years is prescribed for any perpetrator who hunts game, catches fish or other freshwater or marine organisms in such manner or by such means that cause their massive destruction or by using prohibited accessory equipment [Article 204(2) of the Code]. The same punishment is inflicted on the perpetrator who permanently takes abroad a top game trophy [Article 204(3) of the Code]. The objects intended to be used or used for the purpose of committing a criminal offence as well as the catch shall be confiscated [Article 204(4) of the Code]. Criminal offences of poaching of game and poaching of fish from the Code/97 merged into one criminal offence in the new Criminal Code.

[26] Act approving the Protocol on Biosafety (Cartagena Protocol) to the Convention on Biological Diversity, Official Gazette – Multilateral Treaties No. 7/02.

13. Killing or torture of animals

Article 205 of the Code regulates the criminal offence of killing or torturing animals. Imprisonment for a term not exceeding one year is prescribed for any perpetrator who kills an animal without a justified reason or severely maltreats it, inflicts unnecessary pain on it or puts it through unnecessary suffering [Article 205(1) of the Code]. Imprisonment for a term not exceeding two years is prescribed for any perpetrator who commits the aforementioned criminal offence out of greed [Article 205(2) of the Code]. Imprisonment for a term not exceeding six months is prescribed for any perpetrator who by negligence exposes an animal to conditions of hardship over a longer period of time by depriving an animal of food or water or in another manner [Article 205(3) of the Code]. The legislator prescribed that the animals subject to the criminal offence of killing or torture shall be confiscated [Article 205(4) of the Code].[27]

14. Transmission of infectious diseases of animals and organisms harmful to plants

Article 206 of the Code regulates the criminal offence of transmission of infectious diseases of animals and organisms that are harmful to plants. Imprisonment for a term not exceeding one year is prescribed for any perpetrator who fails to comply with regulations or decisions by means of which the competent state authority lays down measures for the suppression or prevention of the spread of an infectious disease of animals or organisms harmful to plants and thereby causes the danger of the spread of that disease or its agents or of occurrence or the spread of organisms harmful to plants [Article 206(1) of the Code]. If the aforementioned criminal offence is committed through negligence, the perpetrator shall be punished by imprisonment not exceeding six months [Article 206(2) of the Code]. Here we deal with specific endangerment. Serious consequences of this criminal offence are set out in Article 214 of the Code.

[27] Introduction of the criminal offence of torturing animals raised interest of scholars even in the Code/97 in the practical application of the provisions of the general part of the Criminal Code on a mistake of law. See P. Novoselec, 'Sudska praksa: "Mučenje životinja. Zabluda o protupravnosti." [Case law: 'Cruelty to animals. Mistake of law']', 14 *Hrvatski ljetopis za kazneno pravo i praksu* (2007) 2 pp. 1031-1032.

15. Production and circulation of harmful products for the treatment of animals

According to Article 207 of the Code, production and circulation of harmful products for the treatment of animals are punishable. Imprisonment for a term not exceeding two years is prescribed for any perpetrator who produces for the purpose of sale or puts in circulation products for the treatment or prevention of an infection in animals that pose a risk to the animals' life or health and thereby causes the spread of an infectious disease or the death of a larger number of animals [Article 207(1) of the Code]. If the aforementioned criminal offence is committed through negligence, the perpetrator shall be punished by imprisonment not exceeding six months [Article 207(2) of the Code].

16. Veterinary malpractice

Article 208 of the Code regulates the criminal offence of veterinary malpractice. Imprisonment for a term not exceeding one year is prescribed for a veterinarian or a veterinary technician who, in rendering aid to, examining, giving vaccination or treatment to animals, fails to comply with the rules of the veterinary profession, and thereby causes disease, considerable deterioration of illness or death of an animal. Serious consequences of this criminal offence are set out in Article 214 of the Code.

17. Forest destruction

Article 209 of the Code regulates the criminal offence of forest destruction. Imprisonment for a term not exceeding two years is prescribed for any perpetrator who, contrary to regulations, cuts down or clears or otherwise devastates a forest and thereby commits no other criminal offence for which a more severe punishment is prescribed [Article 209(1) of the Code]. If the aforementioned criminal offence is committed in a forest that is a constituent part of an area that, pursuant to a competent authority’s regulation or decision, has been declared a protected natural value, the perpetrator shall be punished by imprisonment not exceeding three years [Article 209(2) of the Code]. The legislator also prescribed that the objects intended to be used or used for committing a criminal offence or which are the result thereof shall be confiscated. [Article 209(3) of the Code].

18. Change in the water regime

Article 210 of the Code regulates the criminal offence of the change in the water regime. Imprisonment for a term not exceeding two years is prescribed for any perpetrator who, contrary to regulations, changes or disrupts a water regime and thereby commits no other criminal offence for which a more severe punishment is prescribed [Article 210(1) of the Code]. If the aforementioned criminal offence is committed in an area that, pursuant to a competent authority's regulation or decision, has been declared a protected natural value, the perpetrator shall be punished by imprisonment not exceeding three years [Article 210(2) of the Code]. Here, the legislator also prescribed that the objects intended to be used or used for committing a criminal offence or which are the result thereof shall be confiscated. [Article 210(3) of the Code]. The legislator also stipulated that an attempt of the criminal offence shall be punishable as well [Article 210(4) of the Code].

19. Illegal exploitation of mineral resources

Article 211 of the Code regulates the criminal offence of the illegal exploitation of mineral resources. Imprisonment for a term not exceeding three years is prescribed for any perpetrator who, contrary to regulations, exploits mineral resources and thereby causes considerable damage [Article 211(1) of the Code]. The attempt of the criminal offence of the illegal exploitation of mineral resources shall be punishable as well [Article 211(4) of the Code]. Imprisonment from six months to five years is prescribed for any perpetrator who, contrary to regulations, exploits mineral resources in an area that, pursuant to a competent authority's regulation or decision, has been declared a protected natural value [Article 211(2) of the Code]. As in the previously described criminal offence, here the legislator also prescribed that the objects intended to be used or used for the purpose of committing a criminal offence or which are the result thereof shall be confiscated [Article 211(3) of the Code].

20. Illegal construction

The criminal offence of illegal construction is regulated in Article 212 of the Code. Imprisonment from six months to five years is prescribed for any perpetrator who, contrary to regulations, constructs a building in an area that, pursuant to a competent authority's regulation or decision, has been declared a protected natural value, cultural property or other

area of special interest to the state. The criminal zone of this criminal offence has been significantly narrowed down because not every illegal construction is punishable. Here we take into account the requirement (principle) that criminal law must be *ultima ratio*. Illegal construction is covered by offences under Articles 179 to 194 of the Construction Act.[28] Only building on protected areas is punishable by the said criminal offence. Protected areas in the Republic of Croatia include 47% of its land and 39% of its sea. In principle, these areas include nature parks, nature reserves and national parks.

21. Active remorse

According to Article 213 of the Code, the court may remit the punishment of the perpetrator of any of the criminal offences referred to in Articles 193, 194, 196, 197 and 198 of the Code who voluntarily averts the danger or eliminates the condition he or she caused before the occurrence of serious consequences. This is the provision on active remorse.[29] By moving to the dominant ecocentric model of regulating environmental crimes for which negligent abstract endangerment is largely sufficient to have a criminal offence at all, the legislator believed that sentencing should be avoided wherever there is no special need for punishment and where it is beneficial to the environment. It is active remorse in criminal crimes against the environment that is ideal for the implementation of the principle that punishment must be *ultima ratio*, encouraging at the same perpetrators to remove pollution before serious consequences occur. Severe consequences are those that are described severe environmental crimes (Article 214 of the Code): death, serious bodily injury, serious health impairment of one or more persons, changes caused by the pollution that cannot be removed for a considerable period of time and a major disaster.

22. Serious criminal offences against the environment

Finally, Article 214 of the Code stipulates serious criminal offences against the environment. Imprisonment from one to ten years is prescribed for certain criminal offences against the environment if as a result of the criminal offence one or more persons suffer serious bodily

[28] Construction Act, NN 175/03.

[29] For more information on the problem of differentiating between active remorse and voluntary abandonment of a criminal attempt, see Novoselec and Bojanić, op. cit., n. 5, at pp. 315-316.

injuries, or changes brought about by pollution cannot be eliminated for a considerable period of time, or a major disaster occurs [Article 214(1) of the Code]. These are criminal offences referred to in Article 193(1) and Article 193(2), Article 194(1) and Article 194(2), Article 196(1) and Article 196(2), Article 197(1), Article 198(1) and Article 199 of the Code. If the aforementioned criminal offences result in the death of one or more persons, the perpetrator shall be punished by imprisonment from three to fifteen years [Article 214(2) of the Code]. The perpetrator shall be punished by imprisonment from six months to five years for committing a criminal offence against the environment referred to in Article 193(3), Article 194(3), Article 196(3), Article 197(2) and Article 198(2) of the Code, in which a number of persons suffered serious bodily injuries, or changes brought about by pollution cannot be eliminated for a considerable period of time, or a major disaster occurred [Article 214(3) of the Code]. If as a result of these criminal offences one or more persons die, the perpetrator shall be punished by imprisonment from one to eight years [Article 214(4) of the Code]. The same punishment (imprisonment from one to eight years) is prescribed for environmental crime cases that caused considerable damage [Article 214(5) of the Code]. These are criminal offences referred to in Article 200(1), Article 200(2), Article 201(1), Article 201(2), Article 201(3), Article 202(1) and Article 202(2) of the Code. Imprisonment from six months to five years [Article 214(6) of the Code] is prescribed if considerable damage is caused as a result of criminal offences referred to in Article 206(1), Article 207(1) and Article 208(1) of the Code. Causing considerable damage represents a qualifying circumstance in criminal offences referred to in Article 200(3), Article 201(4), Article 202(3), Article 206(2) and Article 207(2) of the Code. The perpetrators of these criminal offences shall be punished by imprisonment for a term not exceeding three years [Article 214(7) of the Code]. In relation with this offence, it should be noted that the concept of an 'environmental disaster' is no longer defined by the Environmental Protection Act. In addition, Environmental protection intervention plan that also contained the concept of an 'environmental disaster' ceased to be valid after entry into force of the Regulation on the prevention of large-scale disasters involving hazardous substances (Official Gazette 114/08).[30] The concept of a 'large-scale disaster' was introduced instead, and it is defined in

[30] Regulation on the prevention of large-scale disasters involving hazardous substances, NN 114/08.

Article 4(1)(77) of the Environmental Protection Act.[31] The same concept is also used in the Protection and Rescue Act.[32] Due to the uniform application of indeterminate property values to certain criminal offences by all courts, the Criminal Department of the Supreme Court of the Republic of Croatia issued a legal opinion at its session held on 27 December 2012 (No. Su-IV k-4/2012-57) that the legal character of 'substantial damage' in the criminal offence of serious criminal offences against the environment referred to in Article 214(5), Article 214(6) and Article 214(7) of the Code exists when the value of the damage exceeds HRK 60,000.

III. Conclusion

Croatian criminal law accepts predominantly ecocentric theory of the protection of the environment through criminal law and consequently in Title XX of the Criminal Code it provides for certain criminal offences against the environment. Descriptions of these criminal offences and the penalties prescribed comply with the minimum standards contained in Directive 2008/99/EC on the protection of the environment through criminal law. Criminal offences against the environment are primarily regulated as endangerment offences, a significant number of which may be qualified as abstract endangerment offences. Not only intentional, but also negligent environmental offences are punishable. In accordance with the provisions of the general part of the Criminal Code (Articles 37 and 38), punishment of instigators and abettors is also guaranteed and punishment of legal persons is made possible under the Act on the Liability of Legal Persons for Criminal Offences.[33] Hence, Croatian criminal law has contributed to Europeanization of the protection of the environment through criminal law, a process that started with the said directive, but with regard to the legal framework of the Lisbon Treaty it has certainly not been completed yet.[34]

[31] Nature Protection Act, NN 110/07.

[32] Protection and Rescue Act, NN 174/04, 79/07, 38/09 and 127/10.

[33] Act on the Liability of Legal Persons for Criminal Offences, NN 151/03, 110/07, 45/11 and 143/12.

[34] For more information on the current problems with harmonisation of environmental criminal law at European level, see S. Ruhs, 'Europäisierung des Umweltstrafrechts',1 *Zeitschrift für das Juristische Studium* (2011) pp. 13-20.

Specific fields of regional development and environmental protection

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Posting of workers in Croatia and Hungary

I. Introduction

The initial aim of European integration has been to remove all obstacles to the free movement of workers within the European Union in order to allocate workforce optimally in the single market and thus increase competitiveness, including the Union's global competitive position. Next to the free movement of workers, a second category of cross-border movement of workers has been developed, which covers those persons who are posted (sent) by their employer for a limited period to a Member State other than the state in which they usually work. Posting of workers serves mainly the freedom of services with the serious consequence that only a certain part of the labor law regulations of the host country has to be applied to posted workers.

The posting of workers generates crucial tensions: first between the workers' social rights and the Union's economic preferences and second between the contradictory economic and socio-political interests of the sending and hosting countries. These contradictory objectives have been decided at the level of the EU in favor of economic interests, i.e. the competitiveness of the Union.

The paper first highlights the general European framework and recent challenges of posting. The main focus is on the legal situation and the special administrative provisions in cases when posting occurs between Croatia and Hungary, but also in other situations of posting of workers when Croatia and Hungary are home or host states.

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II. The European regulation on posting of workers

1. Posting of workers in service of competitiveness

The crucial aim of the European Union has been from the very beginning to increase the competitiveness of the Member States and thus the global competitive position of the EU. One of the most significant instruments for achieving this aim was to guarantee the four freedoms, namely the freedom of goods, services, capital and workers.

European law differentiates between two kinds of cross-border movement of workers. The first group includes workers who take up employment in another Member State as their home state on the basis of the free movement of workers. The second category of cross-border movement of workers covers those workers who are posted (sent) by their employer for a limited period to a Member State other than the state in which they normally work and carry out their work in the territory of the host state. The legal basis of the posting of workers is the free movement of services (Articles 56-62 TFEU). Consequently, the regulation of posting serves primarily the economic interests of the Union as a whole.

Directive 96/71/EC on the posting of workers in the framework of the provision of services (hereinafter: Directive) contains the major provisions on posting.[1] This Directive basically determines which law shall apply to posted workers. According to Article 3, the labor law of the sending state shall apply to the posted worker, but certain 'hard core' provisions of the hosting state shall prevail.

In order to make posting possible, it is important to guarantee the social security of the posted workers. Therefore, the Union adopted Regulation (EC) No 883/2004 on the coordination of social security systems[2] and Regulation (EC) 987/2009 on the implementation of Regulation 883/2004.[3] Article 12 of the Regulation contains the main rule. It states that posted workers shall continue to be subject to the legislation of the

[1] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

[2] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

[3] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.

sending Member State, provided that the anticipated duration of such work does not exceed twenty-four months and that he is not sent to replace another person.[4] The same rule applies to self-employed persons, if they pursue a similar activity as they normally pursue in another Member State.

Posting has three forms. In the first case a company provides for a service in another Member State and wants to carry out its activity with its own workers. For this reason it sends its workers to this (host) Member State. Another form of posting is if the company sends workers to an establishment or to an undertaking owned by the group in the territory of a Member State. The third possibility of posting is to hire out workers to a user undertaking operating or established in a Member State (cross-border temporary work).

2. Posting, as a legal instrument to discriminate workers

The different legal basis of cross-border movement of workers brings about the different treatment of workers. Workers employed in a cross-border way enjoy different treatment on the basis of the legal label of their kind of employment. This is however controversial not only from the social point of view but also from an economic view in terms of the interests of labor market.

Posted workers are second-class workers as for them only a certain part of the labor law regulations of the host country have to be applied according to Article 3 of the Directive and the relating jurisdiction of the European Court of Justice (these are the so-called 'hard-core' provisions).[5] The enumerated regulations have to be applied to posted workers, but it is not allowed to apply labor law regulations other than those listed above.[6]

[4] Art. 12(1) Regulation No 883/2004.

[5] The following minimum working conditions of the host country are obligatory for posted workers: the statutory minimum wage, maximum working time, minimum rest periods, minimum paid holiday, conditions of hiring out of workers, health, safety and hygiene regulations, protection of pregnant woman, young mothers, children and young workers, and equal treatment between men and women.

[6] This principle was stated in the Luxemburg judgment. The Court emphasised that although the Directive lays down a nucleus of mandatory rules for minimum protection, Article 3(1) Directive sets out an exhaustive list of the matters. See in *Commission of the European Communities v Grand Duchy of Luxembourg*, C-319/06, 19 June 2008.

As the result of the difference in treatment of posted workers, it occurs that in a factory nationals of the host country and posted workers carry out the same work together whereas posted workers work under much worse conditions then their colleagues having a normal employment relationship.

The clear difference in treatment between posted workers and workers having a normal employment relationship is justified by the EU only by economic reasons – mainly by the free movement of services in the EU. As the Court of Justice of the European Union declared in the Laval and Rüffert judgments,[7] economic reasons prevail over social protection and the equal treatment of workers. It clearly stated that it is forbidden to apply other provisions for the posted workers than those set out in the Directive 96/71/EC. Posted workers cannot even enjoy the rights declared in the collective agreement (if it is not declared generally applicable) and workers have limited rights to strike for the equal treatment of posted workers. These statements made clear in the Laval and Viking-Line[8] judgments.

Both forms of carrying out work abroad are similar from various points of views. First, they are the same from the point of view of the worker since he carries out the same work independently from the legal basis of his employment in the host state. Secondly, it is indifferent for the labor market whether the worker carries out his work directly and independently or through his employer. As the ECJ pointed out in the *Vicoplus judgment*, it seems artificial to draw a distinction with regard to the influx of workers on the labor market of the Member State according to the form of employment because in both cases the movement of workers is capable of affecting or even disturbing the labor market.[9] However, this statement considered only cross-border temporary work and not the other forms of posting of workers. Consequently, cross-

[7] ECJ, Case C-341/05, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet,* 18. December 2007, para. 111; ECJ, Case C-346/06, *Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG* v *Land Niedersachsen,* 3 April 2008 para. 33-34.

[8] ECJ, Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union,* v *Viking Line ABP, OÜ Viking Line Eesti,* 11 December 2007.

[9] ECJ, Joined Cases C-307/09 to C-309/09, *Vicoplus SC PUH, BAM Vermeer Contracting sp. zoo, Olbek Industrial Services sp. zoo* v *Minister van Sociale Zaken en Werkgelegenheid,* 10 February 2011 para. 35.

border temporary work differs from the other two forms of posting. The Court of Justice of the EU pointed out that in case of cross-border temporary work the emphasis is on providing workforce. This activity has the same result as if workers would go into another Member State making use of the free movement of workers. This difference is important to note. For the posting between Croatia and Hungary, it means that during the transitional period, the first two forms of posting (in the framework of providing services and within a group of companies) will be allowed, while the third form (cross-border temporary work) will not be allowed.

3. Contradictory rights and interests

Posting of workers generates various conflicts of interests and rights. On the European level, the conflict lies between the fundamental freedoms and the fundamental rights of workers, namely the right to equal treatment as well as the right to strike and collective bargaining. The European Court of Justice delivered some judgments in which it tried to solve this conflict. The Court elaborated a detailed method (the so-called proportionality test) to examine whether difference in treatment can be justified. On the level of national law, this question also raises the contradiction of different sources of law, especially between Constitutional law and Community law.

The posting of workers indicates moreover tensions between the interests of the Eastern and Western European Member States. While the 'new' Eastern European Member States have serious interest in the export of services, Western European states try to protect their labor market. Crucial is the tension between the contradictory economic and socio-political interests of the participating countries. These contradictory objectives are decided at the level of the EU in favor of economic interests and the competitiveness of the Community. This tension can best be illustrated by the Laval case, in which the Court declared that trade unions are not allowed to use strike, if it results in the infringement of the fundamental freedom of services and the right to establishment. The *Rüffert case* and the *Commission v Luxemburg* judgment of the European Court of Justice have also clearly shown that the earlier practice of the Western European Member States to protect their labor market and respective social model against foreign cheaper workforce and thus social dumping has to be limited in the future.

Hungary is rather an exporting country as far as posting of workers is concerned. It is expected that also in Croatia the percentage of outgoing posting will be higher than that of ingoing. To a smaller extent, but Hungary experiences and Croatia can expect also some posting as a host country in the future. This incoming posting has basically two roots. Either it is coming from countries where services are cheaper, e.g. Romania, Slovakia, Bulgaria in the framework of providing services or it takes the form of Western European managers being sent to Croatian or Hungarian subsidiaries.

4. Two proposals for new regulations

In March 2012, the Commission published two proposals for the amendment of the existing rules on the posting of workers and the improvement of the relation between free provision of services and the right to take industrial actions.[10] While the 'Posted Workers Enforcement Directive' would serve the aim to better implement and enforce the Directive, the Proposal for a Council Regulation ('Monti II' Regulation) tries to provide a solution for the collision between fundamental economic freedoms and fundamental rights generated particularly in the Laval and Viking cases.[11]

Article 2 of the Monti II Regulation lays down that European fundamental freedoms and the fundamental rights shall mutually respect each other. This declaration implies that these rights and freedoms are generally equal; therefore, none of them can override the other or take priority over the other. In situations where they conflict each other, they have to be reconciled in accordance with the principle of proportionality. Both rights and freedoms can be restricted in order to guarantee the exercise of the other one. Article 3 of this proposal delivers a possible solution for conflicts, by providing an obligation for the Member States to establish access to alternative dispute resolution mechanisms in situations where there is a conflict between the right to

[10] Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services; Brussels, 21.3.2012, COM(2012)131 final. 2012/0061(COD), and Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, Brussels, 21.3.2012, COM(2012)130 final, 2012/0064(APP).

[11] See n. 7 and n. 8, respectively.

take collective action and the exercise of the freedom to provide services. It obliges only those Member States where an alternative dispute mechanism to resolve labor disputes already exists.

The general aim of the Proposal for the Directive is to improve the enforcement of the Posted Workers Directive and enhance the cooperation between the Member States. In order to achieve better cooperation between the Member States, the proposal sets out several instruments.[12] In the past, it has caused several problems that each Member State had different provisions, and required different documents from the undertakings which posted workers to its territory. Especially sending Member States reported that often it is not clear which documents the host Member State requires and whether the national provisions have been in line with the freedom to provide services or in fact caused a restriction of it.[13] To solve this problem, Article 9 of the Proposal for the Directive provides for an exhaustive list of administrative requirements and control measures, which the Member State may impose in order to monitor compliance of the posting undertaking with the rules of the Directive.

In many Member States, the chain of subcontracts has led to serious difficulties and circumvention of the employer's liability for the posted workers' rights. The greatest problems can be noticed in the construction sector, where exploitation is widespread. Workers often have been left without wages when companies suddenly disappeared. Article 12 intends to put an end to this practice and to introduce joint and several liabilities in subcontracting. Although the headings of Article 12 sound promising, the proposed measure has several limitations.

The Proposal for the Directive had an important aim: to cancel the so-called 'letter-box SMEs' (small and medium enterprises). This name

[12] It contains for instance provisions to guarantee better access to information, the close and mutual administrative cooperation between the Member States and rules to guarantee that effective and adequate labor inspections are carried out.

[13] This shortcoming arose e.g. in the Commission versus Luxemburg judgment (C-445/2003) and in the preliminary ruling in the criminal proceedings against dos Santos Palhota (C-515/08). In both cases the main question was which administrative requirements can lawfully require the host state from the posting companies. See this problem in a comparative way: A. van Hoek and M. Houwerzijl, *Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union to the European Commission* (21 March 2011) p. 31-33.

refers to enterprises which do not carry out real activities in the sending Member State as the only reason of their establishment in the respective state was to take advantage of the regulation of posting and in this way to evade the applicable rules of the state in which the work is carried out.[14] The objective of the proposal was to eliminate the possibility of the evasion of rules by creating a company in a Member State with the single aim to send workers into another Member State. Abuses have been committed by employers, taking advantage of the insufficient clarity of the legal provisions. Therefore, the proposal contains in Article 3(1)-(2) an indicative, non-exhaustive list of qualitative criteria, characterizing the temporary nature of posting and the existence of a genuine link between the employer and the sending Member State.[15] Article 3 defines the factual elements which characterize the activities carried out by an undertaking established in a state. It is crucial to decide whether the sending company genuinely performs substantial activities, or purely internal management and/or administrative activities.

The two proposals are recently under discussion. The Irish Presidency emphasized in its working plan the significance of these suggestions for labor mobility and growth and its ambition to reach a first agreement on the proposal.[16] Real advantages of the adoption of these instruments would be better cooperation between the Member States and less administrative burdens. In their recent forms, the proposals show some obvious shortcomings, e.g. the terms of 'posting' and 'posted worker' are still not clear. Furthermore, the conflict between fundamental economic freedoms and collective labor rights is at most only partially solved.

[14] European Commission, *Commission staff working document, Executive summary of the impact assessment*, Brussels, 21.3.2012, SWD(2012)64 final 7, and ISMERI Europa, *Preparatory study for an Impact Assessment concerning the possible revision of the legislative framework on the posting of workers in the context of the provision of services, Final report*, March 2012. 18.

[15] See also Hoek and Houwerzijl op. cit. n. 13, at pp. 13-15.

[16] '[…] the Presidency has prioritised the new Enforcement Directive to improve the implementation in practice of the 1996 rules for the posting of workers. This would provide clarity for services providers as well as protection for workers posted across EU borders. The proposal is one of the twelve priority actions of the Single Market Act aimed at boosting the European economy and creating jobs. Working closely with partners, the Irish Presidency will set a high level of ambition for this dossier by working to reach a First Reading Agreement on the proposal.' *Programme of the Irish Presidency of the Council of the European Union*, p. 33.

III. Posting of workers between Croatia and Hungary

1. General overview

Posting of workers affects several fields of law, particularly labor law, social security law and tax law. In practice, all of them shall be taken into account in case of posting. Our article concentrates on a short overview of the labor and social security law aspects of posting between Croatia and Hungary. Before looking at the regulation in detail, we have to give a short overview of posting between the two countries regarding the current situation of Croatia as a candidate country joining the Union on the 1st July 2013.

Regarding posting between the two countries, we have to differentiate between two periods. The first period finishes with the accession of Croatia to the Union in July 2013. Until this date, the provisions of the Union basically do not apply to the posting between the two countries. However, some rules, particularly concerning social security, apply based on an agreement concluded between the two countries in 2005.

The second period will start with the accession of Croatia to the EU. From this time on, Croatia will enjoy the free movement of services, which also includes the right to post workers. In the Accession Treaty of Croatia[17] only Germany and Austria have maintained limitations regarding the posting of Croatian workers.[18] It was declared that transitional provisions on free movement of workers also include the posting of workers. However, the same rule does not apply between Croatia and Hungary, which means that the two countries fully apply the normal rules of the Union to the posting of workers between them.

2. Hungarian provisions on the posting of workers

2.1. Labor law regulations

The new Hungarian Labor Code[19] contains in its Articles 295-297 the labor law provisions applicable to workers posted to Hungary. These regulations apply if a foreign employer employs a worker in the territory of Hungary under agreement with a third party or by an employer, who

[17] Council of the European Union, *Accession Treaty: Treaty concerning the accession of the Republic of Croatia*, 14409/11, Brussels, 7 November 2011.

[18] See Art. 18 of the Treaty and Annex V, 2. point, Free movement of persons.

[19] 2012. évi I. törvény a Munka Törvénykönyvéről [Act I. of 2012 on the Labor Code]. It is a new Code regulating individual and collective labor law, which entered into force in July 2012.

belongs to a group of companies. Temporary agency work is regulated separately. The Labor Code proclaims that all provisions on temporary work (Article 214-222 Labor Code) shall be applied to agency workers posted to Hungary.

Article 295 provides that regarding the maximum working time and minimum rest periods, the minimum duration of annual paid leave, the amount of minimum wages, the conditions for temporary agency work as per Sections 214-222, occupational safety, the conditions of employment or work by pregnant women or women who have recently given birth, and of young people and, furthermore, the principle of equal treatment, the Hungarian law including the provisions of a collective agreement with extended scope shall apply to posted workers. The Labor Code incorporated the fields mentioned in Article 3(1) of the Directive. The measure gives a quite broad definition of the minimum wage.[20]

In the Hungarian labor law, the most important source is the Labor Code. Although a procedure of extension of collective agreements exists, but in practice extended collective agreements play an absolutely minor role. In the last twenty years, only four extended collective agreements have existed.[21] For posting, it is important to note that in the building sector an extended collective agreement exists. Article 295(3) of the Labor Code expressly states that the workers employed in the construction sector shall be subject to collective agreements covering the entire industry or an entire sector.

It is important to note that the Hungarian regulation clarifies the application of the principle of more favorable conditions laid down in Article 3(7) of the Directive. The law states that the Hungarian provisions need not be applied if the law governing the employment relationship (i.e. the law of the sending state) contains more favorable regulations for the employee in terms of the mentioned requirements.

[20] Art. 295(2) Labor Code: In the application of Paragraph c) of Subsection (1), the concept of minimum wage shall be understood as the remuneration defined in Sections 136-153. Minimum wage shall not include payments made to voluntary mutual insurance funds, and any remuneration provided to the employee that is not subject to personal income tax.

[21] Namely in the electricity industry, in the bakery, in the tourism and catering and in the building industry.

The Hungarian law makes use of the exceptions defined in Article 1(2) and Article 3(2) of the Directive, containing exactly the same rules as the Directive.[22]

Article 297 contains an interesting rule which serves the posted workers' interests. According to this rule, the beneficiary is obliged to inform the foreign employer in writing concerning the working conditions applicable to the posted worker prior to the conclusion of a services contract. In the event of failure to provide this information, the beneficiary has full financial liability for the workers' claims. The goal of this provision is to motivate the party for whom the services are intended to thoroughly inform the other undertaking on the applicable Hungarian regulations. The Hungarian contracting party fulfills its obligations if it informs the other contracting party about the conditions in written form. This way it can release itself from any liability towards the workers.

2.2. Social security regulations regarding posted workers between Croatia and Hungary

2.2.1. Agreement on social security from 2005

Until Croatia is not a member of the Union, special regulations apply to the social security of posted workers. In 2005, Croatia and Hungary concluded an agreement on social security which was adopted by the Act CXXV of 2005 (hereinafter: Act) into the Hungarian law.[23] This agreement replaced the earlier agreement between Hungary and Yugoslavia concluded in 1957.

The agreement basically adopted the major rules of the social security regulations of the Union. This means that in case of posting for a certain time, the law of the sending state shall be further applied, i.e., the posted worker is insured in the sending state, pays her/his contribution in this state as if s/he would work in the state of origin.

The act also declares the principle of equal treatment, which means that in the application of the rules of one state, the citizens of the other state shall enjoy the same protection as the own citizens of the concerned

[22] Art. 296 Labor Code.

[23] 2005. évi CXXV. törvény a Magyar Köztársaság és a Horvát Köztársaság között a szociális biztonságról szóló, Budapesten, 2005. február 8-án aláírt Egyezmény kihirdetéséről. [Act CXXV of 2005 on the proclamation of the agreement on social security signed on the 8th of February 2005 in Budapest between the Hungarian Republic and the Croatian Republic].

state, i.e., the citizens of the sending state shall be regarded equal with the own citizens of the hosting state.[24]

Article 7 of the Act contains the main principle of social security in case of posting between Croatia and Hungary. Accordingly, in case of posting the worker remains insured under the social security system of the sending country, as far as the sending does not exceed 24 months. If the posting is to be prolonged after this duration, the worker and the employer can mutually request the renewal of the application of the social security rules of the sending state. In exceptional cases the application can be extended with another 24 months, if the hosting state's authority grants its permission.

According to Article 7(1), the self-employed person can perform her/his activity temporarily in the other state and in such cases the social security rules of the state of origin shall be applied to her/him for maximum 12 months in the same way as if s/he would perform her/his activity in the state of origin. Special regulation applies to the so-called mobile workers, who are employed as a member of travelling or flying personnel. To them, only the law of the state shall be applied in the territory of which the seat of the undertaking is situated. In case of workers in vessels, the flag of the vessel determines the applicable law. Persons of the public service are insured together with their family during posting by the law of the sending state.

The posted worker receives medical care from the hosting state according to its regulation and the sending state has to recover the actual costs of the treatment.[25] The restriction of this principle is that in case of expensive treatments, the prior permission of the competent authority of the sending state is needed. Such permission is however not necessary if the treatment is inevitable, as the person is in a life threatening condition or the treatment cannot be postponed.

2.2.2. Hungarian administrative rules

In Hungary, the 'Országos Egészségbiztosítási Pénztár' (National Health Insurance Fund, hereinafter: OEP,) is the authority competent for the social security issues of posting. The OEP issues the certificate for the posted workers for the maximum duration of 24 months. The Hungarian employer has to fill in a special form, namely the HR/HU 128.

[24] Art. 4 of the Act.

[25] Art. 12(1) and 17 of Act CXXV of 2005.

Important is to note that prior to providing the certificate, the OEP examines – in the same way as in the case of posting into the Member States of the EU – whether the activity in the other state is really a posting, the posted person is insured according to the national rules and the employer has a significant economic activity in Hungary. Only if all the mentioned conditions are fulfilled will the OEP provide its permission.

The employer has to declare that the employment relationship with the posted worker will be maintained during the posting, all rights of the employer will be exercised only by the certain employer specified in the form and the working place of the posted worker is the actual place specified in the form. Furthermore, the employer has to confirm that it is not the aim or result of the posting to replace another worker posted before to the same position. It is namely not allowed to employ posted workers in the hosting state in the same position over the permitted 24 months. The sending employer has to state that during the posting it will pay the social insurance of the posted worker and will guarantee the continuation of the employment of the posted worker after her/his return.

Moreover, there is an important rule which aims to avoid the use of the so-called 'letter-box companies' for posting. The employer has to declare that during the whole duration of posting it will perform a significant economic activity and employ workers besides those workers who deal with the leading of the company and its administrative activities in Hungary. Consequently, the social security rules of posting cannot apply if the employer employs during the posting only such workers who deal with administrative issues or with the leading of the company. The sending employer has to perform significant economic activity in Hungary. This requires that during the posting either the number of the employed persons in Hungary achieves 25% of all employed people by the employer or the percentage of the income resulting from the activities in Hungary reaches 25% of all income of the employer. The OEP examines the data of the last 6 or 12 months to control the existence of these requirements and these have to be maintained also during the posting. Another condition is that the employer has to employ the posted worker in the same branch as its activity in Hungary.[26]

[26] See all mentioned rules in: Országos Egészségbiztosítási Pénztár: Kiküldetési szabályok változása a 883/04/EK rendelet szerint [National Health Insurance Fund:

The posted worker has to be insured according at least 30 days prior to the posting. If the posting has a break longer than 60 days, a new posting is allowed. However, if the break is shorter than 2 months, the sending of the same worker twice shall be regarded as one posting.

3. Croatian legislation on the posting of workers

3.1. Labor legislation

From the adoption of the first Labor Act in 1995, the Croatian legislator has changed labor legislation on several occasions in the process of harmonization with the *acquis communautaire*.[27] Finally, a new (i.e. the second Labor Act since Croatia became an independent state) was adopted in 2009.[28] However, the common practice of frequent changes in legislation as well as the perceived shortcomings of the existing solutions *pro futuro* clearly suggest the need for further intervention in labor law or the enactment of an entirely new act that will respond to the challenges of the labor market more adequately and a well-articulated need for flexibilization of labor relations. The mentioned necessity has largely been the result of permanent tension between the rigid protection of workers' rights, that unions insist on, and demands for a more liberal regime of regulation of labor relations, particularly in the context of employment, the duration of a fixed-term employment contract and the termination of an employment contract that the Association of Employers insists on.

Regarding the posting of workers, criticism of linguistic experts should also be noted referring to several synonyms, i.e., '*upućeni radnici*'*(posted workers)*, '*izaslani radnici*' *(seconded workers)*, '*detaširani radnici*' *(detached workers)*, that co-exist in official translations in Croatia and cause considerable confusion, and due to differences in relation with the clarity standards, in practice they cause significant difficulties to uninformed users.[29] Moreover, the Aliens Act

Changes of the rules on posting of workers according to the Regulation No 883/2004], available at *www.oep.hu* (30.5.2013).

[27] Labor Act; Official Gazette, Narodne novine, NN 38/95, 54/95, 65/95, 17/01, 82/01, 114/03, 142/03, Constitutional Court Decision U-I-2766/2003, U-I-469/2004, U-I-1607/2004, U-I-4768/2004, U-I-4513/2004, NN 68/05.

[28] Labor Act, NN 149/09, 61/11, 82/12, 73/13.

[29] M. Bajčić, 'Challenges of Translating EU Terminology', in M. Gotti, ed., *Book of Abstracts CERLIS 2009* (Bergamo, University of Bergamo 2009); M. Bajčić, 'Challenges of Translating EU Terminology', in M. Gotty and C. Williams, eds.,

uses the phrase '*raspoređeni radnik*', which further expands the list of synonyms used causing *inter alia* problems for competent officials in understanding, interpreting and implementing the law.

The current Labor Act contains provisions concerning posted workers only in the context of those workers who are sent outside the Republic of Croatia, but it does not contain explicit provisions relating to workers sent to Croatia by foreign employers. Provisions primarily regulate the mandatory content of the employment contract or a written confirmation of the conclusion of the employment contract, in the case of a worker posted abroad,[30] operation of temporary employment agencies, including the obligations of both the users and the agencies towards posted workers,[31] and the provision *expressis verbis* contains specific rights of workers posted abroad.[32] The latter refers to the obligation of an employer who sent his/her worker abroad in the case of termination of the employment contract that the employee signed with the foreign employer (except if the employment contract is terminated due to the behavior of the worker) to compensate for relocation costs and ensure adequate employment in the country. Also, when determining the period of notice and the amount of severance pay, the period that such employee spent abroad is considered part of the employee's period of continuous service with the employer who sent him/her abroad.[33] In the context of judicial protection of labor rights, in the case of violated rights and without any prior attempt to obtain protection from the employer, a worker *inter alia* sent to work abroad can directly approach the court within 15 days after receipt of the decision in question.[34]

3.2. The Croatian Aliens Act in the light of the Posted Workers Directive

The Aliens Act[35] contains the most important provisions concerning workers posted to the Republic of Croatia, whether they come from the EU or the European Economic Area, or the territories of third countries.

Legal Discourse across Language and Cultures (Bern, Berlin, Bruxelles, Frankfurt, New York, Oxford, Wien, Peter Lang 2010) p. 83.

[30] Art. 16 of the Labor Act.

[31] Art. 24 to 32.

[32] Art. 123.

[33] Art. 123(1) and (2).

[34] Art. 129.

[35] Aliens Act, NN 130/11, 74/13.

The provisions of Articles 86 to 89 transposed the most important nucleus of the solutions of Directive 96/71/EC. From the definition of a posted worker it is clear that a posted worker is a worker employed by a foreign employer, where the foreign employer, within the framework of temporary or occasional provision of transnational services for a limited time period: 1) posts him/her to the Republic of Croatia on his/her own account and under his/her direction, based on a contract concluded between the foreign employer posting him/her to such work and the service user in the Republic of Croatia, provided that the employment relationship is maintained between the foreign employer and the posted worker during the period of posting, or 2) posts him/her to the Republic of Croatia to an establishment or to a company owned by the same group that the foreign employer belongs to, provided that the employment relationship is maintained between the foreign employer and the posted worker during the period of posting, or 3) as a temporary employment agency, hires out a worker to a user established or operating in the Republic of Croatia, provided that the employment relationship is maintained between the temporary employment agency and the posted worker during the period of posting.[36] A foreign employer is defined as a natural or legal person established in another Member State of the European Economic Area which, within the framework of transnational provision of services, posts the worker for a limited period of time to work in the Republic of Croatia, and a posted is a worker posted by a foreign employer to carry out his/her work for a limited period of time in the Republic of Croatia, which is not the state in which he/she usually works.[37]

The Act *expressis verbis* specifies the obligation of a worker who is a third-country national legally employed by a foreign employer and posted to the Republic of Croatia for a period over three months to regulate his/her temporary stay for the purpose of work in accordance with the provisions of the Act.[38]

The Aliens Act guarantees to posted workers terms and conditions of employment relating to prescribed maximum work periods and minimum rest periods, minimum paid annual leave, the minimum rates of pay, including overtime rates, health and safety at work, protective measures in the terms and conditions of employment of pregnant

[36] Art. 86(1) of the Aliens Act.
[37] Art. 86(2) and (3) of the Aliens Act.
[38] Art. 86(4) of the Aliens Act.

women, women who have recently given birth or are breastfeeding, and of young workers, and the prohibition of discrimination; and they shall be determined in accordance with national regulations in the field of labor and non-discrimination harmonized with the *acquis communautaire*, and consequently in accordance with relevant collective agreements and/or arbitration awards as autonomous sources of labor law that may be universally applicable.[39] However, these conditions shall not apply to workers posted to the Republic of Croatia for a period shorter than eight days if the foreign employer posts them to perform the initial assembly and/or the initial set-up necessary for putting the delivered products into use if that was agreed as an essential component of a contract for the goods delivery. However, an exemption from the application of the terms and conditions of employment in the case of such short-term posting of workers shall not be possible for workers in the field of civil engineering relating to construction, repair, maintenance, adaptation or demolition of buildings, excavation, earthworks, actual construction, assembly and disassembly of prefabricated elements, installation, alteration, renovation, repair, disassembly, demolition, regular maintenance, maintenance, painting and cleaning or improvement.[40] If the aforementioned working conditions referring to posted workers are determined in the regulations of the Republic of Croatia in a more favorable manner than in the regulations of the state in which the employer is established, the former, i.e., Croatian labor law shall be applied as it is more favorable for the workers in question.[41] The above provision is in line with the fundamental standard of Croatian labor legislation stating that if there are provisions of acts, collective agreements or rules of procedure that regulate specific issues in different ways, the most favorable law is always applied to the worker (workers' best interest).

However, this provision may cause significant difficulties in daily use for both the competent authorities and labor inspection of the Republic of Croatia that might, by applying this statutory formulation plastically and very literally, impose some sanctions since a more favorable right has not been applied to the posted worker. The said provision of the Aliens Act undoubtedly relies on Article 3(7) of the Posted Workers Directive, but in order to provide its proper implementation, Croatian

[39] Art. 3 of the Directive 96/71/EC.
[40] Art. 86(11) of the Aliens Act.
[41] Art. 86(12) of the Aliens Act.

authorities, labor inspectorates and courts must have an excellent understanding of the EU judicature, and we are afraid this is not the case in Croatia. The application of the aforementioned Article of the Directive, and thus the analyzed provision of the Aliens Act, has been significantly reduced by the interpretation of the Court of Justice of the EU in the cases of *Laval* and *Rüffert*. According to the Court, the said provision of the Directive protects posted workers when the home state's labor law provides a higher level of protection of the rights than the host state, so it should not be a victim of reducing one's rights due to the posting. Moreover, the provision of the Directive gives an employer the opportunity to negotiate with a worker more favorable conditions than those provided by the legislation of the host state, but not the application of a more favorable host state law.[42] In other words, legal rules of the home state labor law can be used as a means of undermining the host state labor law.[43] Looking at the above in the light of the Bolkestein Directive on Services, it is clear that this Directive was used in the internal market 'to reinforce the existing legal position in relation to labor law'.[44] Although Article 3 of the Directive excludes its application in situations where the provisions of the Posted Workers Directive are applied, its exclusion from the application should be taken very tentatively, because the Posted Workers Directive regulates work-related issues, while it guarantees the freedom to provide services,[45] which is a fundamental substratum and the basic function of the posting of workers.

While transposing the provisions of the Posted Workers Directive into the national legal system and creating Article 86(12) of the Aliens Act, it is possible that the Croatian legislator had in mind its provision of Article 3(10), which is not explicitly mentioned in any particular place in the Croatian Act in question, and which represents a derogation from the provisions of the Treaty on the freedom to provide services, and therefore it must be interpreted very strictly as confirmed by the Court

[42] See A. C. L. Davies, *EU Labour Law* (Cheltenham, UK, Northampton, MA, USA, Elgar European Law 2012) p. 97.
[43] P. Syrpis, *EU Intervention in Domestic Labour Law* (Oxford, Oxford University Press 2007) p. 124.
[44] Syrpis, op. cit. n. 43, at p. 126.
[45] K. Dumančić, *Granice slobode pružanja usluga u Europskoj Uniji* [The limits of the freedom to provide services in the European Union] PhD thesis (Zagreb, Faculty of Law 2011) p. 302.

of Justice of the EU in the aforementioned *Commission v. Luxembourg*.[46] [47] The provision of Article 3(10) of the Directive refers to the exception with respect to the protection of public interest and hence it is not subject to the possible unilateral interpretation of Member States without supervision of EU institutions, and, as highlighted by experts, it is almost impossible to pass the test set by the Court of Justice of the EU in this respect.[48] Thus the said provision cannot be used as an excuse of Member States to apply national labor law to any posted worker on their territory, as from the current position of EU law on preferring economic freedoms to social rights, it would undermine the current meaning of posted workers, that primarily implies achieving a certain form of social dumping under the aegis of the freedom to provide services.

There is no doubt that the careless interpretation of Article 3(7) and (10) of the Directive and an inadequate transposition of paragraph (7) into the national law of the Republic of Croatia resulted in a confusing provision of the Aliens Act of Article 86(12) that is incompatible with EU law, thus it should *pro futuro* be modified urgently. In addition, the comments of that national act should *expressis verbis* refer experts to the traps of a literal interpretation, as well as extremely important standards set forth by the jurisprudence of the Court of Justice of the European Union.

As in the Directive, the length of time for which the posted worker has been transferred to the Republic of Croatia is calculated on the basis of a reference period of one year from the commencement of the posting, and for the purpose of calculating the duration of the posting, all previous periods in which the same job was performed for the same foreign employer by any posted worker sent by the foreign employer shall be taken into account.[49]

Judicial protection and administrative cooperation and information imply that in the context of the guaranteed working conditions the posted worker may initiate judicial proceedings against a legal or natural person of the foreign employer or a service recipient in the Republic of Croatia before the competent court in the Republic of Croatia and in accordance with the regulations of the Republic of Croatia.[50] However,

[46] ECJ, Case C-319/06 *Commission* v *Luxembourg*, 19 June 2008. See n. 6.
[47] Davies, op. cit. n. 42, at p. 98.
[48] Ibid.
[49] Art. 87(1) and (2) of the Aliens Act.
[50] Art. 88(1) of the Aliens Act.

the Aliens Act does not mention the provision of Article 6 of the Directive that the given possibility of jurisdiction before the court in the host state is without prejudice, where applicable, to the right under existing international conventions on jurisdiction to institute proceedings in another state.[51] For the purpose of exercising the right to full information on the protection and scope of the stipulated rights and the required international cooperation, the Aliens Act imposes a task on the ministry competent for labor-related issues to ensure the required mutual administrative cooperation and assistance in order to make the data on the working conditions available to all interested parties.[52]

Prior to posting a worker, a foreign employer shall submit to the Croatian authority competent for coordination of social security systems, either in writing or electronically, a posting declaration which must include information on the foreign/sending employer (the name and registered office, that is, the name and surname, address and contact details, such as telephone and telefax numbers, and electronic mail address), information on the posted worker (the name and surname of the posted worker and information on the state the worker usually works in), the commencement and the foreseen duration of the posting, information on the beneficiary (the name and seat, that is, the name and surname, address, the place where the service is provided and a brief description of the service), and information on the date of issue, validity, the number and the competent body that issued a valid residence permit and work permit (this refers to a third-country national) according to the regulations of the state in which the foreign employer is established. Any change of the given data during the posting period shall be reported and submitted accordingly.[53]

The matter of posted workers is dealt with by the Croatian legislator in two separate regulations, depending on whether Croatian employers post their workers to EU Member States and third countries, or *vice versa*. The provisions of the Labor Act and the Aliens Act apply to Croatian workers and foreign workers, respectively. This solution is assessed inappropriate since with respect to the nomotechnical structure and a thoughtful and logical sequence referring to standardization of certain parts of the matter in question as well as a terminology approach, the Aliens Act is quite expansive, very extensive, and in some segments

[51] See Art. 6 of the Directive 96/71/EC.
[52] Art. 88(2) of the Aliens Act.
[53] Art. 89(1), (2) and (3) of the Aliens Act.

even illogical and confusing. Moreover, the body responsible for its implementation is the dominant Ministry of the Interior, which is in terms of labor law issues neither adequately staffed nor competent.

IV. Posting of workers in Croatia and Hungary

Croatia and Hungary are countries that are still searching for appropriate economic models and have not finalized the process of their economic transition. As countries with relatively low incomes, they are almost exclusively the countries that post their workers.[54] In this context, the posting of workers between Hungary and Croatia is not expected to involve the posting of a large number of workers to one or another country. It is much more likely that Hungarian and Croatian workers will be posted to other EU Member States, especially to the wealthier ones, where the domestic workforce is more expensive than Croatian or Hungarian workers. It is thus very likely that provision of services in certain economic sectors will be predominantly characterized by the posting of Croatian and Hungarian construction workers to other, wealthier and economically more stable Member States, because the construction industry is the main economic activity that absorbs the posted workers in the EU.[55] It is especially interesting bearing in mind the difficult situation in the construction sector in both countries and the fact that the EU recorded a loss of 1.4 million jobs in that sector.[56]

In Hungary, there are no statistical data on the number of imported posted workers, but it is estimated that the number of those workers posted by Hungarian companies to other Member States, primarily Germany and Austria, ranges between 17,000 and 18,000.[57] A situation with posting workers in Hungary which received major media attention was definitely the case of a strike at Budapest Airport in 2008 when the employer used posted workers as strike breakers.[58]

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[54] G. Bosch, et al., 'Minimum Wages and Collective Bargaining in the Construction', in D. Grimshaw, ed., *Minimum Wages, Pay Equity and Comparative Industrial Relations* (Abingdon, Oxon, Routledge 2013) p. 171.

[55] Bosch, et al., op. cit. n. 54, at p. 170.

[56] B. Galgózi, et al., eds., *EU Labour Migration in Troubled Times, Skills Mismatch, Return and Policy Responses* (Farnham, Surrey, Ashgate 2012) pp. 22-23.

[57] Á. Hars and L. Neumann, '*Hungary: Posted Workers*', (MTA-PTI, Hungary 2012), available at *http://www.eurofound.europa.eu/eiro/studies/tn0908038s/hu0908039q.htm* (15.6.2013).

[58] Posted workers in the European Union, Eurofound (2010) p. 27, available at *http://www.eurofound.europa.eu/docs/eiro/tn0908038s/tn0908038s.pdf* (15.6.2013).

Croatia has no direct statistical data on the number of posted workers who arrived in Croatia or Croatian workers posted to other EU Member States. Such information could be indirectly collected for the period before full membership of the Republic of Croatia in the EU, because police stations were responsible for regulation of the residence of aliens in the context of work permits issued. However, collection of data by sending a query on such workers to all police stations in the Republic of Croatia would take too much time. Future amendments to the Labor Act will resolve difficulties with collecting relevant statistical data on host and sending posted workers in Croatia by imposing an obligation, in particular on temporary employment agencies, to submit the necessary information to competent authorities.[59]

In the light of the analysis of the legal status of posted workers in Croatia and Hungary, but in general as well, we should not neglect the content of the Rome I Regulation on the law applicable to contractual obligations[60] which replaced the Rome Convention that established uniform rules for determining the law applicable to contractual obligations in the European Union (Rome Convention of 1980 on the law applicable to contractual obligations).[61] Namely, in paragraph 34 of the Preamble it also allows the host state to apply its national rules of labor law to individual employment contracts of the posted workers where these are mandatory requirements. In other words, this means that in the light of the recent case law of the Court of Justice of the EU, the Regulation must be interpreted in terms of the Posted Workers Directive.[62] In this way, Member States may adopt strategies for the protection of national labor markets from the pressure of posted workers, but only in accordance with the provisions of the aforementioned minimum and maximum level protection given in Article 3(1) of the Posted Workers Directive.[63] Any further step would imply an unacceptable restriction of the freedom to provide services, which can be justified only on the basis of a strict interpretation of the

[59] The insights the authors received based on an interview with Mrs. Inga Žic, head of Employment and Labor Law Office of the Ministry of Labor and Pension System, in May 2013.

[60] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177/6, 4.7.2008.

[61] OJ L 266/1.

[62] Davies, op. cit. n. 42, at p. 98.

[63] Davies, op. cit. n. 42, at p. 99.

protection of public interest.[64] In the light of European private law, these issues therefore raise the question of jurisdiction of the host state courts for posted workers. In the particular situation, Hungarian and Croatian courts, just as the courts of other Member States, would only have the possibility, or to be more precise, jurisdiction, to apply mandatory rules from Article 3(10) of the Posted Workers Directive[65] taking into account all constraints imposed by the Court of Justice of the EU in this respect in its previous, complex jurisprudence with a very strict interpretation.

V. Concluding remarks

EU legislation relevant to the regulation of posted workers related issues undoubtedly aims to encourage cross-border workers mobility as an important element of the freedom of movement for workers. However, the case law of the Court of Justice of the EU in a number of these cases perceives the *raison d'être* of the freedom of movement of workers and the posting of workers primarily through the dominant economic focus, i.e., giving priority to the economic freedom rather than to social rights of European citizens. A legal possibility of achieving social dumping in the EU is placed at the core of the problem, because as a form of providing services, the posting of workers departs from the traditional function of national and European labor law.

Although we should try to understand the case law of the Court of Justice of the EU from the point of view of the primary objective of European integration, the creation of a common market, which will undoubtedly always give priority to the economic over the social dimension, we should not underestimate the impact of neoliberal efforts in obstructing the concept of 'Social Europe'.[66]

Due to the economic situation and the past characterized by transition, the consequences of which are still visible, Croatia and Hungary are undoubtedly predominantly sending countries, whose respective legislative instruments have been mainly harmonized with the *acquis communautaire*, but their implementation should closely follow the current and future case law of the Court of Justice of the EU.

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[64] L. Merrett, *Employment Contracts in Private International Law* (Oxford, Oxford University Press 2011) p. 271.

[65] Merrett, op. cit. n. 64, at p. 277.

[66] See N. Bodiroga-Vukobrat and H. Horak, 'A more liberal and economic and a less social approach: The impact of recent ECJ rulings' 4 *Croatian Yearbook of European Law and Policy* (2008) p. 50.

In such conditions, the main question is whether Croatian and Hungarian workers will also serve as a means of achieving social dumping in rich Member States, as a result of low standards and high unemployment in their own countries, and whether they will be willing to accept work for wages that are not eligible for the citizens of those Member States. Unfortunately, the solutions of the European legislation and the recent case law of the Court of the EU have practically legalized such a possibility.

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Discontent of the peregrines: migrants and the right to strike

I. Introduction

Irregular Mexican migrants[1] harvesting in US farms, Polish construction workers preparing for the London Olympics, Hungarian and Croatian nurses treating patients in German hospitals – these are common characters of the contemporary labour markets. Indeed, migration affects every part of the world. Country of origin, transit and destination, these categories are not isolated, in fact, a single country can play all of the three roles either simultaneously or within a longer time period. More than 3% of the world's population consists of international migrants.[2] Approximately 175 million people live as migrants in the world, roughly half of them being migrant workers.[3]

People migrate for various reasons. A common distinction is made between voluntary and forced migrants, the latter referring to people who had to leave their own country for another because of human rights abuses, environmental reasons (such as, for instance, famine or natural disasters) or to escape poverty. Another distinction is made between legal – illegal, or in other words, irregular, clandestine or undocumented migrants, the latter indicating migrants with forged documents or no documents at all, or with expired work permits.

But how can migrants exercise their fundamental labour rights, such as the right to strike, and how does the national workforce react to their presence? Irrespectively of the reasons behind migration, the presence of foreign workers (migrants as well as non-migrants) brings new dynamics into the functioning of the labour markets. "To begin a

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[1] We use the term migrants in the sense of the United Nations' definition: persons who stay outside their usual country of residence for at least one year.

[2] ILO, *International Labour Migration. A Rights-based Approach* (Geneva, International Labour Office 2010) p. 15.

[3] *Towards a fair deal for migrant workers in the global economy. Report VI.* (Geneva, International Labour Office 2004), available at *http://www.ilo.org/public/libdoc/ilo/2004/104B09_110_engl.pdf* (30.5.2013).

discussion on labour and citizenship with border crossing or mass protests means to firmly position migrants as protagonists of struggles around freedom of movement and labour rights."[4]

Migration as well as the right to strike often triggers the attention of researchers. This is hardly surprising, as both of them are distinctive and controversial phenomena of the labour market. The aim of this paper is to take the research one step further and explore the interaction between labour migration and the right to strike. In the last decades the labour markets have transformed. The changes have profound effect not only on migrant workers but also on those who stay in their country of origin. Strikes by or against migrants are one the most thought-provoking issues of modern labour law, particularly having in mind the currently developing common EU migration policy with the main focus on labour migrations and the right-based approach the Union is trying to implement. This paper will focus on international, regional and national legal framework and case-law regarding migrant workers' right to strike, as well as the right to strike of national workers against migrant workers, with particular emphasis on the Hungarian and Croatian law and practice, having in mind the countries' EU membership and participation in the common EU migration policy (especially the recent accession of Croatia to the Union and its obligations to adjust the legislation to the *acquis communautaire)*. The paper will analyse references and consequences of legal *pro* and *contra* provisions regarding the right to strike of migrant workers, and identify legal ambiguities which could disadvantage the right to strike of various groups of migrant workers, i.e. migrants with different EU residence status and migrants engaged in particularly vulnerable employment sectors. The right to strike of migrant workers has a central role in the protection of basic labour rights of migrant workers, which is often jeopardized because of its legal linkage with the right to residence and the specific employment relationship.

II. Labour migration and the right to strike

Migrant workers, particularly those migrating individually, and employed in sectors of employment where lower educational levels are required, usually face labour discrimination in terms of working conditions, salaries, equality at work, occupational safety, health

[4] R. Andrijasevic and B. Anderson, 'Conflicts of mobility: Migration, labour and political subjectivities' 29 *Subjectivity* (2009) p. 363.

standards and accessibility of professional advancement and professional mobility. Some forms of discrimination, along with disrespect of national and international labour standards, could and do easily lead to labour exploitation and abuse. Therefore, one of the essential labour rights – the right to express discontent over abusive working conditions – has even more importance in the context of labour migration. While trade unions and other workers' associations, along with national and regional Courts, have been very instrumental in advancing the right to strike for national workers, employers often consider migrant workers as a *sui generis* category of workers, with limited – if any – possibility to express discontent. National legislations still link the exercise of the right to strike with membership in trade unions, which international bodies have already disconnected through their interpretation that the right to strike is an individual right, not a right linked to membership in the trade union,[5] and the legality of residence status of the migrant worker has been detached from the enjoyment of fundamental human rights by regional human rights courts. These two obstacles hinder effective exercise of the right to strike by migrant workers. Moreover, it seems that migrant workers do not exploit sufficiently their statutory labour rights because they renounce upfront the support and assistance of trade unions by having the lowest membership in them of all workers. The reasons for low participation in unions or associations are complex and range from insufficient outreach efforts by the unions towards migrants (either because of a general failure to see membership growth as a union power resource, or because of a reluctance to organize migrants and minorities specifically)[6] and reluctance of other union members (national workers) to support specific demands of labour market competitors to migrant workers' reluctance to organize collectively. We cannot ignore the role of the State either, which should promote unionization of migrant workers in order to contribute to the combating of labour and other forms of exploitation as well as minimize unfair competition (between

[5] Council of Europe, *Conclusion I-X-1 on the application of the European Social Charter. Committee of independent experts on the application of the European Social Charter* (Strasbourg, 1969-1987) cited by Ž. Potočnjak, *Pravo na štrajk* (Zagreb, Pravni fakultet 1992) pp. 203-208.

[6] S. Marino, 'Trade union inclusion of migrants and ethnic minority workers: Comparing Italy and the Netherlands' 18(I) *European Journal of Industrial Relations* (2012) p. 5-6.

cheap labour and labour which is paid in accordance with national laws and regulations). In addition to the overall increased vulnerability of all migrant workers (with a due exception of highly qualified migrants of particular professional specialization who migrate within so called *elitist migrations* and who enjoy the highest possible employment and labour standards), several categories of migrant workers are specifically exposed to increased incidence of abuse of labour and human rights – undocumented migrants and migrant workers employed in so called vulnerable sectors of employment i.e. informal or atypical sectors, private households, seasonal sectors, etc. and they are the ones who should be supported to join unions and to use more all the labour rights available, including the contested and often controversial right to strike.

III. The legal regulation of the right to strike with special regard to migrant workers

'Strike is a temporary work stoppage of a group of workers aiming at the advancement of their own (or another group of workers') economic and social interests'.[7] There are various legal sources under which the right to strike can be guaranteed and regulated under national law and practice, such as constitutional provisions,[8] international law by which the country is bound, statutory law and regulations, judge-made law, collective agreements and self-regulation by trade unions.[9] This legal framework shapes how workers (national or foreign) may exercise their right to strike.

1. The international level

All categories of migrant workers should enjoy all fundamental human rights, including undocumented migrant workers who are formally not excluded from the internationally protected right to strike. Let us name just a few major international human rights instruments which have recognized either the right to organize or the right to strike: the

[7] E. Kajtár, *Magyar sztrájkjog a nemzetközi és az európai szabályozás fényében*, [Hungarian Strike Law in the Light of International and European Regulations. Doctoral Thesis] (Pécs, PTE Állam- és Jogtudományi Karának Doktori Iskolája 2011) p. 18.

[8] Both the Hungarian Fundamental Law and the Constitution of Croatia regulate the right to strike.

[9] E. Kajtár and A. Kun, 'Right to Strike in a Changing Regulatory Environment' 4 *Pázmány Law Working Papers* (2013) pp. 1-18.

Universal Declaration on Human Rights (1948), Article 20 and Article 23(4) (Everyone has the right to form and to join trade unions for the protection of his interests); the International Convention on the Elimination of All Forms of Racial Discrimination (1969) [Article 5(e-ii) in which the Parties have undertaken the obligation to ensure equality before the law in, *inter alia*, the right to form and join trade unions]; the International Covenant on Economic, Social and Cultural Rights (1966) was the first international instrument to explicitly regulate the right to strike (Article 8 lists rights for 'all members of the human family' and for 'everyone'). The rights are to be exercised without discrimination based on national origin; listed rights include, amongst others, the right to form and join trade unions. Also the Convention on the Elimination of all Forms of Discrimination against Women (1979) [Article 14 (2e)] and the International Covenant on Civil and Political Rights (1966) (Article 22) shall be mentioned.

ILO Conventions did not explicitly regulate the entitlement to the right to strike, but their Committee on Freedom of Association has implicitly recognized that right under the provisions of Conventions No 87 and 98.[10]

The extensive case law of the International Labour Organisation covers various aspects of collective dispute and industrial action. Regarding migrant workers a case from 2001 contains a very important conclusion. In this case, the General Union of Workers of Spain (UGT) alleged that the new law on foreigners (Act No. 8/2000 on the Rights of Foreigners in Spain and their Social Integration) restricted foreigners' trade union rights by making their exercise dependent on authorization of their presence or residence in Spain. The lack of clear intermediate regulations caused a sudden change in the law, foreigners were subjected to a much stricter regime and those who were in the process of applying for authorization were going to be deprived of the rights they enjoyed. According to the argument of the Government the regulation was introduced to control migratory flows and combat the mafias (human trafficking and exploitation of workers) by creating a clear distinction between Spanish nationals and legal foreigners, on the one

[10] Ibid. ILO C 87, Article 11 Each Member of the International Labour Organization for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise. ILO C 98, Article 1(1) Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

hand, and irregular foreigners, on the other. The ILO Committee recalled that Article 2 of Convention No. 87 recognizes the right of workers, without distinction, to establish and join organizations of their own choosing without previous authorization. With regard to the denial of the right to organize to illegal migrant workers, the Committee pointed out that all workers, with the sole exception of the armed forces and the police, are covered by Convention No. 87.[11]

Besides international human rights instruments and ILO labour rights instruments, another important instrument for the regulation of the rights of migrant workers is the International Convention on the Rights of Migrant Workers and Members of their Families (1990) (hereinafter: ICRMW). Despite the very low ratification rate – no labour migration destination countries or other developed countries ratified it – and the fact that it attributed only declaratory significance to the rights of migrant workers and their families, in 2004 the European Economic and Social Committee recommended ratification of the ICRMW to the European Union and Members States with the "aim of promoting migrant workers' fundamental rights" and this invitation was reiterated in 2009[12]. It is worth looking at the provisions of the Convention related to the right to strike, as they can serve as a role model for national legislations as well as a legal standard for creating the overall framework for the protection of the rights of migrant workers. In Article 26 of the Convention, State Parties should ensure recognition of the right of migrant workers and members of their families to take part in meetings and activities of trade unions and of any other associations established in accordance with law. The Convention explains that this right is necessary in order to protect economic, social, cultural and other interests of migrant workers and members of their families and must be subject only to the rules of the organization concerned. Furthermore, the States Parties should recognize the right of migrant workers and members of their families to join freely any trade union and any such association, as well as the right to seek the aid and assistance of any trade union and of any similar workers' association.

[11] ILO 327th Report, Case No. 2121.

[12] European Parliament, Opinion of the European Economic and Social Committee on the Proposal for a Council Directive 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 OJ C 27/114, 3.2.2009, p. 4, 7.

Article 40 ICMRW stipulated the right of migrant workers and members of their families to form associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests. It is important to mention that the Convention has included safeguards against arbitrary limitations to the right to form unions and take part in their legal activities in the provision that no restrictions may be placed on the exercise of these rights other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security, public order or the protection of the rights and freedoms of others.

Finally, ILO C189 Convention on Decent Work for Domestic Workers was adopted in 2011 with the aim to promote decent work for all workers, but particularly work carried out by women and girls, many of whom are migrants and who are more vulnerable than other workers to discrimination in respect of conditions of employment and of work, and to other abuses of human rights.[13] The Convention has stipulated that each Member shall, in relation to domestic workers, take the measures set out in this Convention to respect, promote and realize the fundamental principles and rights at work, namely: (a) freedom of association and the effective recognition of the right to collective bargaining (Article 3). In addition, the Convention has clarified that in taking measures to ensure that domestic workers and employers of domestic workers enjoy freedom of association and the effective recognition of the right to collective bargaining, Members shall protect the right of domestic workers and employers of domestic workers to establish and, subject to the rules of the organization concerned, to join organizations, federations and confederations of their own choosing.

2. The Council of Europe

The Council of Europe has two main instruments to protect the right to strike: the European Convention on Human Rights (1950) and the European Social Charter (1961). The European Convention on Human Rights states that everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right

[13] ILO, *Preamble of the C189 Convention concerning decent work for domestic workers – Domestic Workers Convention* (Geneva, 100th ILC session, 16 June 2011), available at *https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:2551460* (1.6.2013).

to form and to join trade unions for the protection of his interests [Art. 11(1)]. The 1961 European Social Charter, as well as its revised version of 1996, states that with a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties recognise the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into [Article 6(4)].
Due to the cooperation with the ILO, similar but not identical patterns can be observed. Thanks to the European Committee of Social Rights, we can find a hand crafted criteria catalogue.
The Charter provides a broad spectrum of economic and social rights and embodies the values represented by social Europe. It is a unique international document with complex and systematic regulations and an exclusive apparatus for monitoring compliance.[14] The fact that since the Treaty of Amsterdam of 1997 it has formed part of Union law and, therefore, has been a source of workers' rights strengthens its significance. The most intense critiques concern the following areas: implementation, check-up, sanctions, soft terms, 'à la carte rights', and the individual complaint mechanism.[15] In fact, all of these areas are problematic regarding the regulation of the right to strike in the Charter. Implementation largely depends on the willingness of the states. Revision in 1991 aimed at greater effectiveness, establishment of a more efficient check-up mechanism that divides competences of the different organs more clearly. The involvement of employees' and employers' organisations in the supervision was strengthened. However, this reform only partly delivered the desired changes. The sanction system is still built on the method of publication and naming and shaming.[16] Despite all the efforts made, the effect and acceptance of the Charter remains low.

[14] A. M. Świątkowski, *Charter of Social Rights of the Council of Europe* (Alphen aan den Rijn, Kluwer Law International 2007) pp. 41-42.
[15] R. Birk, *European Social Charter* (Alphen aan den Rijn, Kluwer Law International 2007) p. 36.
[16] Kajtár, op. cit. n. 7.

3. The EU

3.1. Lack of competence (?)

The strike regulation of the EU is significant from the perspective of our research. It differs in many respects from that of the ILO or the Council of Europe. While the primary role of the latter two is protection of human (and workers') rights, this cannot be said about the EU. The differences are stemming not only from the different levels of governance (global or regional) but also from the various historical backgrounds and aims. Accordingly significant divergence can be detected in terms of how norms are formulated, how strong the protection offered by these norms is, the effectiveness of the monitoring system and, last but not least, regarding the order of priority between economic and social rights.[17]

The right or freedom to undertake industrial action forms part of the common constitutional traditions of the Member States (and it consequently forms part of EU law).

According to the Community Charter of the Fundamental Social Rights of Workers of 1989 the right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations and collective agreements (Article 13). Article 151 of the Treaty on the Functioning of the European Union states that the Union and the Member States shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained.

Arguably, the right to take industrial action is a tool to promote improved living and working conditions. Nonetheless, the Union has no competence to legislate over it. Article 153 TFEU (with a view to achieving the objectives of Article 151) lists the fields in which the Union shall support and complement the activities of the Member States. Paragraph 5 contains an express exclusion provision: The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs. This is a surprising restriction knowing that the right to strike is recognised in EU Member States.

[17] Ibid.

In contrast, the Charter of Fundamental Rights of the European Union clearly includes the protection of the right to strike. It states that workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action (Art. 28).

The right to strike, as well as its main limits, is expressed here. There is room for restriction, as the protection has to be granted in accordance with Community law and national laws and practices.

The Court of Justice of the European Union transmits an ambiguous message. On the one hand we hear that the right to take collective action and also the right to strike are fundamental rights which form an integral part of the general principles of Community law. However, we also hear that these rights are not as fundamental as the four freedoms, the cornerstones of the Community. As Norbert Reich puts it, there is no reserved area left. Suddenly, with Laval[18] and Viking,[19] national labour law, which so far enjoyed immunity, falls within the scope of the Community's free movement regulations.[20]

The most perceptible characteristic of the regulation is the lack of competence of the EU (on the other hand, as it has been pointed out

[18] *Laval v Svenska Byggnadsarbetareförbundet*, C-341/05 [2007] ECR I-11767. In Laval Swedish unions took action against a Latvian construction company, Laval over the working conditions of Latvian workers refurbishing a school in the town of Vaxholm. Laval refused to sign a collective agreement and a blockade of the work place was initiated by the trade unions. It was questioned if Community law can restrict or prohibit trade unions in one Member State taking industrial action. The CJEU stated that the right to strike is a fundamental right, but in effect gave priority to the right of businesses to supply cross-border services.

[19] *International Transport Workers' Federation and Finnish Seamen's Union v VikingLine*, Viking, Case C-438/05, [2007] ECR I-10779. In Viking a Finnish passenger shipping company (Viking Line) operated a ferry, Rosella, under a Finnish flag and with a mostly Finnish crew. To save cost Viking decided to opt for a cheaper Estonian flag and crew. As a response to this the Finnish sailors took actions. The CJEU was asked to decide the relationship between the rules on free movement and the fundamental right to strike. The CJEU recognised the right to take collective action, but condemned the action of the Finish union as it limited the freedom of movement.

[20] N. Reich, 'Free Movement v Social Rights in an Enlarged Union. The Laval and Viking Cases before the European Court of Justice', 8 *German Law Journal* (2007), available at *http://www.germanlawjournal.com/article.php?id=891* (30.5.2013).

before, the EU's regulations on free movement do limit collective actions). Taking into account the special nature of the European social policy, this is hardly surprising. Yet, we cannot ignore that the tendencies present in the 21st century make regulation necessary. Globalisation serves as a catalyst for collective actions with the involvement of more countries (cross-border demonstration is only one example). Acknowledgement of the right to strike as a fundamental right also means that no strike breakers from other Member States are allowed, nor is the relocation of production from one Member State to another. The national tool kit is obviously insufficient to handle these types of problems.[21]

3.2 Does the EU common migration policy recognize the right to strike of migrant workers?

Common migration policy of the EU towards third country nationals has been developing in the last decade through the adoption of Directives in the field of migration. Up to date, the Member States have adopted five Directives and two Directives are currently under negotiation.[22] The Single Permit Directive, the Blue Card Directive and the Long-term Residents Directive have incorporated the same stipulation of the right to organize for migrants, providing for freedom of association and affiliation and membership of an organisation representing workers or

[21] E. Kajtár, 'Bridge(s) over Troubled Water', 4 *Pécsi Munkajogi Közlemények* (2011) pp. 117-131.

[22] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ L 289/15, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44, Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, OJ L 155/17, Council Directive 2011/98/EC 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, OJ L 343/1. European Commission, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010)379; European Commission, Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, COM(2010)378 are still in the process of adoption by the Member States.

employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security.

The Scientific Research Directive does not include the right to organize because of the special rules relating to research and the presumption that the nature of this work in the Member States does not imply freedom of association or affiliation.

It is essential to mention that the Directives do not explicitly include any mention of the right to strike, and all of them include the possibility for Member States to restrict equal treatment as regards the freedom of association to certain categories of migrants. The European Economic and Social Committee has voiced its concern and disagreement over this possibility, which it considered to contradict the principle of non-discrimination.[23] The Committee on Employment and Social Affairs of the European Parliament has also put forward an interesting amendment proposal on the text of the upcoming Directive on Seasonal Employment to include 'the rights and benefits conferred by such organisations, inter alia the right to negotiate and conclude collective agreements and the right to strike and take industrial action, in accordance with the host Member State's national law and practices'.[24] At this point and having in mind previously adopted provisions of the EU common migration policy, it is very unlikely that seasonal workers will be given specific labour rights that were not previously regulated in other Directives, despite the fact that the amendments do not attempt to harmonize the right to strike, but merely refer to the national legislative provisions and practices. It is more likely that seasonal and all other migrant workers residing in the territory of the EU will continue to have difficulties in their attempts to derive their fundamental right – to strike – from the provisions of the *acquis communautaire* relating to migration.

[23] Cf. p. 4.11-4.12 Opinion of the European Economic and Social Committee on the Proposal for a Council Directive on a single application procedure. See n. 12.

[24] European Parliament, Opinion of the Committee on Employment and Social Affairs for the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of *seasonal employment,* COM(2010)0379 – C7-0180/2010 – 2010/0210(COD), rapporteur: Sergio Gaetano Cofferati, 1.12.2011.

IV. The right to strike of migrant workers in particularly vulnerable sectors of employment

Migrant workers employed in particularly vulnerable sectors of employment (defined by the TUC Commission on Vulnerable Employment as 'precarious work that places people at risk of continuing poverty and injustice resulting from an imbalance of power in the employer-worker relationship')[25] theoretically enjoy the same scope of labour rights as all other workers employed in non-vulnerable sectors of employment. But, in practice, their situation is utterly different due to the fact that migrant workers employed in private households, tourism, entertainment industry, low-pay sectors, catering, agriculture, and other either seasonal, temporary or atypical jobs usually have fixed-term, temporary contracts. Legal insecurity ensuing from short-term employment puts them in a situation in which they are reluctant and usually unwilling to seek membership in trade unions or to initiate the organization of workers employed in the given occupation. The TUC Commission on Vulnerable Employment has made an analysis of membership of vulnerable workers in trade unions in the UK and came to the conclusion that only 10 per cent of all vulnerable workers are union members, with double union participation of workers who are in permanent employment compared to those in temporary employment.[26] Moreover, the same research has revealed that trade union membership among recent migrant workers is only half of the membership of other workers, with the overall proportion of women in the migrant sector estimated at 60 per cent and the vast majority of non-unionized workers being employed in the private sector.[27] This figure clearly demonstrates the magnitude of the problem and highlights the fact that 'the most vulnerable among the vulnerable' are the least protected by the national labour laws and regulations. Migrant workers deliberately choose economic prosperity and security of residence status over labour rights, which significantly lowers the level of their labour protection and results in their vulnerable position on the labour market.

Another problem is physical and, consequently, legal invisibility of migrant workers employed in atypical sectors. This is related to the

[25] TUC Commission on Vulnerable Employment, *Hidden Work, Hidden Lives*, available at *www.vulnerableworkers.org.uk* (02.05.2013).
[26] See n. 25, at p. 68.
[27] See n. 25, at p. 69.

nature of their employment and very limited (if any) external interaction, which is an issue particularly for workers in domestic households. Legal invisibility and the considerable occupational segregation of migrant workers, along with low levels of organization in the informal economy, further limits these workers' access to collective bargaining, therefore, it structurally excludes from access to collective bargaining those disadvantaged workers to whom Convention No. 111 guarantees equality. The problem is particularly serious in developing countries and transition economies where the formal sector is small, with a limited number of workplaces in which collective bargaining can be applied (usually restricted to the public and semi-public sectors), resulting in the situation that collective bargaining mechanisms have been ineffective at reaching most workers in many developing countries, thereby compromising equality of treatment.[28]

These factors essentially limit the right to strike of migrant workers in vulnerable employment because national legislations usually authorize the union or organization representing workers engaged in the specific occupation to officially announce and initiate a strike. In the absence of a union or similar organization, individual migrant workers are usually not entitled to formally announce strikes.

In addition to this, individually employed migrant workers, particularly those working for private employers, in the majority of cases have a residence status tied to the employer). International human rights organizations have in numerous occasions appealed to the States to consider granting an individual residence status to migrant workers because it would have a protection effect and would allow their access to the rights, but to no avail. As the expression of discontent over the labour conditions implies almost certain (and frequently immediate) withdrawal of the residence permit of a migrant worker, the right to strike for migrants employed in particularly vulnerable employment remains an illusory expectation.

V. What would we do?

1. The Hungarian experience

Strikes involving migrants (either as subjects or objects of the industrial action) are rare in Hungary; consequently, we have to settle for a

[28] A. Blackett and C. Sheppard, 'Collective bargaining and equality: Making connections' 4/142 *International Labour Review* (2003) pp. 424, 427, 429.

hypothetical case. How would Hungarian judges decide in a situation similar to Viking or Laval? This question is rather complex. The employer shall ask the opinion of the trade union operating at the employer's workplace prior to passing a decision in respect of any plans for actions affecting a large group of employees (like proposals for the employer's reorganization, transformation). Actions comparable to those involved in the aforementioned cases would most likely be unlawful. Strike against an employer who has partially transferred his activity abroad so as to force him to conclude in that given foreign country the same collective agreement as the one in force between the trade union and the employer in his "home country" would be considered unlawful. Similarly, trade union action to force the posted workers' employer to quasi join the collective agreement to extend the application of the conditions of the collective agreement to posted workers would be unlawful.[29]

2. Migrant workers' right to strike in Croatian law and practice

The Constitution of the Republic of Croatia guarantees the general right to strike, without prejudice to the statutory limitations of that right for workers employed in the armed forces, police, state administration and public services (Article 60). Thus, the Constitution implicitly recognizes the right to strike of all persons legally residing in the territory of the Republic of Croatia, including migrant workers. The fundamental right – to strike – as transposed from international and regional human rights instruments has been interpreted as a 'constitutional guarantee of the subjective right of workers to strike',[30] but the provisions of the Labour Code[31] curtailed the subjectivity of the right by providing that unions or their associations have the right to call for a strike and conduct it with the purpose of promotion and protection of the economic and social interests of their members or because of salary or compensation for salary if they were not paid thirty days after the deadline for payment

[29] Gy. Kiss and E. Kajtár, 'Freedom of Services, Establishment and Industrial Conflicts. Country Report Hungary', in R. Blanpain and A. M. Świątkowski, eds., *The Laval and Viking cases: freedom of services and establishment v. industrial conflict in the European Economic Area and Russia* (Alphen aan den Rijn, Wolters Kluwer 2009) pp. 83-101.

[30] Potočnjak, op. cit. n. 5, at p. 255.

[31] *Croatian Labor Code* (Zakon o radu), Official Gazette, Narodne novine, NN 149/09, 61/11, 82/12.

(Article 269). This provision has left non-unionized migrant workers in Croatia deprived of a right to organize and conduct a strike. As we previously mentioned, in our view, workers have to be 'strike right holders' i.e. entitled to the right to strike as individuals, as stipulated in ICESCR, Article 8(1) and as recommended by the Committee of Independent Experts on the Application of the European Social Charter ('The right to strike is the right of workers, not a right linked to membership in the trade union').[32] Thus, we consider that the provisions of the Croatian Labour Code should expand the personal scope of the right to call for a strike and maintain other currently stipulated elements of the legality of a strike (like strike announcement, the obligation to exhaust other available means of negotiations between employer and employee(s), the obligation to conduct conciliation, and to submit a written justification for the strike, the time and place of commencement of the strike to the employer).

Since membership in a trade union is a precondition of enjoying the right to strike in Croatia and since individual workers are not legally entitled to declare a strike, it was necessary to investigate the level of participation of migrant workers in Croatian trade unions. Our research involved ten major trade unions (representing the main sectors of employment of migrant workers in Croatia) out of the twenty registered trade unions. Namely, we contacted the Trade Union of Workers in the Metallurgy Industry, the Independent Union of Workers in the Energy, Chemistry and Non-metallurgy Industry, the Trade Union of Construction Workers, the Trade Union of Commerce, the Independent Union of Workers in the Communal Sector, the Trade Union of Workers in Tourism and Services, the Trade Union of Transport, the Union of Engineers and Forestry Technicians, the Independent Union of Workers in the Textile, Footwear, Leather and Rubber Industries, and the Trade Union of Workers in Agriculture, the Food Industry, Tobacco Production and Water Management. In addition, we interviewed the Union of All Independent Trade Unions as the roof organization that collects all relevant information related to the membership of migrant workers in all unions.

Seven unions reported no migrant worker members. In other three trade unions, which do have migrant workers as members, union representatives identified several problems and obstacles concerning

[32] Council of Europe, Conclusion I-X-, in Potočnjak, op. cit. n. 5, at pp. 203-208.

data reliability in union membership registration. It was noted that one of the issues was the fact that trade unions did not register members according to the migration status of workers and their nationality. Another obstacle in acquiring reliable data was the fact that union representatives could not distinguish between whether migrants held dual citizenship and thus were to be considered nationals or they had permanent or temporary residence in Croatia. Further, trade union representatives emphasised that those migrant workers who left the country did not de-register with them, while the police did not share their data on the expiration of the single (work and residence) permits of migrants, so no one actually knows the exact number of migrant workers who are unionized in Croatia at present. Finally, union representatives cautioned on the need to strengthen the unions' outreach to the smaller, usually privately owned, companies where the rate of union membership among migrant workers is miniscule. The same is applicable to the short-term employed migrant workers who are difficult to motivate to join unions, so by opting for a non-unionized employment relation they basically renounce the right to strike.

The only union which has available data on migrant worker members is the Trade Union of Metallurgy Industry Workers, which counts 137 migrant workers, all employed in the same sub-contractor company from neighbouring Bosnia and Herzegovina. Trade Union representatives were not aware of any strike organized by migrant workers or any strike organized against migrant workers in Croatia. This does not mean that labour rights of migrant workers are fully respected. Just on the contrary. Trade unions' legal advisers have pointed out numerous instances of violations of labour rights and labour exploitation of migrant workers. To name just a few: their salaries are lower than the salaries of national workers, they are reluctant or unwilling to report work related accidents, deprived of per diems and monetary stimulations available to other workers, accommodated in inadequate housing conditions, etc.

The law in Croatia does not stipulate the unions' duty to report the irregular residence status of migrant workers to the police. One union's representative has mentioned that any sort of assistance necessary is extended to all migrant workers, regardless of their residence status. But, it is to be noted with concern that several unions which do have migrant worker members have resolutely rejected any consideration of assistance to illegally employed migrant workers and would not accept

them in their membership. Another trade union representative even considered reporting to the police illegally employed migrant workers (who are then immediately deported) as a sort of 'protection afforded to the migrant worker and to other legally employed workers'. This approach is not in line with the above mentioned trends in the protection of migrant workers, nor does it contribute to their enjoyment of fundamental human rights.

VI. Three key words: rivalry, protest and solidarity

The interaction of the migrant (or more broadly: foreign) and national workforce with special regard to industrial action can be described with three key words: rivalry, protest and solidarity.

1. Rivalry

Let us start with rivalry. Migration is often associated with competition, opposition and conflict. The EU2020 strategy stresses the contribution of migrants to the EU economy: a smart and sustainable growth will need third-country nationals to fill shortages in the labour market, mainly to offset labour force decline. However, the existence of modern diasporas, the use of cheap posted workers, the threat of relocation of enterprises create tension and this tension has often burst out in some form of protest. Emblematic cases, such as the afore-mentioned Laval and Viking, signal hostile feelings towards foreign workers.

Globalisation intensifies trans-nationalisation of production. The threat that unless they agree to lower wages employers will move production to a 'cheaper' location, to another part of the world brings workers into competition with each other.[33] Competitiveness is a priority. On the global scale workers are forced to compete with each other over jobs. At the country level national (citizen) workers fear that immigration will have an adverse impact on the wages of competing native groups and labour conditions will be undermined. Foreign workforce is desirable for the employers because their employment means numerical, temporal and wage flexibility. Migrants are more prepared to work for longer

[33] A. Bieler and I. Lindberg, 'Globalisation and the New Challenges for Transnational Solidarity', in A. Bieler and I. Lindberg, eds., *Global Restructuring, Labour and the Challenges for Transnational Solidarity* (London, Routledge 2011) pp. 3-16.

hours and often accept lower wages.[34] Migrants are frequently demonised and the media often mirrors strong anti-immigrant sentiments as well. Examples include anti-Romanian demonstrations in Italy in 2007-2008.[35] The presence of foreigners in the national labour market is often seen as a source of social dumping, or race to the bottom. There is a clash of interests between workers in stable jobs and workers at the periphery of the labour market (such as certain types of migrant workers).

Foreigners also raise the issue of strike breakers, because they may be used as substitutes for local workers in times of conflict. A good example is the strike at Budapest Airport in December 2008. Budapest Airport decided to hire new workers due to the proximity of Christmas. Some 40 strike-breakers arrived at Ferihegy airport from Greece and the airport manager started to train them as check-in security controllers. The Union claimed violation of the strike law and turned to the Labour Inspectorate to prevent the use of foreign workers hired to cover for striking security staff. The strike went on and the Greek security controllers started to work. The European Trade Union Confederation expressed its support for the airport employees. The Hungarian labour code states that it is forbidden to employ a hired-out worker at any place of business of the user enterprise where there is a strike in progress from the time when pre-strike negotiations are initiated until the strike is called-off. However, this 'anti-strike-breaker' provision of the Labour Code only prohibits the use of temporary workers. An employer wishing to maintain his activities may, however, utilize his own employees, or recruit new workers other than temporary workers.[36] According to the ILO, the hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term constitutes a serious violation of freedom of association.[37] The national regulations did not provide sufficient guidance.

[34] A. Caviades, 'Labour Migration and European Capitalism', in G. Menz and A. Caviedes, eds., *Labour Migration in Europe* (Basingstoke, England, Palgrave Macmillan 2010) pp. 59-60.

[35] E. Recchi and A. Triandafyllidou, 'The Effects of Europeanisation', in G. Menz and A. Caviedes, eds., *Labour Migration in Europe* (Basingstoke, England, Palgrave Macmillan 2010) p. 143.

[36] Kajtár, op. cit. n. 7.

[37] ILO, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (Geneva, International

2. Protest

2.1. Denial of rights

To start with the most extreme examples, migrant workers in some parts of the word are still discriminated and denied the right to organize unions, join unions or go on strike. Two examples: in 2007 in the United Arab Emirates 4000 Indian workers went on strike to protest at their low wages and poor working conditions. The Government threatened them with imprisonment and deportation and refused to address the causes of their complaints. In July 2008, after South Asian workers in Kuwait engaged in a strike and held mass demonstrations to demand better pay and working conditions, the Government deported over 1129 Bangladeshi workers.[38]

2.2. Exploitation

Globalisation – besides its advantages – also made exploitation of the workforce easier. Certain groups of migrants, especially those with lower levels of education are in a multiply disadvantageous position. The low-skilled migrants and their family members are at higher risk of social exclusion and are trapped in so-called low status or 3D jobs.[39]
The exploitation oftentimes leads to protest. Migrant workers' movement in French car plants in the late '70s, early '80s is a classic example. The French car and building industries were typical illustrations of the situation in highly-developed countries. Certain jobs became defined as jobs for foreign labour. [40]
In August 2010 a group of 200 Chinese migrant workers put down their buckets in Sweden, left their lodgings and marched 16 miles. The workers, hired by a Chinese company to pick wild berries, felt that they had been given false promises. In Sweden, picking wild berries is a big business. The berry-pickers are primarily migrant workers from Southeast Asia (Vietnam, Thailand, China), usually from poor families

Labour Office, 2006), available at *http://www.ilo.org/wcmsp5/groups /public/@ed_norm/@normes/documents/publication/wcms_090632.pdf* para. 632.

[38] See n. 2, at pp. 174-175.

[39] The expression 3 D refers to work that is dirty, dangerous, difficult, or the combination of these (unhealthy, physically demanding, monotonous, and socially unattractive). Agriculture, construction, heavy industry, domestic services, cleaning services are some of the most common examples.

[40] S. Castles and M. J. Miller, *The Age of Migration* (Basingstoke, Palgrave-Macmillan 2003) pp. 188-191.

who have to borrow money for the journey to Sweden. In a – plausible – worst case scenario not only do they earn less than they have hoped for, they also end up in debt.[41]

The hunger strike of 300 migrants in Greece – the main transit country for illegal migration into the EU – in March 2011 against the immigration system was an even more radical form of protest. "We are migrant men and women from all over Greece. We came here due to poverty, unemployment, wars and dictatorships. .. We came (either with regular entry or not) in Greece and we are working to support ourselves and our families. We live from our sweat and with the dream, some day, to have equal rights with our Greek fellow workers."- reads the Announcement by the Assembly of Migrant Hunger Strikers.[42]

The scale of the problem is demonstrated by the existence of a transnational migrant strike day. The movement started with a migrants' strike and boycott day in the USA in 2006. Since then on the 1st of March with the slogan 'a day without foreigners' a general strike is organised in various parts of the world (Austria, Italy, France, etc.). Migrants stop to work for a day to initiate change in policy towards migrants.[43]

2.3. Can undocumented peregrines express discontent?

International human rights standards, including international labour standards, are explicitly migration status blind. This approach was confirmed by two prominent regional human rights courts, the European Court on Human Rights in case *Siliadin v France*[44] and the Inter-American Court on Human Rights in its advisory opinion on the application of international labour standards to irregular migrant workers. In this opinion, the Court has set a precedent that non-discrimination and the right to equality are applicable to all residents,

[41] Ch. Woolfson, et al., 'Forced Labour and Migrant Berry Pickers in Sweden', 28 *International Journal of Comparative Labour Law and Industrial Relations* (2012) at pp. 152, 168-171.

[42] *http://w2eu.net/2011/01/18/300-migrants-hunger-strike-greece/* (30.05.2013)

[43] *http://transform-network.net/blog/archive-2012/news/detail/Blog/1-march-2012-transnational-migrants-strike.html* (30.05.2013)

[44] Case Siliadin v France, 26/10/2005, Application no. 73316/01, available at *http://ec.europa.eu/anti-trafficking/download.action;jsessionid=cyqRQXZbj2lmTTjLQJnLhJQszKv92Xx4zx8Sqf5FZHWnsm8yN4jK!134714294?nodeId=0236dd77-487c-4cdc-9041-b9f8d21d9827&fileName=Siliadin_v_France_en.pdf* (1.5.2013).

regardless of their immigration status.[45] The Courts have simply reiterated rights accorded by the above mentioned international human rights instruments. In addition to this, the UN Committee on the Elimination of Racial Discrimination has recognized that 'while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated'.[46] Finally, the Council of Europe adopted landmark Resolution 1509 in 2006 on the human rights of irregular migrants, in which it unequivocally protected their freedom to form and to join a trade union (Article 13.5). The ILO Committee on Freedom of Association has reiterated universal applicability of the right to freedom of association and has confirmed that the right to join trade unions is also applicable to migrant workers in an irregular situation.[47] According to the FRA Report, the majority of EU Member States have legislation that does not prohibit migrants in an irregular situation from joining trade unions, with the exception of Cyprus, Latvia and Lithuania. In Greece, migrants in an irregular situation participate in trade unions even if there is no such explicit right.[48] Belgian trade unions started to offer membership to

[45] The Court decided unanimously that 'the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labour-related nature. When assuming an employment relationship, the migrant acquires rights that must be recognized and ensured because he is an employee, irrespective of his regular or irregular status in the State where he is employed. These rights are a result of the employment relationship.' Inter-American Court of Human Rights, *Juridical condition and rights of the undocumented migrants*, Advisory Opinion OC-18/03 of 17 Sept. 2003, requested by the United Mexican States. ILO, *Freedom of association in practice: Lessons learned*, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (Geneva 2008) p. 58.

[46] Platform on International Cooperation on Undocumented Migrants, *General Recommendation 30: Discrimination Against Non Citizens*, 01/10/2004, para. 35, in Platform on International Cooperation on Undocumented Migrants (PICUM), *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework* (2007) pp. 38-39.

[47] Cf. Fundamental Rights Agency, *Fundamental rights of migrants in an irregular situation in the European Union* (Vienna 2011) (hereinafter: FRA Report) pp. 55-56 and ILO, op. cit. n. 45, at p. 57.

[48] FRA Report.

undocumented migrants in 2008,[49] while FRA reported on the increasing efforts of German trade unions to recruit undocumented migrant workers.[50] From the available research data, we can clearly draw a conclusion that trends in the protection of undocumented migrant workers started to shift in the past decades. We can notice a more inclusive approach towards this category of workers, which is more susceptible to labour exploitation and abuses than others, and an overall alignment of practices with the international human rights and labour rights frameworks.

3. Solidarity

Of course it would be misleading to paint an all dark picture of globalization. Transnational production structures may not only trigger competition but also cooperation. New ways of transnational solidarity also open up and this is especially important for the disadvantaged group of migrants. One has to note, however, that this type of solidarity is not automatic. It has to be based on continuous decision. Another effect of globalisation is that trade unions are forced to come up with new ways and strategies. As Richard Hyman puts it, 'trade unions need to redefine, indeed re-invent, their understanding of solidarity; and to do so they need to rediscover how to behave proactively and strategically'.[51] Trade unions have suffered a decline in membership, in public status and in effectiveness in achieving their core objectives. Solidarity has many meanings. One conception presupposes common identity, a collective loyalty and a clear sense of difference from those outside the group. The second type is based on common interest, the classic rationale for trade unionism. The third type involves 'mutuality despite differences', this third approach is similar to charity.[52] This third type is the most relevant when it comes to the issue of migrant workers.
Institutionalised forms of transnational solidarity and labour cooperation are the European Trade Union Confederation (ETUC) and the International Trade Union Confederation (ITUC). The ETUC represents

[49] ILO, op. cit. n. 45, at p. 57.
[50] FRA Report.
[51] R. Hyman, 'Trade Unions, Global Competition and Options for Solidarity' in A. Bieler and I. Lindberg, eds., *Global Restructuring, Labour and the Challenges for Transnational Solidarity* (London, Routledge 2011) p. 19.
[52] Woolfson, op. cit. n. 41.

amongst others the rights of migrant workers.[53] It agrees with the EU2020 strategy, which stresses the importance of the contribution of migrants to the EU economy due to the greying societies, but it underlines the need to consider migrants first of all as human beings, to whom equal human and social rights must be ensured to the same extent as to the European citizen, as well as the right to free and fair mobility and to equal treatment in the workplace. The ETUC's agenda is based on the following priorities:

- recovering a balance between the right to free movement of labour and the protection of social standards;
- fighting against social dumping and wage competition and all forms of discrimination;
- right-based approach of legislative initiatives at European level;
- respect for international and fundamental labour standards;
- improving the trade union presence in the field of migration and cooperation with origin countries;
- encouraging the exit from irregular migrant status and undeclared employment;
- effective integration policy;
- supporting collective bargaining and trade union membership and, last but not least,
- strengthened role of public services, civil society organisations and trade unions.[54]

VII. Concluding remarks

Migration is more than a mere fact; it is a necessity of the contemporary labour markets. It is a tool to balance demographic decline and labour market shortages as well as a route to a better life for many people. The most important question is the following: can human rights, amongst others, the right to strike be guaranteed to migrant workers? Martin Ruhs and Philip Martin highlight the tension between more migration and more rights, claiming that there is a trade-off between insisting on equal rights for migrants and an open labour immigration policy (broad

[53] The ETUC calls on the EU Member States to refrain from applying any kind of measures to block or limit the free movement of Croatian workers within the EU.

[54] *Action Plan on Migration*, Adopted at the Executive Committee Meeting of 5-6 March 2013, available at *http://www.etuc.org/a/11097#nb* (30.05.2013).

possibilities to migrate).[55] However, the right to strike is a core labour right which should equally be enjoyed by migrant and non-migrant workers.

The very presence of foreign workers (migrants as well as non migrants) brings new dynamics into the labour markets and requires the re-thinking of the relation between different human rights. The interaction of foreign and national workforce may trigger very different reactions from rivalry and protest to new and more complex forms of solidarity. This new dynamics in labour markets should not undermine the exercise of the fundamental human right – the right to strike. Rivalry, denial of rights and exploitation should in reality be replaced with solidarity and common fight for improved labour rights of all workers, regardless of their migration status. As the right to strike is at present not a harmonized area of the EU *acquis*, with a high probability that the EU Member States will insist on maintaining that competence, national legislations should continue striving to align with the international human rights and labour standards in the area of the right to strike. In the time of the serious demographic crisis Europe is faced with, along with the rise of other international labour markets, only a rights-based and inclusive approach could increase the EU's attractiveness for labour migration. The EU will have to re-consider and expand currently limited labour rights and its equality policy towards third-country nationals in order to meet ever-rising standards of international competitiveness. Hungary and Croatia will have to follow that path and will have to embrace new trends in the labour protection of migrant workers, which undeniably include the right to express discontent for all migrant workers, regardless of their immigration status.

[55] M. Ruhs and Ph. Martin, 'Numbers vs. Rights: Trade-Offs and Guest Worker Programs' 42 *International Migration Review* (2008) pp. 249-265.

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Civil law frameworks for liability of companies for environmental damages and their influence on regional development

I. Introduction

One of the fundamental goals of regional development refers to efficient environmental protection and the basic instrument for the accomplishment of this goal is first and foremost a proper legislative framework. The main topic of this paper is the civil regulation of the liability of companies for environmental damages with a special emphasis on the modes of the liability and release from liability. A systemic overview and analysis of the legislative frameworks for liability of companies for environmental damages should indicate certain legal inconsistence, non-compliance between some laws and the possibility of equalization and adjustment of particular legal texts.

The authors make reference to the role of particular institutions of regional development in the efficient implementation of legal rules regulating liability of companies for environmental protection and the need for their common, coordinated action for the purpose of systematic and efficient implementation of laws, i.e. the goals which should be achieved by regulation of these issues from the field of substantive law. This reveals a close connection between environmental protection governed by civil law and that governed by administrative law and thus the inability of their absolute separation.

The paper particularly singles out the similarities and differences between the regulation of the respective issues in the Croatian and Hungarian system of civil law as well as the extent of the influence of harmonization with EU requirements on these two countries considering the fact that Hungary and Croatia as a Member States of the European

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Union needed to harmonize the legal regulation of civil liability for environmental protection with the requirements of the European Union.

II. The civil law system of liability of companies for environmental damages in Croatia and Hungary

1. Liability of companies for environmental damages within the Croatian system of civil law

Environmental law in general as well as liability for environmental damages plays an important role in the Croatian legal system. The Constitution of the Republic of Croatia prescribes that it is up to the state to provide for adequate conditions for a healthy environment.[1] The right to a healthy environment can go hand in hand with the following state obligations: 1) abstaining from any kind of direct or indirect interference with the exercise of the right to a healthy environment; 2) prevention of any kind of interference of third parties such as large corporations from the exercise of the right to a healthy environment, and 3) adoption of measures necessary for the achievement of the full exercise of the right to a healthy environment.[2] In an attempt to adopt a contemporary constitutional document, the constitution makers have constitutionalized the 'preservation of the nature and human environment' in Article 3 of the Constitution as one of the highest values of the constitutional order of the Republic of Croatia and in Article 69 of the same document 'the right to a healthy environment'.[3] Although it cannot be deemed as a direct source of the appertaining law, the Environmental Protection Declaration adopted by the Croatian Parliament on 5 June 1992 discloses the will of the state to define civil liability for environmental damages.[4]

[1] The Constitution of the Republic of Croatia, revised text, Official Gazette, Narodne novine, NN 56/90, 135/97, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10.

[2] A. Bačić, 'Ustavni temelji i problemi zaštite okoliša u hrvatskom i europskom pravu [Constitutional Foundations and Environmental Protection Issues in Croatian and European Law]', *Zbornik radova Pravnog fakulteta u Splitu* 4(2008) p. 741.

[3] Bačić, loc. cit. n. 2, at p. 742.

[4] In its Chapter VII, the Environmental Protection Declaration lays down that the Republic of Croatia sees no alternative to defining the material and criminal liability of those who endanger and devastate natural values and human environment and is, in compliance with the polluter-pays principle, to adopt appropriate fees for environmental damages, which will generate financial prerequisites for restoration and advancement of the devastated environment. Environmental Protection Declaration, NN 34/92.

Environmental protection in Croatia governed by civil law includes both preventive protection aimed at the prevention of environmental damages and repressive protection or, in other words, the rules for liability for already existing environmental damages. Pursuant to the rules for strict liabilities, both legal entities and natural persons are in this context liable for their action or omission which has led to environmental damages.[5] Civil liability for environmental damages is to be proved at a competent court[6] and the referring contentious proceedings can be initiated by a natural person or legal entity whose right has been violated. The basic rules of liability for environmental damages are incorporated in the Civil Obligations Act and the Environmental Protection Act.

1.1. Civil Obligations Act

The Civil Obligations Act[7] (hereinafter: COA) sets forth that where damage results from things or activities representing a major source of danger (threat) for the environment, liability shall be imposed regardless of fault.[8] In the context of such liability, the presumption of causality encompasses as follows:

- being a party to an obligatory relation in which damage occurred,
- harmful action,
- damage, and
- harmful consequence.

Furthermore, the Civil Obligations Act prescribes legal presumptions of damage caused in relation with a dangerous thing or dangerous activity and stipulates that such damage shall be considered as resulting from that thing or activity, unless it has been proved that they have not caused the damage.[9] In its subsequent Article, the COA sets forth that the owner shall be liable for damage resulting from a dangerous thing, and the person engaged in the respective activity shall be liable for damage resulting from a dangerous activity.[10]

[5] P. Klarić and M. Vedriš, *Građansko pravo* [Civil Law] (Zagreb, Official Gazette PLC 2009) p. 622.
[6] Municipal Court in first instance (authors' remarks).
[7] Civil Obligations Act (COA), NN 35/05, 41/08, 125/11.
[8] Art. 1045(3) of the COA.
[9] Art. 1063 of the COA.
[10] Art. 1064 of the COA.

The Civil Obligations Act also defines the cases in which owners can be released from their liability for damage resulting from dangerous things. What constitutes a certain legal gap here is the fact that the COA contains no provisions on release from liability for damage resulting from dangerous activities. Although there is no provision making reference to the analogous application of the rules governing the conditions and manners of release from liability for damage resulting from dangerous things, release from strict liability for damage resulting from dangerous activities should require application of the provisions defining the release from liability for damage resulting from dangerous things.

Pursuant to the aforementioned, a company dealing with a dangerous activity can be released from its liability for environmental damage that arose during the performance of that activity if one of the following requirements has been met:

- if it has been proved that damage has arisen from an unpredictable and external cause which could not have been prevented, avoided and remedied,
- if it has been proved that damage has resulted solely from the action of the injured party or third person, on the occasion of which the damage could not have been anticipated and the consequences thereof could not have been avoided and remedied.

A company dealing with a dangerous activity can be partially released from liability for environmental damage arisen during the performance of that activity if the injured party has partially contributed to the emergence of the damage. If the emergence of the damage has partially resulted from a third person's action, that third party shall be jointly and severally liable with the owner of the thing and shall make damage compensation proportionally to the extent of their fault.

The COA depicts force majeure as one of the reasons for release from strict civil liability. To some extent it remains unclear whether the action of a third or an injured party can, in specific circumstances, be regarded, as 'an unpredictable cause beyond the subject matter that could not have been prevented, avoided or remedied' according to the COA? All these possibilities (cause beyond the subject matter, inevitability and irremediability) may refer to actions of an injured or a third party. However, since the action of a third or an injured party is considered as a special exoneration reason, one can conclude that such action cannot

be deemed as force majeure according to the COA. Many European legal systems denote action of a third or an injured party as force majeure[11] under the condition that the action is not 'under supervision' of a person in charge.

1.2. The Environmental Protection Act

The strict liability of companies conducting dangerous activities for environmental damages is also regulated by the Environmental Protection Act[12] (hereinafter: EPA).[13] This Act prescribes the liability of companies conducting dangerous activities based on the proven fault or proven negligence principle. The criterion for defining a dangerous activity is designated pursuant to the way of management and realization of the activity or pursuant to the substances or agents utilized when performing it.

If more companies conduct a dangerous activity together, liability for environmental damage or for an imminent threat (danger) of environmental damage shall be joint and several.

Article 153 of the EPA sets forth exemptions from the strict liability of companies for environmental damage, i.e., damage done to protected species if it has been proved that the damage resulted from the following:

- consequence of a natural phenomenon of an unpredictable and unavoidable character that could have been neither prevented nor avoided,
- action of a third party albeit all the appropriate safety measures were undertaken,
- adherence to an order or instruction given by authorities, except if that order or instruction was given after an emission or a sudden incident caused by the company's own operation.

Unlike the COA, the EPA encompasses no provision that would challenge the interpretation that an action of an injured or a third party may be regarded as force majeure since this force is depicted as a

[11] For more details see B. Koch and H. Koziol, *Unification of Tort law: Strict Liability* (The Hague/London/Boston, Kluwer Law International 2001).

[12] Environmental Protection Act, NN 110/07.

[13] Art. 151(1) of the EPA. Paragraph 4 of the same Article is binding for a company dealing with a dangerous activity in terms of remedying environmental damages and eliminating an imminent threat of damage resulting from the respective dangerous activity.

'natural phenomenon' of an unpredictable and unavoidable character that could have been neither prevented nor avoided.

Certain interpretation ambiguities are in this light introduced by Article 154(1) of the EPA, stipulating that if, due to particular accidental circumstances, a company does environmental damage, i.e., harm to protected species, by conducting a dangerous activity, it shall be considered that the damage resulted from these accidental circumstances. A case designated as an event which could have been prevented if it had been anticipated but it cannot be imputed to the wrongdoer (injurer) as fault represents a limit of the scope of culpability. If a certain activity is qualified as being dangerous, it becomes irrelevant whether the damage occurred accidently or not, since only force majeure can provide release from strict civil liability.

Moreover, paragraph 2 of the same Article stipulates that if a company proves that the damage was not caused by its activity or if it proves that the damage resulted from an activity of another legal entity or natural person or that the damage emerged due to some other circumstances, the presumption of causality shall be rejected. The legal formulation 'or that the damage emerged due to some other circumstances' is too general and too broad considering the fact that the strict civil liability of companies or liability in line with the causality criterion is actually a form of liability not implying fault: it is liability from which one could only be released under specific conditions prescribed by law. Damage occurred due to 'some other circumstances' as an exoneration reason may entail a number of circumstances which might release a company conducting a dangerous activity from strict liability, which takes us far away from the basic concept of liability according to the causality criterion.

The basic assumption of the liability of companies for environmental damage is the precise determination of which company has caused environmental damage, assessment of the damage relevance and of the imminent threat. The EPA has attributed this task to the central body of the state administration, and if this body is not able to identify the company that caused the damage, it shall inform the Ministry of Interior thereabout for the purpose of undertaking necessary measures and action for the identification of the company responsible. After the identification of the company in fault and the preparation of a damage assessment by a public adjuster, measures aimed at environmental damage remediation and/or the elimination of the respective imminent threat shall be

specified. At this point, it comes to the issue of the purposiveness of the legal formulation that the central body of the state administration may order the company by means of a decree to implement its own assessment and provide necessary information and data. Providing necessary information and data by the wrongdoer (injurer) may contribute to the proper assessment of the severity of the damage and the imminent threat (danger), but the assessment conducted by the injurer gives space to a possible escape from (part of) the liability.[14]

The EPA is also binding for a company that has caused the imminent threat (danger) of damage or environmental pollution by its action or omission while conducting its operations in terms of undertaking prevention or remedial measures with no delay.[15]

In compliance with the corresponding provisions of the EPA, authorized submitters of an application for damage compensation shall include local and regional self-government units or the state, depending on the site and place of harmful action for the environment, on the type of damage and on who has undertaken the measures for elimination of the threat (danger) of damage, all under the condition that the company responsible has not done so or that the nature of the subject matter prevents it from doing so pursuant to the EPA. Compensation for damage done to natural persons and legal entities on the occasion of causing environmental damage by pollution and compensation for damage done on such occasions to the property of those people or for any economic loss or for any kind of right infringement shall be subject

[14] A non-governmental, nonpartisan and non-profit civil society for environmental protection called 'Zelena akcija' proposed in its 'Comments and Proposal for the Final Draft Act on Environmental Protection Adopted at the Government Session of 13 September 2007' the deletion of this provision from the draft act due to the fact that the preparation of damage assessment by the injurer 'provides the operator with the possibility of misuse'. These comments and proposal are available at *http://twiki.zeleniforum.org/foswiki/pub/Zeleniforum/ProjektipravookolisaNews/ZZO-komentari_ZA.doc* (30.4.2013).

[15] In compliance with Article 159 of the EPA, prevention measures imply every action and measure undertaken as a reaction to an incident, action or omission that has brought to an imminent threat (danger) of damage or pollution for the purpose of prevention of emergence of environmental damage and harm to protected species or reduction of such a damage to the least possible extent while remedial measures mean every action or combined action, including mitigation or temporary measures, i.e. measures prescribed for the purpose of restoration, rehabilitation or replacement of damaged natural resources and/or their damaged functions or for the purpose of ensuring an alternative to these resources and functions.

to the appropriate rules of the Civil Obligations Act as suggested by the EPA.[16]

2. Liability of companies for environmental damages in the Hungarian civil law system

2.1. The legal framework of Hungarian environmental protection

In Hungary there is quite a wide regulation for the protection of the environment. Such as in many countries, the constitution, the Civil Code, the Criminal Code has its own regulations in this field. There is also a special act on environmental protection and other acts also prescribe special rules especially for legal persons and companies to protect the environment or mitigate the occurred damage.

The Fundamental Law[17] declares the people's right to health and a healthy environment in Articles XX and XXI. According to these sections, everyone shall have the right to physical and mental health; Hungary shall promote the application of the right referred to above by an agriculture free of genetically modified organisms, by ensuring access to healthy food and drinking water, by organizing safety at work and healthcare provision, by supporting sports and regular physical exercise, as well as by ensuring the protection of the environment (Article XX). Article XXI declares that Hungary recognizes and enforces the right of everyone to a healthy environment; anyone who causes damage to the environment shall be obliged to restore it or to bear the costs of restoration, as provided for by an Act; it shall be prohibited to import pollutant waste to Hungary for the purpose of disposal. According to the interpretation apparent from the jurisprudence of the Constitutional Court, the right to a healthy environment is an abstract human right which shall be enforced by factual procedural rules. These rules can provide for the presence of society in the law making process.[18]

[16] Arts 157 and 158 of the EPA.

[17] Magyarország Alaptörvénye (2011. április 25) [Fundamental Law of Hungary (25 April 2011)].

[18] *http://konferenciakalauz.hu/files/conference/2888/kornyezethez_valo_jog.pdf* (20.5.2013)

2.2. Environmental protection in the Civil Code

Since the topic of this paper is the civil liability of companies for environmental damages,[19] the authors would first like to make clear that the Civil Code does not differentiate between a natural person or a legal person as the person who caused the damage. There are no levels or different effects depending on whether a natural person or a company caused (either intentionally or out of neglect) the damage to the environment.

According to Article 345 of the Civil Code[20] if someone causes damage to other persons through activities that endanger the human environment, he can't be relieved of liability if he is able to prove that he has acted in a manner that can generally be expected in the given situation. If the one who caused the damage would like to be relieved, he must prove two cumulative conditions: the damage was caused by a factor which was unavoidable and fell beyond the realm of activities involving considerable hazards.[21] The Civil Code also states that these rules must be applied regarding a person who caused damage to the environment. Any exclusion or limitation of liability shall be null and void; this prohibition shall not apply to damage caused to a thing.

The new Civil Code of Hungary[22] which will come into force in 2014 basically declares the same rules. The main difference between the present and the future regulation is that the new Civil Code contains the definition of the operator. Since the present act did not define the operator, its category was précised by the practice of the courts. But from the following year, the definition will be clear: the operator is the

[19] A. Kecskés, 'The corporate governance concerns of stakeholder protection' 12 *Acta Universitatis Bogdan Voda – Series Oeconomica* (2011) pp. 27-37; A. Kecskés, 'Részvény és részvét. Gazdaság és tolerancia', in *Szaketikák Tanulmánykötet – Tolerancia Konferencia* (Pécs, 2008) pp. 51-57; A. Kecskés, 'Részvényárak mindenek felett? Érdekszférák a vállalatirányítás jogában', in *Emlékkönyv Román László születésének 80. évfordulójára* (Pécs, 2008) pp. 215-234.

[20] Act IV. of 1959 on the Civil Code.

[21] About more civil law measures in environmental protection see also: N. Lucic and M. Márton, 'Strict liability in civil cases with special regard to environmenal damages', in T. Drinóczi, et al., eds., *Contemporary Legal Challenges: EU-Hungary-Croatia* (Pécs – Osijek, Pécsi Tudományegyetem Állam- és Jogtudományi Kar, Eszéki J.J. Strossmayer Egyetem Jogi Kar 2012) pp. 433-456.

[22] Act V of 2013 on the Civil Code.

person on whose behalf the hazardous activity operates. If it has more than one operator, they shall be regarded as mutual torfeasors.[23]

2.3. The Act on Environmental Protection

The special regulation for the protection of the environment is Act LIII of 1995 (hereinafter: Ktv.) This act regulates special administrative prescriptions, contains detailed rules on civil law liability, and declares the polluters pays principle. According to Article 101, the operator has civil, criminal and administrative liability for its actions which have effects on the environment. The operator shall:

- abstain from actions which endanger or harm the environment and discontinue such actions (if they already occurred);
- if the actions mentioned before have occurred, immediately notify the competent authority;
- if the actions mentioned before have occurred, take all possible measures to diminish and mitigate them and prevent further damages;
- if the environmental degradation already occurred, restore the original state, or as it is declared in special provisions, restore toward the baseline condition, and restore the natural services and sources;
- be liable for environmental degradation caused by its activity and pay remediation costs.

This act also encompasses regulations which concern companies. According to Article 102(5)-(6) the members, (in case of sole proprietorships also) and executive officers of the company, who took such decisions (or provisions) whereof they knew or should have known with due care that its execution results in environmental degradation, in the event of the termination of the company shall bear unlimited and joint and several liability for the reparative and restitutive obligations which were not satisfied by the company. Those members or executive officers who did not take part in the decision making, voted against such decision, or disclaimed such provision shall be relieved from liability. Those executive officers who do have liability shall not be executive officers in a company which may only pursue economic activity with an environmental permit (unless they fulfill their obligations).

[23] 6:536. §.

2.4. Liability for environmental damages and corporate law

Companies' liability for environmental damages can hardly be interpreted without the idea of the regulation on companies. The general rule and basis of the executive officers' and the members' liability is laid down in Act IV of 2006 on Business Associations (hereinafter: Gt.). According to Article 30, the business association shall be liable for damages caused to third parties by its executive officer when acting in an official capacity. Executive officers shall conduct the management of the business association with due care and diligence as generally expected from persons in such positions and – unless otherwise provided in the Act – give priority to the interests of the business association. Executive officers shall be liable to the business association in accordance with the general rules of civil law for damages caused by any infringement of the law or any breach of the memorandum of association, the resolutions of the business association's supreme body, or their management obligations.

Where executive officers are vested with the joint right of representation or where the company is managed by a body, the liability of executive officers for damages to the business association shall be joint and several according to the provisions of the Civil Code pertaining to joint negligence. If the damage results from a decision of the management body, any member who did not take part in the decision-making process or voted against it shall be exempt from liability.

The members' liability depends on the type of the business association. There are four types of companies in the Hungarian company law: general partnership, limited partnership, private limited-liability company and public limited liability company. Regarding each of the companies we find different liability regimes: in the case of the general partnership, members bear joint, unlimited and several liabilities for the obligations of the company. The limited partnership is somewhat different: the members of the partnership undertake to jointly engage in business operations, where the liability of at least one member (general partner) for the obligations not covered by the assets of the partnership is unlimited, and is joint and several with all other general partners, while at least one other member (limited partner) is only obliged to provide the capital contribution undertaken in the memorandum of association. In case of a private or public limited liability company, the members' liability is more or less the same: it extends only to the provision of their capital contributions and to other possible

contributions as set forth in the memorandum of association. With the exceptions set out in the regulation, members shall not be liable for the liabilities of the company.

Limited liability in cases of business associations has its own reasons. As Tibor Nochta stated in 2007 in his book 'Company Law', the reason of the limitation of the members' liability is the high economic risk of undertakings. This kind of liability is the 'royalty' for the members for taking such a risk.[24] But the lawmaker doesn't tolerate abuse of this limited liability either. The members are not allowed to exploit the limited nature of their liability. Although we have to mention that the referring rules do not allow the creditors to find satisfaction directly from the members during the existence of the company: they can only claim their interest in case of termination and only if the members abuse their rights. According to Article 50 of the Gt., in the event of the termination of a private limited-liability company or a public or private limited company without a legal successor, any member who has abused his limited liability may not rely on his limited liability. Any members of private limited-liability companies and public or private limited companies who have abused their limited liability or the company's legal personality to the detriment of creditors shall bear unlimited and joint and several liability for the unsatisfied obligations of the defunct business association.[25]

The liability of the members as specified above shall apply in particular if such members disposed over the assets of the business association as if they had been their own, or if they reduced the assets of the business association for the benefit of others or their own while that they knew or should with due care have known that the business association would not be able to satisfy its obligations towards third parties as a result thereof. Of course if a legal successor of the terminated company exists, these rules are not applicable.

We also have to mention Act V of 2006 on Company Information, Company Registration and Winding-up Proceedings (hereinafter: Ctv.) and Act XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings (hereinafter: Cstv.) since they are in close relation to

[24] T. Nochta, *Társasági jog* [Company Law] (Budapest – Pécs, Dialóg Campus Kiadó 2007) p. 220.

[25] A. Kecskés, *Felelős társaságirányítás – Corporate Governance* (Budapest, HvgOrac 2011) pp. 55-56; V. Halász and A. Kecskés, *Társaságok a tőzsdén* (Budapest, HvgOrac 2011) pp. 186-189.

company law. The Ctv. (among others) regulates the so called winding-up proceedings which are procedures which terminate the firm which is solvent (without legal successor), so it has no debt which cannot be paid. Once the company decides its termination via the abovementioned process, the administrator steps into the role of the executive officer, and his main task (in the interest of the creditors) to take all measures needed for the termination together with its registration. According to environmental protection regulations, the Ctv. declares that if the winding-up process turned into a liquidation process (i.e., the company has not enough stock to fulfill the demands of the creditors), and the administrator lingered to launch the liquidation process without any good reason, also (among others) if he failed to do his outmost to diminish the environmental damages (which occurred of course during the activity of the company) or to provide remediation, the competent Court will oblige the administrator to give contribution to the stock of the company which is commensurate with the measure of the amount of the damage.[26] Furthermore, after 15 days from the publication of the winding-up process, the administrator shall [according to Article 102 point e)] notify the competent environmental protection authority whether such environmental damages, environmental liabilities remain which can result in a payment obligation or other disbursement.

We also have to mention that there is a special type of termination and cancellation of firms in Hungarian law. In this procedure, the Court of Registry, under special circumstances, deletes the company from the registration. After this procedure, any creditor can within 90 days request the Court to declare the liability of those executive officers who failed to settle the environmental burdens.[27]

The regulation of companies can hardly be interpreted without the relevant rules of the liquidation process. Of course, since our topic is environmental protection, here we mention only the regulation referring to our proper subject. Six articles of the Cstv. deal with liability for environmental damages. We only mention the most relevant ones. The court shall notify the environmental protection authority when ordering liquidation.[28]

Any creditor or the liquidator – in the debtor's name – may bring an action during the liquidation proceedings requesting the court to

[26] Art. 99(5) Ctv.
[27] Art. 118/A(3) Ctv.
[28] Art. 29d Cstv.

establish that the former executives of the economic operator failed to properly represent the preferential rights of creditors in the span of three years prior to the initiation of liquidation proceedings in the wake of any situation carrying potential danger of insolvency, in consequence of which the economic operator's assets have diminished, or that they prevented to provide full satisfaction for the creditors' claims, or failed to carry out the cleaning up of environmental damages.[29]

In the process of liquidation, the liquidator shall provide for the protection and safeguarding of the debtor's assets, in particular to sustain the productivity of arable lands, to restore the original condition of arable land used for unauthorized purposes, to carry out planting and rehabilitation works in forests, furthermore, the observation of regulations concerning environmental protection, nature conservation and protection of historical monuments to provide a solution for any damage and contamination of the environment which is proven to originate from before the time of the initiation of the liquidation proceedings by way of cleaning up the damage or contamination during the proceedings, or by selling the assets in question in their state of contamination.[30]

Last not but least, there is another regulation which links together the duty of the administrator and the liquidator according to the requisites of the relevant process. Government Decree 106/1995 (hereinafter: Decree) states that the liquidator shall provide a statement to the liquidator and the competent environmental protection agency within fifteen days from the time of the initiation of the liquidation proceedings as to whether there are any environmental damages or environmental hazards remaining that may result in penalties or other payment obligations, and expenses connected with the cleanup of such damage (the Decree refers to Article 31(1) of the Cstv.).[31] This agency examines whether there are such environmental effects and damages which cause duties and rights during the liquidation process. The agency can oblige the company to launch an investigation of the state of the environment, if:

- it maintained at least 20 years of activities that require ab environmental permit, or

[29] Art. 33/A Cstv.
[30] Art. 48(3) Cstv.
[31] Art. 3(1), Decree

- from its statement it is clear that a huge environmental damage or threat to the environment occurred.[32]

The company shall, within two years (but at the latest until the end of the liquidation process), fulfill those obligations that preclude the aggravation of the environmental damages or the transfer of the pollution from one environmental component to another.[33] These mentioned rules are also applicable in the winding-up process.

III. The role of particular institutions (regional development) in the implementation of legal rules for civil environmental protection – the connection between civil and administrative law

As mentioned in the introduction, one of the basic goals of regional development is efficient environmental protection[34] and the basic instrument for the accomplishment of this goal is a proper legislative framework. Due to the variety of the contents of its scope, environmental law cannot be classified into any of the traditional branches of law. Which branch of law will be chosen by the legislator on the occasion of concrete standardization of individual objects of environmental law – and particularly the choice between civil and administrative law – depends on the complexity and the properties of the object of regulation, the purpose of the law and its expected effects. Accomplishment of this goal will most likely require a combination of standards appearing in various branches of law.[35] The rules of civil liability for environmental damage serve primarily as repressive protection. However, efficient rules of liability do not lead only to repression but also to prevention. Imposing liability for damage reparation or compensation on those who have caused environmental damage prevents and restrains further actions that are harmful for the environment.[36]

[32] Art. 4(1)-(2), Decree.
[33] Art. 8(2), Decree.
[34] For more details on environmental protection and regional development check S. Tišma and S. Meleković, eds., *Zaštita okoliša i regionalni razvoj: iskustva i prespektive* [Environmental Protection and Regional Development: Experiences and Perspectives] (Zagreb, Institut za razvoj i međunarodne odnose 2009).
[35] O. Lončarić Horvat, et al., *Pravo okoliša* [Environmental Law] (Zagreb, Organizator 2003) p. 38.
[36] Cf. Lončarić Horvat, et al., op. cit. n. 35, at p. 197.

Although the primary topic of this paper is the liability of legal entities, and more precisely companies, for environmental damages, institutions of regional development which might have an effect on the efficient implementation of legal rules for environmental protection governed by civil law can be mentioned here only through the lens of the general protection of civil society from harmful influences of particular companies as potential environmental polluters (both repressive and preventive protection). Courts play a major role in enforcement of the liability rules when it comes to already occurred damage and one applies for its compensation and/or prevention of its further occurrence. Still, legal environmental protection gains efficiency with increasing prevention of the occurrence of environmental damages. Therefore, coordinated action of all the institutions of regional development dealing with environmental protection, which are in most cases administrative bodies, is a relevant prerequisite for the realization of efficient environmental protection as one of the basic goals of regional development.

In terms of the generation of liability for environmental damage pursuant to the Croatian civil law, one has to define, among other presumptions of liability, parties to an obligatory relation, i.e., injured party and injurer. Since the EPA in its Articles 150 to 154 lays down the way and conditions under which companies can be liable for environmental damage and in its Article 155 (1) obliges the central state administrative body to identify the company that has caused environmental damage and/or an imminent (threat) danger of damage and assess the relevance of the environmental damage and/or the imminent (threat) danger of damage, it is clear that the efficient implementation of civil standards regarding liability of companies for environmental damage depends on, among other things, the quality of the work of administrative bodies, the competences of which include environmental protection affairs.

Preventive environmental protection is greatly enhanced via supervision by particular administrative bodies conducted within their competences. The Ministry of Environmental and Nature Protection is an administrative body that, within its competences, proposes, promotes and monitors measures for the advancement of environmental protection

and performs environmental protection inspection tasks.[37] The Ministry of Environmental and Nature Protection adopts annual plans for performance of environmental protection inspection tasks. The starting point of the preparation of those plans is the obligation, prescribed by the EPA, of the implementation of coordinated supervision of operators which are bound to apply the harmonized environmental protection conditions and of operators that manufacture or store dangerous substances, consistency in implementation of systematic supervision, gathering information on possible negative influence on the environment based on certain indicators and/or subjective reasons or perception of the public, the liability for implementation of control of regulation enforcement and mandatory professional training and work promotion.[38]
The planning and implementation of the entire regional development policy and the establishment of a comprehensive system of planning, programming, managing and financing of regional development as well as coordination of actors and activities of this system belong to the competences of the Ministry of Regional Development and EU Funds. Environmental protection is part of the regional development policy, so the cooperation between the Ministry of Environmental and Nature Protection and the Ministry of Regional Development and EU Funds needs to be maintained concerning these legal issues.
The Ministry of Environmental Protection, Physical Planning and Construction, the Ministry of Culture, the Ministry of the Sea, Transport and Infrastructure, the Ministry of Regional Development, Forestry and Water Management, the Ministry of Agriculture, Fisheries and Rural Development, the Ministry of Interior, the Ministry of Health and Social Welfare[39] and the State Inspectorate all signed an Agreement on the Cooperation of Inspection Departments in the Field of Environmental Protection[40] (hereinafter: Agreement) in 2008, which obliges these

[37] The competences of the Ministry of Environmental and Nature Protection are envisaged by the Act on the Structure and Scope of Ministries and State Administration Organizations, NN 150/11, 22/12.
[38] The annual plan for a current year and reports on implemented supervisions since 2008 are available at the website of the Ministry of Environmental and Nature Protection, available at *http://www.mzoip.hr/default.aspx?id=7639* (02.05.2013).
[39] Some of these ministries have no longer the same name as at the time of the Agreement on the Cooperation of Inspection Departments in the Field of Environmental Protection conclusion.
[40] Agreement on the Cooperation of Inspection Departments in the Field of Environmental Protection, available at

ministries to cooperate within their competences in the implementation of inspection supervision relating to the environment, their particular integral parts and environmental damage, and to jointly conduct coordinated inspection supervision over plants which are subject to preparation of environmental impact studies and to obtaining harmonized environmental protection conditions, plants with dangerous substances that may cause major accidents and, if necessary, over other legal entities and physical persons who deal with activities having an impact on the environment and human health.[41]

In Hungary, administrative law has its very own regulation regarding environmental damages. First of all we have to state that we can speak about administrative liability if, according to the damage, an administrative authority has the right to proceed or an administrative regulation was violated. The legal consequences in such procedures to avoid further damages and give compensation. But what is the connection between civil law and administrative law in the field of environmental protection? Is there any? In practice, state civil law liability for environmental damages has its own difficulties. The reason is that sometimes we don't even know who is exactly the one who suffered the damage. It happens that the ones who suffer damage are our children and grandchildren, thus the effect of the damage is not in the present but in the future. The damages that can be probated in civil cases are usually the consequence of the pollution, not the pollution itself.[42]

Administrative law provides wide measurements for the competent authorities to prevent and to interfere with activities that endanger the environment, and help to diminish the caused damage. In administrative law, most of these measures are sanctions. This field of law operates with the following sanctions: obligations, environmental fines.

We also have to mention the local governments' duties concerning environmental protection. According to the Ktv., the municipal local government shall:

- ensure the execution of the legal regulations serving the protection of the environment and shall perform the official tasks assigned to it;

http://www.mzoip.hr /doc/Inspekcija/Sporazum_INS_HR.pdf (02.05.2013).

[41] Art. 2 of the Agreement on the Cooperation of Inspection Departments in the Field of Environmental Protection.

[42] Z. Ödön, *Kártérítési felelősség a környezet védelmében* [Civil liability for the protection of the environment] (Budapest, Akadémiai Kiadó és Nyomda 1985) p. 77.

- work out a separate municipal environmental program;
- adopt municipal bylaws and shall pass resolutions to attain objectives related to environmental protection;
- cooperate with other authorities;
- enforce environmental protection requirements.

County governments are obliged to:

- prepare county-level environmental programs;
- take a stand on the draft municipal bylaws of municipal local governments affecting environmental protection;
- give preliminary opinions on municipal environmental programs and may initiate the preparation thereof.[43]

IV. Civil liability for environmental damages in EU law

The above chapters showed that Croatia and Hungary are characterized by similar systems of regulation of civil liability for environmental damages. During the process of the accession to the EU, which Hungary joined in 2004, Croatia has harmonized its regulations in the field of environmental protection with the *acquis communautaire*, which has contributed greatly to the high level of similarity between these two European countries concerning this legal issue.

When it comes to environmental protection, the EU has mostly adopted appertaining directives. In other words, these are the documents that, in principle, are not directly applicable in the Member States but require adoption of national measures for their implementation.[44] Having regard to liability for environmental damage, the greatest importance bears the EU Directive 2004/35/EU[45] of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (hereinafter Directive)[46]. Both the Hungarian and the Croatian systems of civil liability for environmental damages have been harmonized with the principles of the Directive.

[43] Art. 46 Ktv.

[44] Lončarić Horvat, op. cit. n. 35, at p. 279.

[45] OJ L 143, 30.4.2004.

[46] On issues of liability for environmental damage according to the Directive 2004/35/EZ from the multidisciplinary aspect check in S. Cassotta, *Environmental Damage Liability Problems in a Multilevel Context: The Case of the Environmental Liability Directive (Energy and Environmental Law & Policy Series: Supranational and Comparative Aspect)* (Alphen aan den Rijn, Kluwer Law International 2012).

The scope of the Directive is designated in its Article 1 and it refers to the establishment of a framework of environmental liability based on the 'polluter-pays' principle, to prevent and remedy environmental damage. Article 8 of the Directive stipulates that an operator shall bear the costs for the preventive and remedial actions taken pursuant to this Directive and the operator shall not be required to bear the cost of preventive or remedial actions taken pursuant to this Directive when they can prove that the environmental damage or the imminent threat of such damage: was caused by a third party and occurred despite the fact that appropriate safety measures were in place; or resulted from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own activities.

Article 10 of the Directive sets forth a deadline for covering the costs by an operator or, if appropriate, a third party that has caused the damage or the imminent threat of damage in relation to any measures undertaken pursuant to the Directive. This deadline is five years from the date on which those measures have been completed or when the liable operator, or third party, has been identified, whichever is the later. The Directive does not prevent the Member States from maintaining or adopting stricter rules for the prevention and remedying of environmental damage,[47] including specification of additional activities that shall be subject to the Directive requirements with respect to prevention and remedying the damage and to identification of further responsible parties.

Environmental damage may be remedied in different ways depending on the type of damage:

- for damage affecting land, the Directive requires that the land concerned be decontaminated until there is no longer any serious risk of negative impact on human health;
- for damage affecting water or protected species and natural habitats, the Directive aims to restore the environment to how it was before the damage had the damage not occurred.

Remedying environmental damage in relation to water or protected species or natural habitats is achieved through the restoration of the

[47] Check the comparative analysis of the system of liability for environmental damage in European legal systems in M. Hinteregger, ed., *Environmental Liability and Ecological Damage in European Law (The Common Core of European Private Law)* (New York, Cambridge University Press 2008).

environment to its baseline condition by way of primary, complementary and compensatory remediation. The damaged natural resources or impaired services must be restored or replaced by identical, similar or equivalent natural resources or services either at the site of the incident or, if necessary, at an alternative site. Annex II of the Directive includes definitions of the distinct types of remediation applicable to water and nature damage, as well as information on the measures that have to be taken into account in order to remedy the damage. Remedying interventions need to take place on the damaged site itself or by creating similar resources in nearby areas. The competent authorities judged that the most difficult issues were the complex technical requirements linked to the economic evaluation of damaged resources/services and environmental remediation methods, as well as the lack of binding thresholds for key terms such as 'significant damage'. However, Member States have started to develop guidelines and are building up their knowledge base on these questions.[48]

V. Conclusion

Liability for environmental damage is a legal issue which is regulated by several branches of law and sometimes it is difficult to set precise limits between them, particularly between civil and administrative law. In regard therewith, efficient implementation of the legal rules for environmental protection – both preventive and legal ones, which are hardly separable from one another – require cooperation of various bodies in charge of environmental protection. From the viewpoint of regional development, environmental protection concerns numerous institutions of regional development, the coordinated action of which enables the achievement of the fundamental purpose and goals of the legislative frameworks of environmental protection.

The most frequent and largest environmental polluters seem to be companies conducting dangerous activities and/or the ones that use dangerous substances while conducting their operations. Liability for environmental damage is regulated in a similar way in the Croatian and

[48] Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of under Article 14(2) of Directive 2004/35/CE on the environmental liability with regard to the prevention and remedying of environmental damage, available at *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0581:FIN:EN:PDF* (30.05.2013).

Hungarian system of civil law. The basic resemblance is reflected in the manner of liability or, in other words, in the fact that both the Croatian and Hungarian system of civil law regards companies conducting dangerous activities as liable for environmental damage according to the criterion of causal, strict liability for the damage, regardless of the fault. The 'polluter pays' liability principle appears to be one of the key similarities between these systems concerning civil liability for environmental damage. During the process of the accession to the EU, which Hungary joined in 2004, Croatia has harmonized its regulations in the field of environmental protection with the *acquis communautaire* in the past years, which has contributed greatly to the high level of similarity between these two European countries concerning this legal issue. In this light, EU Directive 2004/35/EU of 21 April 2004 bears the greatest importance on environmental liability with regard to the prevention and remedying of environmental damages since it encouraged Croatia and Hungary to harmonize their national legislation with the principles of the Directive.

Without underestimating the possibilities of civil liability, we cannot forget the power of administrative law. Although it is not quite relevant regarding this article, we have to state that the measures of prevention are guaranteed by different fields of law, and less by civil law liability; the reason for that is that measures of public law are generally more capable of prevention than civil law regulations. Since we have a claim, the damage is already done, and the Court in its sentence can only prevent further damages, but it is not able to abolish the one that has already occurred.

Dubravka Akšamović*
Lilla Kiraly**

'Integration with the EU is only possible if future members can demonstrate and they are willing and able to interact with their neighbours as EU Members do'
(Commission, 2002)

Cross border cooperation of undertakings and its implications on regional development

I. Introduction

The cross border cooperation of undertakings is an important factor of regional development. The synergy that can result from cross border cooperation of undertakings can have positive impacts on employment, development, and society in general.

The cross border cooperation of undertakings is mainly a matter of incentives from undertakings. But in order to be successful they need a flexible and adaptable legislative framework which will enable them to be successful, but they also need political support from national and regional governments whose task will be to create a business environment which will enable undertakings to maximize their business resources and to achieve the best possible business results. One of the key factors (but not the only factor) for successful business practice is company law rules which define legal framework for doing business. Flexible and adaptable company law rules open space for undertakings incentives. On the other hand, strict and complicated business rules but also poor regional and local policy can be a heavy burden on business incentives. In that sense, the purpose of this paper is to explore Croatian and Hungarian business law rules which regulate mergers, acquisitions and other forms of cooperation of undertakings in order to determine the possible complementarity of those rules and to test their applicability in regional business cooperation. Also, authors will try to find their defined and sustainable regional policy (in both countries) as a support to local and regional cooperation of undertakings from Croatia and Hungary.

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Some models of successful regional and local business partnerships will be given as examples and proof of the fact that cooperation of Croatian and Hungarian undertakings is possible and desirable.

II. Legal forms of cooperation of undertakings in Croatian and Hungarian Law and practice

On the internal market of the EU, it is extremely important to make the merger of companies possible for the purposes of improving the freedoms of establishment[1] and cross border provision of services, the economic efficiency and the competitiveness as well as enhancing the economic organizing force (reducing the costs, better use of market positions and innovation opportunities), to control these from the point of view of competition law[2] and to coordinate[3] market (competition) practices of companies established for coordination purposes.[4] Besides competition law, the regional cooperation of companies and their development strategies have market recovery and stabilization role, which is one of the engines of sustainable development.

Cooperation between undertakings can take many forms. Legal theory makes distinction between two basic forms of cooperation: cooperation which is regulated by Company law instruments such as merger and acquisitions and contractual forms of cooperation which are regulated with regulations as, e.g., the Law of Obligations. Both types of

[1] The principle of freedom of establishment enables an economic operator to carry on an economic activity in a stable and continuous way in one or more Member States. The principles of freedom of establishment and one of international aspect of this topic is the question of the cross-border seat transfer which have been clarified and developed over the years through the case law of the European Court of Justice. See also K. Gombos, 'Tudósítás az Európai Bíróság előtti Cartesio ügyről [Coverage about the Cartesio case before the European Court of Justice]', 5 *Jogtudományi közlöny* (2009) pp. 234-240.

[2] Its three cases: 1) merger of companies 2) acquisition of control (takeover), 3) establishment of a joint venture (concentrative joint venture). See also R. Szuchy 'Az összefonódás-ellenőrzés Európai Uniós szabályai a jogbiztonság tükrében [The EU rules of merger control in the light of legal security]', in B. Majtényi and A. L. Pap, szerk., *FÖLD rész Könyvek sorozat* [EARTH part Books series] (Budapest, L'Harmattan Publisher 2011) pp. 39-44.

[3] Cooperative joint venture.

[4] See I. Vörös, *Az európai versenyjogok kézikönyve* [Handbook of European competition laws] (Budapest, Logod Bt 1996) p. 220. See also E. Király and Z. Bércesi, 'Mozaikok a magyar versenyjog történetéből [The legal history of Hungarian Competition Law]', 2 *Jogtudományi közlöny* (1999) pp. 85-93.

cooperation are equally represented in business practice. The choice of the appropriate type of cooperation is part of corporate strategy and it depends on the purpose which is going to be achieved by future cooperation. When undertakings want firm and long-term relationship, company law instruments like merger should be the right choice. On the other hand, if they want less formal relationship for a shorter period of time or to achieve only one specific business goal, they will regulate their relationship using one of the many forms of business contracts.

1. Corporate law instruments in Croatian company law and practice

The legal sources of statutory mergers in Croatia are Company Code rules. The Croatian Company Code[5] regulates the following forms of company amalgamation:

- mergers,
- fusion (consolidation),
- groups of companies (holding companies),
- short form merger (de facto merger),
- the cross holding companies,
- intercompany agreement.

The main common feature of those operations is the creation of a bigger company where instead of one company there is one new and bigger company which now holds a stronger market position. It is also a common feature of all concentrations between undertakings that it is hard or impossible to break such relationship due to the fact that merger transactions are subject to a number of statutory requirements: the merger decision has to be confirmed by a majority of shareholders, there are strict rules about creditors and their protection.

1.1. Merger and fusion

Mergers and fusions are the most frequent business operations in business practice. In the Croatian Company Code, fusion is defined as a legal procedure between two or more previously independent corporations where one corporation is acquired by the other corporation without going through dissolution. The property of the acquired corporation becomes the property of the surviving corporation. Shareholders of the acquired corporation become shareholders of the

[5] Companies Act, Official Gazzete, Narodne novine, NN 111/93,34/99, 52/00, 118/03, 107/07, 146/08, 137/09, 152/11.

surviving corporation.[6] In the case of merger, two or more corporations merge into another newly established corporation realized via assimilation or fusion. Shareholders of each corporation become shareholders of the new corporation.[7]

Fusion is more frequent in business practice than merger. The reason for that is the fact that in the case of fusion, at least one corporation continues to exist, while in the case of "classic" merger, all corporations involved in the merger merge into a newly established corporation and they stop to exist in the form they existed before the merger.

Business mergers between Hungarian and Croatian companies are not as frequent as they could be. One example is the merger (fusion) of Nova bank from Croatia and OTP bank from Hungary, which was finalized in October 2005.[8] After Nova banka d.d. was merged by the Hungarian OTP bank, Nova banka d.d. stopped to exist and it continues to function as an integral part of OTP bank. Mergers and fusions are business strategies which could *pro futuro* improve market positions of both Hungarian and Croatian undertakings on the European market. The described business operations would enable the creation of bigger and stronger companies which could become leading companies on regional or on European level.

1.2. Groups of companies

Groups of companies are legally independent companies which are mutually connected by shares or by control contracts. The main difference between mergers as business concentrations and groups of companies stems from the fact that within a group of companies, all of the companies keep their legal personality, while in the case of a merger, it becomes an integral part of another corporation (by way of fusion or merger). Within the group of companies, one company is the controlling company and it has prevailing influence on the dependent company based on a contract or share capital.

Croatian corporate law regulates the following types of groups of companies:

- company in which the other company has majority stake or majority voting rights,

[6] Art. 512(1), Companies Act.
[7] Art. 512(2), Companies Act.
[8] Available at *https://www.otpbanka.hr/html/onama.htm; https://www.otpbanka.hr/html/povijest.htm* (11.03.2012).

- parent company and subsidiary (controlling company and dependent company),
- affiliated enterprises (group of companies),
- companies with mutual interests, and
- companies aligned by entrepreneurial contracts.[9]

Affiliated enterprises or groups of companies are the most represented in business practice. There are two main types of affiliated companies. Affiliated companies where companies are connected by share capital (de facto group) and contractual groups. In de facto groups one company is always the controlling company and the other is the dependent company. The company that has a major stake in the dependent company is considered to be the controlling company. In contractual groups, companies are connected by uniform management. Those companies are separate legal entities mutually connected by control contracts.

Hungarian and Croatian companies are often part of large international groups of companies. Many international groups of companies are present on the Hungarian and Croatian markets. For example, in the retail market, Billa and Spar as international retail chains have their subsidiaries in Croatia and Hungary. Also, international groups of companies are present in the banking sector, the IT sector etc. But on the other hand, only a small number of Hungarian-Croatian groups of companies exist. This business strategy would enable Hungarian and Croatian companies to achieve a better market position. As a successful example, we can mention a Hungarian international corporation with a number of companies abroad who created a group of companies and which is represented in the Croatian market too. That is Dunapack Ltd., with a branch in Croatia (Dunapak d.o.o.) whose main business activity is manufacturing and processing of paper, cardboard panels and packaging, as well as trading in and recycling used paper. It is the fifth-largest paper manufacturer and waste-paper recycler in Europe.[10]

It is noticeable that Croatian and Hungarian companies, instead of forming groups of companies as a business strategy, rather choose takeovers. Some recent and important concentrations of companies are for example the takeover of Hungarian companies Fonyódi and ice-cream factory Baldauf by the Croatian holding company Agrokor. Here

[9] Art. 473Companies Act.

[10] *http://www.dunapack.hr/servlet/SLitedp?search_f=index_hr.html* (9.4.2013)

we should also mention the takeover of the Croatian oil company INA by the Hungarian MOL.

1.3. Takeovers

The meaning of takeover is the acquisition of shares traded on the capital market, thereby obtaining control over the company concerned. The term "Company" shall not mean all business organizations, only joint-stock companies, in the Hungarian and Croatian legislation these are the public limited companies.[11]

Takeovers are regulated by the Act on Takeover of Joint Stock Companies[12] (hereinafter ZPDD) and not by Company Codes. This Act will apply in Croatia to all takeovers that happen in Croatia, no matter whether the company who pursues takeover is from Croatia or abroad. In that sense, it is important for foreign undertakings to know the basic features of the takeover procedure in Croatia.

The Act on Takeover of Joint Stock Companies enacted in 2009 is not the first Croatian Takeover Act. Legal regulation of takeovers in Croatia dates back to 1997, when the first Takeover Act was enacted. The first EU takeover directive was enacted in 2004.[13] This means that Croatia was among the first European countries who decided to regulate takeovers. Reasons for that are justified by the need to regulate takeovers and to protect domestic companies and the market from foreign competition, after opening the Croatian market to foreign investors. Besides that, since shareholding was a new concept in the newly established Republic of Croatia, there was a need to protect shareholders in privatized companies and to enable them to get a fair price for their shares.

The Takeover Act follows European values and standards in regulating the takeover procedure. It is fully harmonized with the EU takeover directive. It regulates the following:

- mandatory bid for a takeover of target companies,
- prohibition of circumventing takeover procedure and exclusion of right to vote,

[11] Cs. Farkas, et al., *Társasági jog* [Corporate law] (Szeged, Lectum Kiadó 2009) p. 469.

[12] The Act on Takeover of joint stock company, NN 109/07, 36/09, 108/12 (hereinafter: Takeover Act).

[13] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJ L 142/12.

- equivalent treatment of all shareholders in the takeover procedure,
- neutrality of the supervisory board and of management during the takeover procedure,
- fast, efficient, transparent takeover procedure.

According to the Takeover Act, a legal or natural person is obliged to announce a takeover bid in the following situations:

Natural or legal persons shall be obliged to announce a takeover bid where they have, directly or indirectly, independently or acting in concert, acquired voting shares of the offeree company, which, together with the shares they already possess, exceed a threshold of 25% of voting shares of the offeree company (control threshold).

After they have exceeded a control threshold and announced a takeover bid, natural or legal persons shall be obliged to disclose a takeover bid where they have increased, independently or acting in concert, through a direct or indirect acquisition of voting shares of the offeree company, the percentage of voting rights by more than 10% (additional threshold).

Notwithstanding the provision of paragraph 2 of this Article, a takeover bid shall also be announced by natural or legal persons who have increased, after the takeover bid, independently or acting in concert, through a direct or indirect acquisition of voting shares of the offeree company, the percentage of voting shares by less than 10%, if as a result of this acquisition a threshold of 75% of voting rights is exceeded (final threshold).[14]

The above rules are important in the context of this paper because they will apply to any natural or legal person who has an intention to acquire a controlling influence in any Croatian company. The Takeover Act furthermore also regulates issues such as the rights of shareholders in connection with the takeover procedure, the price of shares in the takeover bid, procedural issues, etc.

Supervision in Croatia over all takeovers has Croatian Financial Services Supervisory Agency[15]. Noncompliance with Takeover Act rules will be treated as a violation of the Takeover Act and will be sanctioned by different sanctions. Also, the takeover procedure can be stopped, which can have negative impacts for stakeholders included in the takeover procedure.

[14] Art. 9, Takeover Act.

[15] *http://www.hanfa.hr/* (06.06.2013)

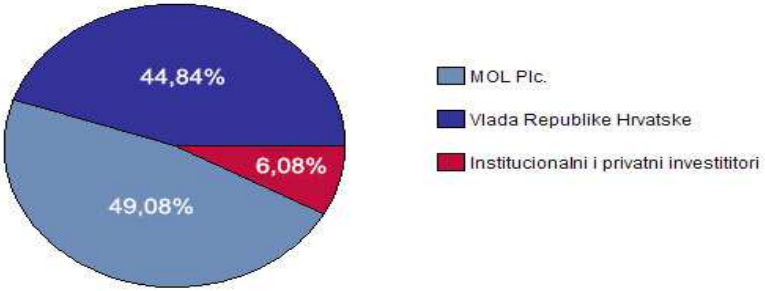
1.4. Example

The takeover procedure that has gained the most attention in Croatia was the takeover of the Croatian gas corporation INA by the Hungarian MOL. MOL became a strategic partner in INA in year 2003 after acquiring 25+1 shares in INA based on a shareholders agreement signed by the Croatian government and MOL. Although MOL didn't acquire a controlling package of shares by virtue of contract, MOL gained the position of a strategic partner with preferential rights. INA became a partner in the regional gas industry partnership between MOL, Slovnaft and TVK in 2003. The shareholders agreement was changed in 2008. When MOL made a public bid and bought a new package of shares in INA , it increased its shareholding to almost 48 percent. This agreement (supplemented with three new agreements) regulated the relationship between the two major shareholders, the Croatian government and MOL in a new manner. This agreement regulated among other things the number of members of the supervisory board and its structure. The total number of supervisory board members is nine among which three will be appointed by the Croatian side, five by the Hungarian side and one of them will be a representative of the workers. Furthermore, according to that Agreement, the management board will have 6 members, from which 3 will be appointed by MOL, 3 will be appointed by the Croatian government, but the prevailing vote in all decisions will be the vote of the head of the management board who will be appointed by MOL. The shareholders agreement also regulates preferential rights given to MOL which consist of the approval of certain types of decisions by the supervisory board. The agreement also defined a so called *lock-up* period, which enabled MOL to sell INA's shares to potential buyers without the written consent of the Croatian government. Also, the agreement gives a right to the Croatian government to buy back shares in INA from MOL for a fair price before they are offered to another potential buyer and for the price which is offered to the potential buyer.[16]

Figure 1 Structure of shareholders in INA on December 31st, 2012[17]

[16] About strategic partnership between INA and MOL see *http://www.ina.hr/default.aspx?id=583* (06.06.2013).

[17] *http://www.ina.hr/UserDocsImages//List_pdf/izv_odrz_razv_2011.pdf* (06.06.2013)



Despite numerous and open criticisms which followed this business takeover from the very beginning until today, there is one fact that should be stressed, one which is often neglected and underestimated. The partnership between INA and MOL opened the door, or to be more precise, should have opened the door to both companies to strengthen their market position and to position themselves on the European market as important regional market players. It is an entirely different question whether they managed to achieve that goal and if not, why they didn't achieve that goal? Did politics interfere too much in something that should have been the matter of entrepreneurial decision?

2. Corporate law instruments in Hungarian Company law and practice

In Hungary, Act IV of 1959 (hereinafter: Ptk.) contains the basic rules applying to business associations, separately for business associations with legal personality (Articles 52-56 of the Ptk.) and for business associations without legal personality (Article578/H of the Ptk.). The Hungarian state, legal persons, business associations without legal personality and individuals can establish a business association with its own company name to pursue or facilitate joint economic activities [Article 52 of the Ptk.]. Pursuant to Article 56(2) of the Ptk. the detailed rules are specified by a separate act, by Act IV of 2006 on Business Associations (hereinafter Gt.).[18] The basic foundation of all business

[18] The business associations without legal personality are the general partnership and limited partnership. The business associations with legal personality are the private limited-liability companies, private or public limited companies and joint company. All four company forms, namely the general partnership, limited partnership, private limited liability company and the private or public limited company (jointly business

associations in Hungary is subject to the conclusion of the article of association or a description about how the business will operate. These consist of a deed of foundation, statues and other legal rules concerning business operation.[19]

Corporate mergers are regulated in Act CXL of 2007 on the cross border merger of capital companies.[20] This Act introduced the concept of capital company (private limited-liability company, private or public limited company, European company and with the exceptions specified in this Act the cooperative) as well as the concept of cross border merger into Hungarian law.

Other Hungarian acts which regulate business restructuring and corporate mergers are:

- Act LXXVI of 2009 on the General Rules of the Pursuit of Service Activities;
- Act XLV of 2004 on the European Company;
- Act XLIX of 2003 on the European Economic Interesting Grouping, Act CXLIV of 1997 on Business Associations;
- Act CXLV of 1997 on the Amendment for Harmonization Purposes of Act CXLV of 1997 on the Company Register, Company Advertising and Legal Procedures in Company Registration Matters;
- Act LXIX of 2006 on the European Cooperative.

Corporate mergers in Hungary are regulated in a similar way as in Croatia. In that sense, Hungarian law regulates the following statutory operations: 1) merger and fusion, 2) group of companies, 3) short form merger or de facto merger 4) cross holding companies 5) intercompany agreements.

2.1. Merger and fusion (consolidation)

Under the provisions of the Gt., a business association can be established by the conclusion of a memorandum of association or the adoption of articles of association or a charter document (Article 11).

associations) can operate as profit-oriented or non-profit associations but this is more frequent in case of the forms with legal personality.

[19] W. W. Clark, G. Monori and Sz. Lipi, 'New Ventures in Transitional Econoies, Comparative Legal Systems in America and Hungary', in G. Rekettye, ed., *Papers to commemorate the thirtieth anniversary of the Pécs Faculty of Business and Economics: The Significance of the Last Decade* (Pécs, 2000) pp. 377-378.

[20] Implementation of Directive (EC) 56/2005 to the Hungarian laws.

However, under the provisions of Chapter VI, a business association can be established via the change of form of an already existing business association, the merger of existing companies or the demerger of companies (separation, secession).
In the case of the merger of business associations, a single successor business association is created from two or more business associations. The merger can be realized via assimilation or fusion. The rules of the Gt. regarding merger apply to the cross border merger of capital companies (the limited liability company, the limited company, the European company, the cooperative company) if all of the companies participating in the merger were established under the law of one of the Member States of the European Union, and their registered seat according to their statutes, their central administration or their primary place of business activity is in one of the Member States of the European Union provided that at least one of them are governed by the law of other Member States of the European Union.[21]
The Gt. regulates two types of mergers: the merger of profit-oriented business associations[22] and the non-profit cooperative company.[23] The association is a cooperative company with legal personality established by the members to promote the efficiency of their business activity and coordinate their business activity and to represent their professional interests. The association does not seek to achieve profit; the members bear joint and several, unlimited liability for debts exceeding the company's assets.

2.2. Groups of companies (holding companies)

The main feature of this business strategy is that it is conducted between two or more different and completely non-related companies through financial control. A holding company is a company or firm that owns other companies' outstanding stock. The terminology usually refers to a company which does not produce goods or services itself; rather, its purpose is to own shares of other companies. Holding companies allow the reduction of risk for the owners and can allow the ownership and control of a number of different companies. The corporate rules of holding companies are based on the fact that on the basis of a fixed

[21] Points a)-b) of Art. 1(2) of Act CXL of 2007 on the cross border merger of capital companies.
[22] Art. 67(3) of the Hungarian Gt.
[23] Art. 316(4) of the Hungarian Gt.

amount of shares are held by company members, and these majority shareholders can make disadvantageous decisions for the creditors and the minority shareholders of the company. Therefore it is necessary to protect minority shareholders and creditors of the company; nevertheless the influence of the majority shareholders exists. Thus goal the regulation is to set out conditions following the acquisition of control.[24]
Hungarian law also regulates holding companies. The Gt. specifies the rules of establishment and operation of the recognized groups of companies – which in a scientific sense can also be called syndicates – in Chapter V.[25] The aim of the conclusion of the control agreement is to realize a unified business policy and the business goals of the group of companies.[26] The control agreement is essentially a cooperation agreement between the members of the group, which – in lack of specific provisions of the Act – shall be governed by the rules of Ptk. So, this agreement does not qualify as memorandum of association and consequently no new legal entity or company is created by the registration. The control agreement shall indicate the participating business associations and it shall specify which company is the dominant member (parent company) and which one is the controlled company (subsidiary). The common business goal (business concept) and the basic rules of cooperation shall be determined. A specific hierarchy exists among the group members, therefore – for the purpose of balancing or compensating the additional rights of the dominant member – the agreement shall also contain provisions to guarantee commitments (primarily of economic nature) incumbent on the dominant member in favor of the members, shareholders (minority) and creditors of the controlled company. In this context, the agreement shall also contain provisions for the legal consequences of breach of contract. In that context, the non-regulated questions – unless otherwise provided by the Act – shall also be governed by the contract law rules of the Ptk. The control agreement can be concluded for an indefinite period of time

[24] B. Buzási, 'A nyilvános ajánlattétellel történő vállalatfelvásárlás szabályai európai és jogösszehasonlító aspektusban [The acquisition of a major holding by way of statutory public takeover bid in the context of European and legal comparative approach]', *Acta Conventus de Iure Civili Tomus VIII.* (Szeged, Lectum, 2008) p. 88.
[25] Art. 55(1)-(3) of the Hungarian Gt.
[26] Regarding matters of tax advantage, see also Zs. Ercsey, 'Az általános forgalmi adóról [About Value Added Tax]', 2 *JURA* (2012) p. 73.

or for a definite period, in the latter case the time period obviously corresponds to the goals to be achieved.[27]

2.3. Short form merger (*de facto* merger)

A *de facto merger* is a transaction that has the economic effect of a statutory merger but is cast in the form of an acquisition of assets or of voting stock and is treated by a court as it were a statutory merger. One corporation is absorbed by another, but without compliance with statutory requirements for a merger. The provision relating to the 'de facto groups of companies' regulated in Article 64(1) of Gt. ensures the introduction of the de facto group rules to Hungarian corporate law. The dominant member – even in lack of the conclusion of a previous control agreement – is entitled to control the controlled company if the operation of the group of companies, the way of cooperation among the participating business associations satisfies three conjunctive conditions:

- the cooperation among the dominant member and the controlled companies must be lasting (at least three years) and stable,
- unified, group-level business concept must be developed and enforced, furthermore,
- the balanced allocation of advantages and disadvantages must be ensured among the companies participating in the group.

Unlike the rules applicable to the recognized group of companies, in case of a de facto group of companies, the affected companies does not have to conclude a control agreement abiding the procedural rules specified in the Act, nor do they have to be registered in the company register as recognized group of companies. This circumstance, contrary to the recognized group of companies, makes the operation as a de facto group of companies easier and cheaper. However, the dominant company of the de facto group of companies does not enjoy the same legal security that is ensured by the existence of a control agreement and the registration as in the case of a recognized group of companies, in case of any doubt the dominant company bears the burden of proof (as well as the increased indemnification liability if it fails to do so) that the actual operation of the group of companies takes the interests of creditors and external members (shareholders) appropriately into account. Articles 64 (3) and (4) of Gt. provide a way for the de facto group of companies to request its registration as a recognized group of

[27] Commentary to the Hungarian Gt. in CD Legal Library.

companies under simplified rules, provided that the court concludes in a lawsuit that the actual operation of the group of companies fulfills the substantive requirements applicable to the recognized group of companies.

2.4. Takeovers

Takeover provisions are contained in Act CXX of 2001 on the Capital Market (hereinafter: Tpt.) and – instead of conditions following the acquisition of control – it regulates the acquisition process itself. Accordingly, the purpose of the takeover rules is primarily to ensure the property rights of shareholders, creditor protection provisions cannot be found in this Act.

In the case of the Hungarian regulation, legal provisions of takeovers of the Gt. concern only limited liability and private limited companies which have an operating structure of non-public offering of shares; the Tpt. concerns private limited companies with an operating structure of public offering of shares. The complete separation of the scope of the Gt and Tpt. does not allow the co-application of the provisions regarding acquisition of control. The acquisition of control in a holding company according to the Gt. can be acquired both according to the rules of corporate law and civil legal proceedings, but in the case of the takeover it is only possible based on corporate law provisions. [28]

The acquisition of a major holding by way of a statutory public takeover bid is regulated in Article 68 of the Tpt. in two different cases. Any acquisition of a participating interest in the offeree company shall be subject to a takeover bid, that is to be approved by the authority in advance: a) for the acquisition of more than 25% of the voting rights, if there is no shareholder in the company, other than the buyer, holding more than ten per cent of the voting rights; or b) for the acquisition of more than 33% of the voting rights. If the participating interest is acquired in excess of the 25 or 33%, the bid shall be presented within fifteen days from the date of publication: a) by any conduct other than an outright bid submitted by the buyer; b) by way of exercising a purchase option or repurchase option, or a call option on a forward

[28] M. Klenanc, 'Takeover-szabályozás Európában: egy tagállam, egy tagjelölt és egy leendő tagjelölt szemszögéből [The takeover regulation in the prospect of an EU member, a joint memeber and a future joint member]', available at *www.vmtdk.edu.rs/fex.file:2f681d01-fd6b-acd3-52f6-6832ae72f7c2/KLENANC+DOL.doc* (20.06.2013).

purchase agreement; c) within the framework of a procedure conducted by a government holding company as defined by law; or d) upon the collaboration of persons acting in concert;
When a participating interest is acquired by persons acting in concert, all parties to the agreement shall be required to present the bid jointly, unless the parties agreed to confer powers upon a particular party to submit the bid. An agreement to designate a party to submit the takeover bid shall not relieve the parties from the obligation to make a takeover bid. All deals for the acquisition of a participating interest by way of a takeover bid shall be handled by an investment firm or credit institution authorized to engage in providing the services (investment service provider).
Article 68 of the Tpt. differentiates between two types of obligations to make a statutory public takeover bid: (1) the conditions before the acquisition of control and (2) the conditions following the acquisition of control. Examining the relevant Hungarian and Croatian legislation (the Hungarian Tpt. and the relevant provisions of the Croatian ZOPDD), it can be seen that the voting rights of 25% represent a decisive influence in both the Hungarian and the Croatian legislation, in which case the protection of the target company's shareholders requires the application of the Takeover Rules. The Tpt. distinguishes between the pre- and post-public takeover bid, and this is associated with a consistent 25 or 33% thresholds, while the Croatian ZOPDD has three successive steps of constructing control - depending on the extent of further acquisitions - the new offer requirement.[29]
Our *example for takeover* is the case of the *Hungarian OTP Bank* and the *Croatian Nova Banka d.d.*, which is the eighth largest bank in the Croatian banking market, with the total assets of HRK 12.5 billion after the takeover of Nova Banka d.d. In its widely spread network consisting of 99 branches throughout Croatia, around 1,000 of its employees provide services to over 400,000 retail as well as corporate customers. The registered office of the Bank is in Zadar, and its business centers are located in Zagreb, Pula, Split, Sisak, Dubrovnik and Osijek. Six months after the arrival of the new majority owner – OTP bank, the largest Hungarian bank – Nova banka d.d. changed its name to OTP banka. Nova banka was created in 2002 by the merger of three regional banks: Dalmatinska banka, Istarska banka and Sisačka banka, and then

[29] Ibid.

expanded by the acquisition of Dubrovačka banka in October 2004. This ended the process of legal and operational merger, one of the most complex and demanding processes ever to take place in the Croatian banking market, and the result of which was a stable and profitable banking institution. Since its beginning, the bank has been successfully adapting to the dynamic market changes, achieving increasingly more significant business results and strengthening its position. In March 2005, the strongest Hungarian bank – OTP bank, operating not only in Hungary, but also in Bulgaria, Montenegro, Croatia, Russia, Slovakia, Serbia and Ukraine – became the new majority owner. Joining the OTP Group, OTP banka Hrvatska integrated its widely spread network and business tradition in the domicile regions with the highly developed banking know-how of a steadily growing international group. Owing to the power of this new partnership, OTP banka has been continuously developing its business in line with the global quality standards in providing financial services for the benefit of its customers, thus contributing to the overall banking development in Croatia.[30]

3. Contractual forms of cooperation of undertakings in Croatian and Hungarian law and business practice

In the previous part of paper, we examined statutory forms of cooperation of undertakings in Croatian and Hungarian law, which are complicated business transactions and are highly regulated in both countries by company code regulations or other kinds of acts.

Contrary to those business operations, the cooperation of undertakings based on obligation contracts are not necessarily regulated by law and can take many forms. One of the basic features of contractual forms of cooperation is that contractual forms of cooperation enable more flexible relationships between business partners, the possibility to adapt to the exact needs of the business relationship and fast changes of existing relationships. Furthermore, it is always possible to terminate the contract, which is not the case for example with merger. Due to all those facts, contractual forms of cooperation are spreading in business practice, and nowadays they take many forms, from basic contractual forms to very complex framework contracts with a number of individual subcontracts.

[30] *https://www.otpbanka.hr/english/onama.htm* (30.04.2013).

In the last decades few, some of those contracts became very frequent and very „popular" in business practice, in particular, joint venture agreements, strategic alliances and cluster. These include horizontal and vertical agreements. Such co-operations between competitors belongs here, the aim of which beyond the objectives of the participating undertakings, being also positive from the consumers' point of view is to facilitate efficient market activity (e.g. release of a new product on the market or an existing one becomes cheaper). The basic features of those forms of cooperation will be explored further in this paper. Special attention will be given to applicability of those forms of cooperation of undertakings on regional level.

3.1. Joint venture agreement

A joint venture agreement can be classified as a type of contract typical for modern business transactions. It is an agreement used by two or more parties to establish a partnership for a business operation.[31] It is very similar and comparable to a partnership agreement but it differs from partnership. Partnership is established for doing business on long term, while a joint venture is established for achieving a particular business goal, and the contract will expire once the goal defined in agreement is achieved.[32]

In Croatian business practice, joint venture agreement is used since the 70's as model for foreign investments.[33] It spread in Croatia and Hungary but also in other east European countries during the time of communism when national markets were closed before foreign competition. Later, the joint venture agreement was used as model of business cooperation between undertakings from west and east Europe. But even today, when political obstacles to foreign investments are removed, joint venture continues to be one of the most frequent form of business contracts, often used as model for long term business relationship.

[31] J. Barbić, 'Pojavni oblici ortaštva- zajednički pothvat [Joint venture- one form of partnership]', 3 *Pravo i porez* (2003) p. 160.

[32] J. Taubman, 'What Constitutes a Joint- Venture', 41 *Cornell L.Q.* 643, (1955-56) pp. 643; W. Jeager, 'Partnership of Joint Venture', 37 *Notre Dame L.* 138, (1961-1962) pp. 138-153.

[33] See also B. Vukmir, *Ugovori o zajedničkim ulaganjima* [Joint venture contract] (Zagreb, Informator 1994).

A joint venture contract is used in business practice for establishing business relations in the private and public sector. We can find it in different economic sectors and branches, in particular in those sectors where there is an increased need for huge investments and capital. Legal theory stresses a number of advantages and benefits of this contractual form: for example, a joint venture agreement will enable business partner to use its capacity in the best possible way

In Croatia and also in Hungary, the joint venture may operate under two main legal structures: a contractual joint venture or an equity capital joint venture. The contractual joint venture is not regulated either in Croatian or in Hungarian legislation as a separate business contract. Rules on partnerships which are part of the Code on Obligation in both countries will apply to this type of joint venture.[34] In Hungary Act XXIV of 1988 on the Investments of Foreigners in Hungary and Act IV of 2006 on Business Associations (Gt.) expressly enable foreign natural persons and business organizations to legally form companies in Hungary. The Foreign Investment Act also allows any legal entity to create a company with foreign participation. Moreover, it enables a company with foreign participation to acquire any real property necessary to carry out its objectives.

The Foreign Investment Act specifically allows for the establishment of joint ventures between foreign and domestic entities through the ownership of equity shares. For no apparent reason, however, the Act only allows foreign investors to acquire registered, rather than bearer shares when forming public companies limited by shares, and when purchasing shares in already existing Hungarian corporations[35]. Such restrictions don't exist in Croatian law. Anyway the current legal situation in Hungary grants wide latitude for high technology investors to found a joint venture. Amendments to the Foreign Investment Act have facilitated the establishment of joint ventures by abolishing the Act's original requirement of obtaining permission prior to the creation or acquisition of a foreign joint venture. This applies even if the joint venture becomes 100% foreign owned. Preceding its amendment, the Act required that any company with a majority of foreign ownership acquire a joint license from the Ministry of Finance and the Ministry of

[34] V. Bilas, et al., 'The problem associated with managing international joint ventures in Croatia', Conference paper, Rotterdam (2007).

[35] T. M. Rinehart, 'Forming a High Technology Joint Venture in Hungary', 11 *Santa Clara Computer & High Tech. L.J.* (1995) p. 287.

International Economic Relations which could take up to ninety days for approval. By no longer requiring foreigners to seek government approval, a great delay in the initial formation of the joint venture has been eliminated. Similarly, the Companies Act permits foreigners to purchase up 100% ownership of existing Hungarian companies without seeking approval or giving notification.

3.2. Strategic alliances

Strategic alliances[36] are recent business phenomena. In the last few decades, there has been an explosion of alliances around the world and across industries. Strategic alliances are business concepts that are changing the structure and dynamics of competition throughout the world.

Companies are forming alliances with their rivals, their suppliers, and even their customers. Alliances take a number of forms and go by various labels. Alliances may be contracts of limited partnerships, general partnerships, or corporate joint ventures, or may take less formal forms, such as a referable network. All strategic alliances fit into three basic classifications of either 'trading', 'functional' or 'dynamic' operating alliances:

A 'trading alliance' or 'supply contract' is straightforward - nothing more than buyers and sellers forming a largely passive sales and distribution or export/import arrangement based on contractual terms. The 'supply contract' is not a specific legal category: in Hungary, basically the provisions of the Civil Code (Ptk.) regarding the transport contracts and the business contracts shall be applied.

A 'functional alliance' or 'cooperation agreement' integrates certain basic 'functions' between the two parties by pooling efforts to attain specific goals and establish ongoing management relationships. These functional alliances are usually used to pursue or improve research and development projects, share costs, provide geographical market access and, generally, enhance distribution or sales activities.

A 'dynamic alliance' or 'technology transfer' involves the 'hidden' assets of the two parties in terms of the skills, knowledge and capacity necessary to deliver results. Examples of 'hidden assets' are research and development capabilities, proprietary technology, organizational

[36] See also D. Tipurić and G. Markulin, *Strateški savezi: suradnjom poduzeća do konkurentskih prednosti* [Strategic alliances: through cooperation to competitiveness] (Zagreb, Sinergija d.o.o. 2002).

strength or market-based acceptance. In a dynamic alliance, selected hidden assets are integrated. However, in many instances, the parties do not know exactly what assets are going to be required because the structure of the alliance almost always evolves during negotiations and initial operations.

In Hungary it has two main types. Technology transfer can take place under a separate licensing agreement: the licensor permits the licensee for a certain fee to produce, use or otherwise make use of the subject of license, occasionally the licensor personally contributes to create the optimal pre-conditions of utilization e.g. transfer of experience, teaching professionals, etc. The subject of this agreement is a patent, utility model, industrial design and trademark relating to a product or a procedure or useful technical information (know-how). Certain groups of technology transfer are exempted from the restriction of competition by Government decree. In this respect, rules of the Tpvt.[37] and decree 86/1999 (VI.11.) of the Government[38] shall apply. The aim of the Act on Research and Development and Technological Innovation[39] is to promote the competitiveness of undertakings based on technological innovation and the more extensive, efficient use of research and development and innovation opportunities in the region as well as joint research projects.

The most common reasons for forming strategic alliances and achieving competitive advantages are as follows.

Setting new global standards: entering into an alliance can be the best way to establish standards of technology in a sector.

Confronting competition: when a high-volume producer decides to attack a new geographic market, defense is difficult if it does not have comparable size. Alliance between companies is a response which has often led to positive results. It is equally valid to attempt an attack on a leader that has consolidated its own positions.

Overcoming protectionist barriers: alliances can allow companies to avoid controls on importation and overcome barriers to commercial penetration. Alliances can also be a way to respect the bonds posted by

[37] Hungarian Act LVII of 1996 on the prohibition of unfair trading practices and unfair competition.

[38] Decree on the exemption of certain groups of technology transfer agreements from the non-competition restrictions.

[39] Act CXXXIV of 2004.

the 'host' country regarding value added local content and participation in the capital of local businesses.
Dividing risks: for certain projects, risks of failure are high and even higher when investments are elevated.
Economy of scale: there are many alliances designed to divide fixed costs of production and distribution, seeking to improve volume.
Access to a market segment: in mature segments, a company often wants to develop in a market segment where it is not present through an agreement with another company.
Access to a geographic market: a strategic alliance is often a way to enter a market that is protected by (national) tariffs and other barriers, or dominated by another company with particular competitive advantages.
Access to technology: convergence among technologies is the origin of many alliances. It is increasingly more frequent that companies need to appeal to their competition in different sectors if they want to realize a product line.
Uniting forces: some projects are too complex, with costs that are too high, to be managed by a single company (e.g. military supplier contracts).
Bridging a gap: if a company does not have the resources or capabilities necessary to develop a particular strategy, an alliance with one or more companies is the most logical solution. Making an alliance to gain access to resources and capabilities that are lacking internally is perhaps the most frequent motive leading a company to seek partners.
When we are talking about strategic alliances as a business strategy in Croatia and Hungary, we must conclude that Croatian and Hungarian undertakings still didn't recognize all potentials of strategic alliances. Strategic alliances are still relatively rare on local and regional level but with a tendency of increase.
One successful *example* is the CBA strategic alliances in the retail sector.[40] In Croatia it is part of the recently established NTL alliances.[41] It is a regional alliance in the retail sector that gathers number of smaller retail companies with the purpose to fight foreign retail chains such as Spar, Kaufland, Billa, etc.

[40] *http://www.cba.hu/pages/cba/kulfold?lang=en* (09.04.2013)
[41] *http://www.ntl.com.hr/stranica/o-nama/26* (20.05.2013)

3.3. Clusters

Since recently, one of the most popular business strategies is networking within clusters.[42] Clusters first emerged in business practice in USA in early 90'. Formal definitions of clusters may vary, but many experts agree with economic expert and Harvard professor, Michael Porter's definition that a cluster is defined as geographic concentration of inter-connected companies and institutions working in a common industry.[43] In addition, clusters encompass an array of collaborating and competing services and providers that create a specialized infrastructure, which supports the cluster's industry. Finally, clusters draw upon a shared talent pool of specialized skilled labor. It is important to recognize however, that industry clusters are more than a group of firms within the same industry. The economic cluster model, represents a synergy, a dynamic relationship and a network between not only the companies that comprise a cluster but also the successful partnering of the stakeholders. Government, education, and other supporting organizations vital to economic success of a region represent these stakeholders. Many successful clusters have established a greater competitive advantage and wealth creation for their regions when compared to companies not in a cluster. Given this success, more policy makers and regions are considering fostering cluster development as building blocks of regional economies.

In business practice, clusters appear in many forms.[44] On the basis of their development, their form of cooperation can be advanced clusters, developing clusters, potential clusters, and latent clusters. On the basis of their organizational strategy there are globalization influenced clusters, resource-based clusters, and politics-driven clusters.

Cluster policy is recognized in the EU as a significant market force and incentive for harmonized European development.[45] Financed by the

[42] European Cluster Observatory, available at *http://www.clusterobservatory.eu /index.php?id=42&nid* (15.05.2013.).

[43] M. Porter, Clusters and the New Economics of Competition, *Harward Business Review*, November –December (1998) pp. 78.

[44] N. Buzás, 'Klaszterek a régiók versengésében [Clusters in the competition of regions]', in B. Farkas and I. Lengyel, eds. *Versenyképesség-Regionális versenyképesség* [Competitiveness-Regional competitiveness] (Szeged, Szegedi Tudományegyetem 2000) pp. 62-63.

[45] Europe Innova, European Commission Working Group, Cluster policy in Europe, Oxford (2008), available at *http://www.clusterobservatory.eu/upload/Synthesis_*

European Commission, an EU-wide investigation dealing with the mapping of potential clusters (cluster mapping)[46] was prepared, which maps the regional densification and concentration points in the case of different branches.[47]

Also, cluster development is recognized both in Croatia and Hungary as a business model which can ensure stronger competitiveness of domestic undertakings.

The need for networks, and within that, industry clusters (regional divisional centers) is clearly visible in the regional plans made after the publication of the Act on Spatial Development[48] in Hungary as well.[49] In Hungary, the clusters are regulated by governmental decrees:

- Decree 146/2007 (VI.26.) of the Government on the rules of state aids from the Research and Technological Innovation Fund,
- Decree 31/2012 (VI.8.) of the Minister of National Development on the detailed rules of the use of resources assigned to the priority of Economic Development Operational Program R+D and Innovation for Competitiveness and the Constructions with the Subject of Regional Operational Programs R+D and Innovation and the Titles of the Subsidies, and

report_cluster_mapping.pdf; European Cluster Memorandum, prepared by High Level Advisory Group for Clusters (2006), available at http*://www.proinno-europe.eu/NWEV/uploaded_documents/European_Cluster_Memorandum.pdf* (10.4.2013).

[46] European Cluster Observatory, Cluster Mapping Database, available at *http://www.clusterobservatory.eu* (08.04.2013).

[47] M. Szanyi, *A versenyképesség javítása együttműködéssel: regionális klaszterek* [Improving competitiveness through cooperation: regional clusters] (Budapest, Napvilág Publisher, 2008) pp. 78.

[48] Simultaneously with the adaptation of the territorial division of the EU, the creation of different documents on regional development became more intensive. After the publication of Act XXI of 1996 on the regional development and land-use planning, the number of such works had increased dramatically in Hungary because besides the counties, the sub-regions and the regions also prepare regional plans. In the chapters of these plans on economic development and conversion of industrial activities, the demand for the establishment of economic clusters suitable for realizing the benefits of geographical concentration appears more and more often. See Buzás, op. cit. n. 44, at p. 58.

[49] Ibid.

- Decree 30/2012 (VI.8.) of the Minister for National Development on the rules of use of appropriations specified for the Regional Development Operational Programs from state aids' aspect.

In Croatia, the national cluster strategy was introduced in 2005. There is wide institutional support to clusters in Croatia and different cluster strategies implemented by different governmental and non-governmental bodies such as HUP,[50] HGK,[51] MING.[52] Also, the Croatian Government so far adopted two Cluster Strategies, one for the period from 2006 until 2013 and one for the period from 2011 until 2020.[53] Both strategies stress as their goal support to existing cluster but they also aim at continuous education of undertakings in order to promote businesses integration through clusters. According to some sources, there are around 70 clusters in Croatia.[54] But despite that fact it seems that they didn't have much positive effect on regional development and employment on local and regional level.

An *example* of successful regional clusters is the I3CT Cross-border Clustering project, which is co-financed by the European Union in the scope of the 2nd Call of the Hungary-Croatia IPA Cross-border Co-operation Programme, and is focused on building a co-operative economy through joint research, development and innovation. The total budget of the I3CT project is EUR 282,687.54 with 84% financed by the European Union. The project will be implemented in Međimurje County and Koprivnica Križevci County in Croatia and Zala County and Somogy County in Hungary. This 16 month long project started in September 2011. The overall objective of the project is to facilitate synergies and cooperation between organizations on both sides of the border including IT companies and clusters, universities and innovation support institutions.[55]

[50] Croatian Association of Employers (Hrvatska udruga poslodavaca).
[51] Croatian Chamber of Commerce (Hrvatska gospodarska komora).
[52] Ministry of Business Affairs (Ministartvo gospodarstva).
[53] *http://www.razvoj-klastera.hr/* (02.04.2012)
[54] M. Dragičević and A. Obadić, *Klasteri i politike razvoja klastera* [Cluster and cluster development policy] (Zagreb, Ekonomski fakultet u Zagrebu 2006).
[55] *http://www.i3ct.net/project.aspx* (02.04.2012)

III. Regional policy and regional programs as support to regional development

1. Regional policy plays an important role in regional development. Proactive regional policy can influence the economic development of a region, it can have an influence on employment, it should define economic priorities of the region and aim at achieving defined economic goals, stimulate foreign investments, etc.

As stressed in the introduction, one of the aims of the paper is to define how regional policy of Croatia and Hungary as neighboring countries influenced business cooperation on regional level. Is the regional policy of both countries supportive in this way?

Croatian and Hungarian regional policy is strongly influenced by European regional policy.[56] EU regional policy has been developing since the 70s. EU regional policy seeks to reduce structural disparities between EU regions, foster balanced development throughout the EU and promote real equal opportunities for all. Based on the concepts of solidarity and economic and social cohesion, it achieves this in practical terms by means of a variety of financing operations, principally through the Structural Funds and the Cohesion Fund. For the period 2007-2013, the European Union's regional policy is the EU's second largest budget item, with an allocation of € 348 billion.[57] Despite the fact that EU regional policy is one of the main EU priorities, EU regional policy is still burdened with a number of problems. In order to find an answer to those problems and to prepare Europe for the next decade, the European Commission issued a document entitled Europe 2020: a strategy for European Union growth.[58]

In order to support the objectives of the Europe 2020 strategy, regional policy must in particular enable:

- a region's competitiveness to be strengthened by targeting resources to high value-added activities, by supporting skills, education and infrastructures;

[56] J. Malais and H. Haegeman, 'European Union Regional Policy', 1 *School of Doctoral Studies Journal* 6(2009); P. Balachin, et al., *The Regional Policy and Planning in Europe* (Routledge, 1999).

[57] EU regional policy, available at: *http://europa.eu/legislation _summaries/regional_policy/ 8* (21.05.2013).

[58] *http://europa.eu/legislation_summaries/employment_and_social_policy/eu2020 /em0028_en.htm* (21.05.2013.)

- smart specialization strategies to be developed in conjunction with other EU policies;
- certain business sectors to be fostered;
- multi-level governance to be developed;
- links to be created between policy domains and between regions.

Croatian and Hungarian regional policy should follow that pattern and undertake measures which will enable undertakings from the region to achieve those goals and to cooperate more closely in order to achieve stronger economic development. So far that has not been the case. Both Hungary[59] and Croatia[60] developed their own regional policy. But that regional policy underestimated mutual regional interests and the mutual regional potential of Hungary and Croatia as neighboring countries. One of the reasons for that was probably the fact that Croatia wasn't a member of the EU. So Hungary was more oriented to develop cooperation and regional policy with other neighboring countries. Hopefully this trend will change in the next few years.

In Hungary as an EU member state, the institutional form of organized cross border cooperation is the Euroregion, in Croatian-Hungarian relation it is the Danube-Drava Euroregion. New institutional frameworks can develop via the Euroregions, which can partly become independent from the centralized state control characterizing most of Hungary's neighboring countries – valid for all six countries except for Austria –, which may result in the development of network-type configurations of region-wide relations, which may explore new dimensions of establishment of economic and social relations[61]. Agreements between governments may be concluded to promote regional policies such as e.g. decree 1034/2011 (III.3.) of the Government on the authorization to establish the final text of the

[59] See on Hungarian regional policy J. Recznitzer, 'Területi politika az EU csatlakozás előtt [Regional policy prior to the accession to the EU]', in B. Farkas and I. Lengyel, szerk. *Versenyképesség-Regionális versenyképesség* [Competitiveness-Regional competitiveness] (Szeged, Szegedi Tudományegyetem 2000) pp. 20.

[60] More on Croatian regional policy see V. Đulabić, 'Moderna regionalna politike u Hrvatskoj: stanje i šanse [Modern regional policy in Croatia: current situation and chances]', Conference paper, HAZU, Zagreb (2008); Ministarstvo regionalnog razvoja i fondova EU [Ministery of regional development and EU funds], available at *http://www.mrrfeu.hr/default.aspx?id=407* (12.03.2013).

[61] Đulabić, loc. cit. n. 60, at p. 20.

agreement between the Government of the Republic of Hungary and the Government of the Republic of Croatia on the cooperation to increase the security of power supply, the agreement between the Government of the Republic of Hungary and the Government of the Republic of Croatia on the joint research and extraction of hydrocarbon occurrences along the common border and the agreement between the Government of the Republic of Hungary and the Government of the Republic of Croatia on the mutual storage of mandatory crude oil and oil stocks.

2. A *number of regional projects* concerning business and the public sector between Hungary and Croatia have been implemented in the last few years. These projects show that the potential of regional cooperation among undertakings from Hungary and Croatia exist. Those efforts are a solid basis for future cooperation. Here are some of them:

Hungary-Croatia IPA Cross-border Cooperation Program 2007-2013 *Transnational Innovation Platform from Crop Field to Table* (No. HUHR/1001/2.1.3/0001 Inno-CropFood) Partnership.[62] The project was realized via joint research, development, and innovation contributes to the expansion of the joint R+D+I capacity of the Hungarian-Croatian border region based on the cooperation between the University of Kaposvár, the J. J. Strossmayer University of Osijek, the Somogy Chamber of Commerce and Industry as well as the South-Transdanubian Regional Innovation Agency and the Croatian Food Agency. The comprehensive goal of the project is to establish a joint communication platform between the agro-food interest groups, actors and researchers for the purpose of expanding the target region's R+D+I capacity. Teaching materials will be prepared from the results of the project for the students and teachers of secondary schools and higher education institutions. Implementation area: Somogy, Baranya and Osječko-Baranjska counties. Implementation period: 01.10.2011-31.01.2013

In June 2009, the Balaton Integration and Development Agency Non-profit Llc., in partnership with the Croatian Development Agency of Međimurska County (REDEA), submitted an application for the research project titled *'The role of health tourism in improving the competitiveness of the border regions of Hungary and Croatia'* (HUHR/0901/2.1.3.) published in the framework of the Croatia-Hungary IPA Border Cooperation Program. In the framework of the project, it will be possible to broaden cooperation with the Croatian partners

[62] *http://www.innocropfood.hu/a-projektrol* (14.04.2013)

affected by and interested in medical tourism (spas, tourism undertakings, representatives of local governments), exchange joint experiences, develop joint strategies, perhaps establish a regional health tourism cluster. Its target groups include undertakings and employees working directly in health tourism and local residents who are related to health tourism through their jobs, furthermore such undertakings which provide accommodation, meals, catering and other services, and local governments which may use the project results in their community development plan. The project determines success factors in health tourism. On the Hungarian side, the work primarily covers the examination of effects of health tourism destinations of Baranya, Somogy and Zala counties, especially the health spa tourism.[63]

Hungarian-Croatian Invest-Pro Program. The participants of the program are the Chambers of Commerce and Industry of Zala County, the Somogy Chambers of Commerce and Industry, the development agency of Varaždin and Koprivnica and the Agricultural College of Križevci. In the course of the program with the total budget of 127,000 euros financed in 85% by the fund of cross border programs, the investment opportunities and the resources for investment purposes are assessed in two pairs of counties of the border area. Their aim is to launch such tourism development in the four counties which can be associated with EU sources. The study is made with the involvement of 200 –50 per county – companies, institutions, local governments and other organizations to map investment opportunities and development resources.[64]

Four Seasons – Four Fairs (4S4F):[65] The project aims at strengthening the business relations and cooperation between undertakings as well as encouraging the investments in each other's countries. For this purpose, the main activity of the project is to ensure the participation of Croatian and Hungarian undertakings operating in the border area in the international business fairs of the region and to organize businessmen meetings. Project partners are: Somogy County Enterprise Centre Public Foundation (leading partner), Development Agency of Virovitica-

[63] *http://www.balaton.hu/?page=hirek&hir_akthely=70&hir_rovatid=244&hir_hirid=38070* (14.04.2013)

[64] *http://szebbjovo.hu/hirek/magyar-horvat-hatar-menti-befektetesi-lehetosegekrol-targyalnak-zalakroson* (14.04.2013)

[65] *http://www.sonline.hu/somogy/kozelet/egy-vasar-ket-nemzet-kozosen-barcson-444785#p2* (14.04.2013)

Podravina County, Local Government of Koprivnica City, Kaposvár Municipality.

GPS – Alternative labour market program along the Drava[66] IPA HUHR/1101/2.1.2/0006: Participants of the project are the South-Transdanubian Regional Resource Centre Service Provider Non-profit Ltd., Pécs and the Centar za poduzetništvo, Osijek. The Associated Partner is the Labor Centre of Baranya County Government Office, Pécs. Project period: 1 March 2013-30 June 2014. The project aims at stimulating Croatian-Hungarian relationships between actors of the labor market.

'Co-operation' labour market model program along the Drava (IPA UHR/1001/2.1.2./0002):[67] Participants of the project: South-Transdanubian Regional Resource Centre Service Provider Non-profit Ltd., Pécs and the Association for Creative Development, Osijek, the Labour Centre of Baranya County Government Office, Pécs Regional Development Agency, and the branch of the Croatian Labor Centre in Osijek. The project period was 1 June 2011-30 September 2012. The project helps cooperation of the actors of the labor market of the two countries, the mobility of labor force, the comparison of employment policy practices, the exchange of good practices, and the establishment of new joint projects, thus contributing to the accession to the EU of the Croatian partners.

IV. Conclusion

Croatia and Hungary as neighboring countries share many commonalities, common history, geographic connection, good understanding of local circumstances, etc. Therefore it is important for them to cooperate closely in private and public projects in order to be competitive in the European market.

One very important aspect of that cooperation is the cooperation of undertakings which is typically based on company law instruments or/and obligation contracts. In that sense, the intention of the paper was to compare company law rules in Croatian and Hungarian law which regulates corporate mergers and other legal forms of cooperation of undertakings in order to define whether they create obstacles to

[66] *http://www.ddrfk.hu/hu/nezetkoziegyuttmukodes/161-ipa-gps-huhr11012120006.html* (14.04.2013)

[67] *http://www.ddrfk.hu/hu/nezetkoziegyuttmukodes/110-ipa-co-op-huhr10012120002.html* (14.04.2013)

cooperation. The research proved and showed that the legal instruments which serve as the legal bases of cooperation of undertakings are very similar in both jurisdictions and in that sense they do not create obstacles to incentives by undertakings. The research also showed that there are successful examples of cooperation between Hungarian and Croatian undertakings but such examples are still relatively rare and of smaller economic scale, which means that not all the potential of cross border cooperation is used. Regional policy plays an important role in the advancement of that cooperation.

Regional authorities from both countries bare responsibility for creating a positive business climate. They should be the driving force in attracting EU funds and in connecting businesses from both sides of the borders. The research also proved that a number of regional projects concerning business and the public sector between Hungary and Croatia were implemented in the last few years. But there is no doubt that more can be done and that more should be done.

Comparing the Hungarian and the Croatian regulations and the examples to be found, it can clearly be concluded that currently, significant results can rather be found in the field of cooperative networks between competitors (business networks) – in the case of concentrations between undertakings, only a few examples were found (e.g. OTP Bank and MOL).

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Concepts and theories on executive remuneration with special emphasis on the recent initiatives and developments in the US and EU

I. Recent developments in the field of remuneration of executives in the US and in selected EU countries

Worsening economic activity and the debt crisis still affect many countries of the Western world. This has resulted in different debates and initiatives on how to further promote the culture of corporate governance, and within corporate governance, how to better align and put under control short term financial interests of executives with those of the companies they lead. Namely, joint stock companies in the globalized world have a tremendous influence over national economies, in many countries they represent the main source of economic growth and employment, and some of them – like banks, represent the very corner stone of financial stability and of any further development of the real economy sector.

While different initiatives and developments may be tracked all over the world, for the purpose of this paper we find it important to observe and explain only those which have occurred recently and at the same time, those of the most relevance for the reader. According to the authors, these are primarily related to the relevant provisions of the Dodd–Frank Wall Street Reform and Consumer Protection Act and the recent decision of the European Parliament to further limit bankers' bonuses through the latest amendments of the Capital Requirements Directive (still not in force). Even though there are a number of other documents and solutions which may be observed and discussed within the EU and some member countries (for example, Spain and Germany have acted solely by imposing executive pay limits for recapitalized banks, while the UK and France have done the same by deciding to tax bonuses at rates of up to 50%),[1] reflections on the US and EU developments will be

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[1] See W. De Jong, *Library Briefing – Regulating bankers' bonuses* (Library of the European Parliament 28/02/2013), available at

followed by the most recent and interesting happening in the field of executive remuneration (Swiss referendum). Having in mind the countries the authors come from, a few words will be given about the current legal framework for executive remuneration in Croatia and Hungary.

There has been a lot of talk about the need to additionally regulate Wall Street operations in order to improve Wall Street transparency and accountability after the financial crisis burst in 2007. The result of extensive talks and consultations about the need to allow shareholders more control over executive remuneration has been implemented with the Dodd–Frank Wall Street Reform and Consumer Protection Act.[2] Namely, with the Dodd-Frank Act section 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78n) was amended by adding a requirement for public companies to disclose and put to the vote at the meeting of shareholders the actually paid total compensation of the chief executive officer (or any equivalent position).[3] In the law of corporate governance the latter is called 'say on pay' (the right of the shareholders to vote on the compensation of executives). According to the findings of the study conducted by Semler-Brossy, an independent executive compensation consulting firm founded in 2001,[4] the majority of American companies passed 'say on pay' in 2012 with substantial shareholder support. However, it must be noted that some divergent opinions on 'say on pay' may be distinguished. While, for example, some say that under certain conditions groups may make better decisions than individuals, according to Bainbridge from UCLA Law School, the fact that public companies in the US are now required to hold an annual nonbinding 'say on pay' shareholder vote on the executive compensation arrangements may result in disruption of the very mechanism that makes the public

http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130487/LDM_BRI(2013)130487_REV1_EN.pdf (16.05.2013).

[2] The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203, H.R. 4173), available at *http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/content-detail.html* (16.05.2013).

[3] See Sec. 953 of the Dodd-Frank Act: Executive compensation disclosures.

[4] 2012 Say on Pay Results from September 5 2012, available at *http://www.semlerbrossy.com/* (16.05.2013).

corporation practicable; namely, the vesting of 'authoritative control' in the board of directors.[5]

While certain European countries, as it was highlighted earlier, decided to tackle the problem of bankers' bonuses solely in recapitalized banks, different initiatives to integrate limits on bankers' bonuses may be found and tracked on the EU level as well. The very last one relates to the decision of the European Parliament to limit bonuses of bankers with the latest amendments of the Capital Requirements Directive (CRD IV Package)[6] as a result of which bankers' bonuses would be limited to two times their salaries. This decision, which was previously negotiated and agreed with the Council, will apply from January 2014. The same was strongly opposed by the bankers from the City of London and officials from Britain but they were defeated by a majority of votes coming from other EU countries.

Apart from regulating bankers' bonuses, it is important to mention that EU officials were active in setting up a non-obligatory framework for the remuneration of board members of other listed companies.[7] Although these documents have been delivered in the form of non-binding recommendations, it could be said that they have helped the development of different national rules and codes and therefore fostered

[5] For both hypotheses see S. M. Bainbridge, 'Is „Say on Pay" Justified?', available at *http://www.cato.org/sites/cato.org/files/serials/files/regulation/2009/2/v32n1-6.pdf* (19.05.2013).

[6] More information about CRD IV Package available at *http://ec.europa.eu/internal_market/bank/regcapital/new_proposals_en.htm* (18.05.2013). See also Annex 1 of the previous Directive 2010/76/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2006/48/EC and 2006/49/EC as regards capital requirements for the trading book and for re-securitizations, and the supervisory review of remuneration policies. In the given Annex certain limits on bankers' bonuses were integrated in the form of guidelines, however, as reported by the European Parliament's Library Briefing (see *infra*) not all Member States have fully implemented these guidelines in their legislative framework.

[7] See Commission's Recommendation for fostering an appropriate regime for the remuneration of directors of listed companies (2004/913/EC), Commission Recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the board (2005/162/EC) etc. More information, together with relevant documents and explanatory memorandums are available at *http://ec.europa.eu/internal_market/company/directors-remun/* (19.5.2013).

transparency of remuneration structures and contracts for all the stakeholders on the market.

Probably the most interesting occurrence with respect to executive compensation took place this year outside the EU, but close to it – within a member country of the European Free Trade Association – Switzerland. Notably, in March 2013 Swiss voters decided in a referendum against abusive remuneration (*Eidgenössische Volksinitiative 'gegen die Abzockerei'*) to impose some of the world's most severe restrictions on executive compensation, ignoring a warning from the business lobby that such curbs would undermine the country's investor- friendly image.[8] The outcome of the referendum, which was backed by almost 68% of Swiss voters, will result in amendments of the Federal Constitution which will prohibit Swiss public companies listed on stock exchanges in Switzerland or abroad from paying out compensation to executives on their departure. Additionally, each year the Annual General Meeting will vote on the total remuneration of the Board, while the company statutes will have to stipulate the amount of annuities, loans and credits to board members, bonus and participation plans and the number of external mandates, as well as the duration of the employment contract of members of the management.[9] Such a decision on remuneration will be binding. Any violation of such principles can result in a criminal sanction.[10] According to the Economist, this new rule, which will be enshrined in the Constitution, could drive a lot of companies out of Switzerland since the fat cats (highly ranked and experienced executives) don't come in Switzerland just for the skiing.[11]

II. On the theoretical background

The amount and composition of executive compensation underwent significant changes in the US during the 1990s. The substantial increase

[8] See the New York Times, 'Swiss Voters Approve a Plan to Severely Limit Executive Compensation', March 3, 2013, available at *http://www.nytimes.com/2013/03/04/business/global/swiss-voters-tighten-countrys-limits-on-executive-pay.html?_r=0* (18.05.2013).

[9] *http://en.wikipedia.org/wiki/Swiss_referendum_%22against_rip-off_salaries%22m* (18.05.2013)

[10] See Article 95(3)d of the initiative.

[11] See the Economist, 'Executive pay. Fixing the fat cats', March 9-15, 2013, available at *http://www.economist.com/news/business/21573169-switzerland-votes-curb-executive-pay-fixing-fat-cats* (18.05.2013).

in executive compensation perceivable at this time was explained in the studies prepared by Charles Himmelberg,[12] R. Glenn Hubbard,[13] and Kevin J. Murphy and Jan Zabojnik[14] by the increased demand for outstanding managerial capabilities.[15] Nevertheless, we believe that it is highly questionable that there is any rational explanation for this enormous increase.

Modern executive compensation practices can be outlined by examining also the theoretical background for such practices. In the United States a considerable theoretical and scientific background was developed for the purpose of demonstrating how certain compensation packages and their various components can facilitate the efficiency of undertakings and the increase of their value through the appropriate motivation of the management. Related research is based on the principal-agent theory,[16] which offers several possible approaches. This theory emphasizes two different, competing, but at the same time parallel characteristics of management compensation. On the one hand, compensation may be applied as a counter-measure to governance costs[17] (namely, the so-called optimal contract theory, or in other words, the arm's length bargaining-theory). On the other hand, managerial power can be considered as a point of departure, based on which compensation is to be treated as governance cost.[18] The separation of ownership structure from corporate governance creates conditions based on which the interests of the shareholders and the management of the company may diverge. Thus, in order to resolve the conflicts resulting from such

[12] Charles Himmelberg, global investment researcher of Goldman Sachs.

[13] R. Glenn Hubbard, professor of Finance and Economics at the US Columbia Business School.

[14] Jan Zabojnik, professor of Department of Economics of Queen's University, Kingston.

[15] See C. P. Himmelberg and G. R. Hubbard, 'Incentive Pay and the Market for CEO's: An Analysis of Pay-for-Performance Sensitivity', available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=236089* (2000) (unpublished, Columbia Business School); K. J. Murphy and J. Zábojník, 'Managerial Capital and the Market for CEO's', available at *http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.175.6229&rep=rep1&type=pdf* (2004) (unpublished) (18.05.2013).

[16] Principal-Agent Theory.

[17] The so-called agency-cost.

[18] See A. A. Berle and G. C. Means, *The Modern Corporation and Private Property* (Macmillan, New York 1932) pp. 4-5.

conflict of interests, it is necessary to establish an optimal compensation scheme.[19]

The so-called behavioral approach is an interesting approach to the theory of executive compensation. This new approach is based on an alternative, psychological perspective, instead of the traditional principal-agent theory. According to this approach, the performance of the CEO is more influenced by his own self-esteem and reputation than the driving force of money.[20] The overconfidence of corporate executives may result in unrealistically optimistic expectations that analysts tend to take for granted, whereby such expectations may be considered by them as self-evident starting points in the future. The performance of the management will be measured based on such expectations, as they will be forced to face these retroactive, unrealistically increased expectations.[21] The behavioral approach also takes into consideration the unfavorable effects of unlimited compensation amounts. The enormous differences in respect of salaries can demoralize the less well paid portion of the workforce and undermine collegiality and team work, which will ultimately result in a drop back as regards productivity and business results. Moreover, it can also give rise to doubts on the side of investors in respect of the practice of corporate governance, since the excessive compensation contracts and payments can be considered extremely high as compared to the annual profit of the companies. Consequently, investor confidence will also be damaged, yet the operation of capital markets is based on such confidence.[22]

From the above-mentioned theories this paper would only like to review the managerial power theory in detail. Both authors find increased managerial power in our days to be a key element in the recent remuneration scandals.

The so-called managerial power theory is practically the counterpoint of the above-mentioned optimal contract theory. It calls the attention to the

[19] See S. M. Bainbridge, 'Executive Compensation: Who Decides?, Review of *Pay Without Performance: The Unfulfilled Promise of Executive Compensation*, by Lucien Bebchuck and Jesse Fried', 83 *Texas Law Review* 1615 (2005) p. 1621.

[20] Bainbridge, loc. cit. n. 19, at pp. 1632-1633.

[21] See T. A. Paredes, 'Too Much Pay, Too Much Deference: Behavioral Corporate Finance, CEO's, and Corporate Governance' 2 *Florida State University Law Review* (2005) p. 711.

[22] Paredes, loc. cit. n. 21, at pp. 712-713.

fact that the intention behind the development of compensation schemes is none other than to conceal the related costs and minimize public uproar.[23] This approach was worked out and further developed by professors Lucian Arye Bebchuk,[24] Jesse Fried[25] and David Walker[26]. According to their position, the contract on executive compensation does not provide a counter-measure for issues related to corporate *governance costs*. On the contrary, the issues arising in respect of such contracts are of the very same nature as those the optimal contract theory aspires to solve.[27] According to the managerial power theory, shareholders accepted the continuously increasing managerial compensation (or at least they reconciled themselves to such increase), therefore, they consider it as a means of corporate executive incentive. However, the foregoing practice has significant additional costs, which raises the question whether such incentive is worth the related costs? The supporters of the theory recognized the contradiction, namely, the fact that increasing compensation is not necessarily accompanied by similarly increasing performance. Moreover, practical experience seems to confirm that the amounts invested into compensation are not necessarily recovered by shareholders as a result of the value-creating activity of the management. The theory also takes into consideration the well-distinguishable ambition of corporate executives to maximize their compensation, for which purpose they do not hesitate to use their influence either. Based on their examinations, the followers of the managerial power theory concluded that in executive compensation contracts the considerations based on which compensation is provided are to be separated from the considerations based on which performance is evaluated. Thus, the theory points out the efforts of 'strong managers', who enjoy a wide scope for action whereby they can influence the terms of their own compensation package. They certainly use such influence also by concealing certain elements of their

[23] See L. A. Bebchuk and J. Fried, *Pay Without Performance – The Unfulfilled Promise of Executive Compensation* (Harvard University Press, 2004) pp. 13-15.
[24] Lucian A. Bebchuk, professor of law, Economics and Finance at Harvard University and Director of the Corporate Governance Program at Harvard Law School.
[25] Jesse M. Fried, professor of law at Berkeley University, California.
[26] David I. Walker, professor at the Law School of the Boston University.
[27] Bainbridge, loc. cit. n. 19, at p. 1624.

compensation, whereby they attempt to reduce interest from the general public and the media, as well as muffle criticism.[28]

Naturally, the theory does not claim that management members always strive to take advantage of the possibilities for increasing their compensation. It does not claim either that the above conduct has exclusive influence over the determination of compensation. However, it calls the attention to the fact that the board members supposed to be independent are not completely independent. This claim is also supported by the fact that the *CEO* typically exercises influence over the election of the members of the board, and he is also responsible for social relations. This results in the practice that board members support the *CEO* in enforcing his position.[29] The reason for such conduct is that in the case of US companies, the *CEO* frequently has substantial influence over the appointment of board members; therefore, it will be in the directors' interest to be on good terms with the *CEO*, as this may increase their chances for re-election. Empirical evidence seems to prove[30] that those members of the board who work in the direct surroundings of the *CEO* display *loyalty* to the *CEO* and adherence to their own position.

The theory lays an emphasis on the fact that previous analyses paid relatively little attention to those compensation elements which however have great significance within the field of management compensation. Such elements include, in particular, those payments which are made to managers according to a specific schedule, for example, preferential loans,[31] pensions and other delayed remuneration elements, as well as supplementary incomes. [32]

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[28] See K. J. Murphy, 'Explaining Executive Compensation: Managerial Power vs. the Perceived Cost of Stock Options' *University of Chicago Law Review* summer (2002) p. 847.

[29] Murphy, loc. cit. n. 28, at pp. 851-852.

[30] Bainbridge, loc. cit. n. 19, at p. 1625.

[31] The 2002 Sarbanes-Oxley Act expressly prohibits loans provided to corporate executives. Naturally, this prohibition applies to loans provided under more favorable terms than those applicable in the market. Financial institutions involved in lending transactions can provide loans to their own executives subject to standard market terms without any restriction.

[32] Cf. Zs. Ercsey and Cs. Szilovics, 'Innovation in Tax Systems', in the CD material of the conference titled '*Intellectual capital as competitive advantage'* (Lifelong Learning Foundation and Selye János University, Faculty of Economy, Komarno 2010).

In summary of the foregoing, we may establish that according to the followers of this theory, although compensation provided on the basis of share price can be justifiable in specific cases, the management may easily find a way to influence option contracts for its own benefit. Thus, such contracts significantly deviate from the optimal contract model, which is theoretically concluded between parties independent from each other. Naturally, the deviation would be in the interest of the management and not the shareholders.[33]

In light of everything that was said so far, the managerial power theory comes to the conclusion that the management *de facto* determines its own compensation. However, according to the position of the above-referenced professors, it does not automatically follow from the above that compensation amounts are totally uncontrolled or may be increased without any control whatsoever. However, such lack of control is counteracted by the rational realization that in the case that the management of the company has determined for itself excessive compensation (for example, a distinctly excessive option), this may even result in a decrease in the price of the company's shares. In such a case, simultaneously with the exercise of the option right, a share dilution could take place, which could reduce earnings per share. Moreover, excessive compensation cannot be considered optimal from the perspective of investors, since the assets used for such purpose would be deducted to the detriment of the investors' profit (namely, from the dividend reserves). Therefore, increasing compensation amounts may give rise to concerns. The management of the company is interested in keeping share prices at an optimal level, which may also reduce the risk of a possible hostile takeover. In the case of lower share prices, the company will become more exposed to the risks of takeovers, which may threaten the management with the loss of their position. For that very reason, share prices are to be protected by way of maintaining compensations at an optimal level, while investor concerns arising in relation to excessive compensation amounts can result in just the opposite.[34]

[33] Bebchuk and Fried, loc. cit. n. 23, at p. 16. See also B. Holmstrom, 'Pay Without Performance and the Managerial Power Hypothesis: A Comment' *The Journal of Corporation Law*, summer (2005) p. 703.

[34] See R. A. Booth, 'Executive Compensation, Corporate Governance, and the Partner Manager', 1 *University of Illinois Law Review* (2005) p. 285.

Critics of the managerial power theory challenge the assumption that the power of corporate executives extends to the determination of their own compensation without limitations. According to their position, the members of the management have an interest in preserving their good reputation and their employment; therefore they not only may, but *must* avoid compensations that can raise a general outcry from the public. The opinion of prominent investors, such as institutional investors and pension funds has special relevance in this respect. Such institutional investors can force managers to exercise self-constraint, even if controlling functions within the board of directors tend to grow weaker. By way of illustration we hereby refer to the case of *Richard Grasso*, former *CEO* of the *New York Stock Exchange*. He was confronted with such strong opposition on account of the terms of his compensation package that he had to resign from his position due to the indignation.[35]
Obviously, the easiest way for the management to avoid exciting the indignation of the public and investors in relation to its compensation would be to exercise self-constraint in this respect. However, professors *Bebchuk*, *Fried* and *Walker* challenge the prevalence of such self-constraint in practice, and being aware of the general practice, we cannot but agree with them. According to their position, the management is more inclined to restructure its benefits, and ultimately conceal and render them less transparent. As a result of such conduct, compensation schemes not only move beyond the advisable amounts, but also become less transparent and are less in line with the objectives the company intends to achieve. The foregoing results in unprofessionalism and distorts the system of payments. It is also to be noted that excessively high compensation amounts can be justified towards the investors only by extraordinary profits. Thus the management can be inspired to initiate share price maximization through excessively risky transactions.
In order to resolve the contradiction, an external compensation consultant can be employed. The expert opinion prepared by such consultant can subdue criticism and provide legitimacy to increased compensation amounts. However, the independence of consultants is questionable, similarly to the independence of gatekeepers, which is generally considered questionable by the representatives of US

[35] Paredes, loc. cit. n. 21, at pp. 705-706.

corporate governance.[36] As referenced previously, gatekeepers displayed unprincipled loyalty to the management of large corporations during both the 2002 dotcom crisis and the 2007 subprime crisis. This conduct significantly contributed to the concealment of the true condition of the firms and the losses suffered by investors.

In addition, it is also a significant consideration that the compensation of corporate executives typically metaphorizes, reflects their prestige and appreciation. Therefore, it is not surprising that no *CEO* would be satisfied with below the average compensation. Obviously, they seek to receive benefits above the average amounts. Moreover, the compensation paid to executives is also indicative of the financial condition of the company. Since nowadays a significant portion of the compensation is paid under performance-oriented titles (or at least titles claimed to be performance-oriented), no company would take the risk of providing to its executives' compensation amounts below the average. Such conduct could be interpreted by the media and analysts as the consequence of the weaker performance and unsatisfactory results of the company. Thus, the relatively moderate remuneration of the *CEO* would be seen as a sanction for weak performance and not as a (forward-pointing) compensation policy to be followed. Therefore, in the United States (and also globally) an increasing tendency can be observed in respect of the compensation of directors.[37]

However, it is questionable whether executive compensations of tens or hundreds of millions of dollars can be justified, even if the activity of the CEO considerably improves the efficiency of the company. Payments in such amounts exceed the average employee salaries by several hundred times, thus they give significant scope to general indignation. In relation to the above comparison, it is to be noted that – although the tendency is global – the fact that European and Asian managers receive significantly lower compensation amounts than their American counterparts cannot be disregarded.[38] If we take into consideration that in Europe concentrated share ownership results in

[36] See L. A. Bebchuk, et al., 'Managerial Power and Rent Extraction in the Design of Executive Compensation' *University of Chicago Law Review,* summer (2002) pp. 789-791.

[37] See J. J. Smuckler, 'The SEC's Rule Changes Regarding CEO Compensation Disclosure: Predicted Effects Using the Optimal Contracting and Managerial Power Theories' 2 *The Corporate Governance Law Review* (2007) p. 123.

[38] Paredes, loc. cit. n. 21, at p. 707.

strong owner control (which entails the lessening of the power of the board and the management), this provides a substantial argument in support of the managerial power theory. In light of the foregoing, we are also of the opinion that a direct connection can be observed between the compensation of executives and their power. The above statement is also supported by the fact that in these days the weakening owner control observable in the United Stated (resulting from plural share ownership) goes together with the increase of the power of corporate executives, as well as compensation amounts that have never been seen before.

III. Executive remuneration in Croatia and Hungary – the current legal framework

In Croatia, having become a full member of the EU this year, executive compensation remains an area of contract law, and it is only to a certain extent regulated by the principles set by the Companies Act and influenced by the rules of the Corporate Governance Code adopted by the Zagreb Stock Exchange and the Croatian Financial Services Supervisory Agency[39] as well as the Recommendations on remuneration of Management Board members and executive directors in joint-stock companies, a document adopted by the Croatian Association of certified Supervisory Board members (HUCNO).[40]

However, before discussing the provisions which explicitly make mention of remuneration, it is necessary to take into account that the concept of executive remuneration in Croatian law is indirectly affected by several basic provisions of the Croatian Companies Act. While Article 272 contains a general obligation for supervisory board members to act in the (best) interest of the company, Article 252 also lays down that executives owe a duty of care to the company. This essentially means that executives are supposed to act in the interest of the company and always negotiate for the company's benefit. Although the main intention of the mentioned provisions is to reduce the risk of claims for damage following 'bad' business decisions, it could be also said that it may influence the way directors approach risk taking in order to maximize their earnings under a certain compensation scheme. In Croatian law this provision is of mandatory nature and it cannot be excluded by the contract. Nevertheless, it is clear that it does not

[39] *http://www.hanfa.hr/uploads/20101223131200.pdf* (18.05.2013)
[40] *http://www.hucno.hr/preporuke-o-nagradjivanju-clanova-uprave.aspx* (18.05.2013)

address the issue of compensation directly, but only sets the standard of care, which is intended to prevent any kind of negligence in managing the company's affairs. To some extent this provision is mitigated by the subsequent provision that executives are not acting negligently if it is reasonable to conclude, based on the given information, that they are acting for the benefit of the company.

As for the Croatian Companies Act,[41] Article 247 of the Act sets the very basic principle for compensation of the members of the management. The relevant provision states the following: In the calculation of total receipts of a particular management board member (salary, share in the companies' profits, reimbursement of expenses, payments of insurance premium, commissions and all other receipts) the supervisory board shall carefully consider whether total receipt amounts are in proportion with the work executed by management board members as well with the current state of business of the company. It is apparent that such an ambiguous provision leaves enough room for supervisory boards to decide in every particular case what would represent a proper proportion in relation to the work executed in contradiction to the current condition of the company.

However, the rule contained in the Act has been upgraded to a considerable degree by documents of optional nature, among which the Recommendations on remuneration of management board members and executive directors in joint-stock companies (The HUCNO Recommendation) deserves to be highlighted. This is especially because its provisions on principles of remuneration, structure of remuneration, fixed or variable remuneration, remuneration for short- and long-term performance, special remuneration and share in company profits etc. are well-developed and elaborated and are, in addition, in line with present legislation: the Companies Act, the Croatian Corporate Governance Code and the recommendations delivered on EU level (European Commission Recommendation on directors' remuneration 2004/913/EC).

The HUCNO Recommendation (hereinafter referred to as: Recommendation) underlines that the decision of the General Assembly on remuneration and costs reimbursement has to rely on information from the annual financial report and the report on the company's

[41] Companies Act, Official Gazette, Narodne novine, NN 111/1993, 34/1999, 121/1999, 52/2000, 118/2003, 107/2007, 146/2008, 137/2009, 125/2011, 111/2012, 68/2013.

situation. In other words, the intention of the Recommendation is to tie remuneration amounts to the performance of directors as well as the economic circumstances in which the company operates. In practice this means, just as the Recommendation points it out, that remuneration should adequately reflect the time, effort and experience of directors, ensure an adequate incentive which would balance the interests of directors with the company's interests.[42] It is also recommended that any remuneration should consist of two parts; 1) a fixed part, which is unchangeable and does not depend on business results, and part 2) which is conditioned on the business results of a business year.[43]

To what extent joint stock companies follow these guidelines set by HUCNO is difficult to say. According to the data presented in the Reports of the Croatian Financial Services Supervisory Agency (HANFA) in 2011, most of the companies did not publish remunerations received by the members of management boards, if such a remuneration policy statement was drafted at all.[44]

Rules on remuneration structure which may be found in the Corporate Governance Code adopted by the Zagreb Stock Exchange and the Croatian Financial Services Supervisory Agency (hereinafter: the Code) are somewhat similar to the above-mentioned rules of the HUCNO Recommendation. Stock options, as well as similar instruments having the effect of long term stimulus are being expressly mentioned and included in the part which deals with remuneration structure for members of the management.[45] According to the Code, all forms of remuneration to directors and the Supervisory Board, including options and other benefits of the management shall be made public, broken down by items and persons in the annual report of the company. Obviously, this supports business transparency and provides shareholders, investors and other stakeholders with information that may be valuable when delivering certain decisions.

[42] See rule 3.6. of the Recommendation.

[43] See rule 3.7. of the Recommendation.

[44] Due to the unavailability of HANFA Reports on the web, this information was found in the material published on the web (Powerpoint presentation): H. Horak and K. Dumančić, 'Board remuneration and independence – where is Croatia', the presentation is available at *http://web.efzg.hr/dok/PRA/kdumancic/ /Horak%20Duman%C4%8Di%C4%87.pdf* (19.05.2013).

[45] See rule 6.3.1. of the Corporate Governance Code adopted by the Zagreb Stock Exchange and the Croatian Financial Services Supervisory Agency.

An economic downturn has pushed the Croatian government to tackle Board remuneration directly, by handing down the Decision on the determination of salaries and other payments of the president and members of management boards in state controlled companies.[46] One of the latest amendments of the Decision has allowed payment of special remuneration to the board members in companies which have started restructuring programmes, even if the company has failed not to generate losses. The latter has been introduced in lieu of the so-called 'golden parachute' option – an agreement that specifies benefits that the board member receives in case his contract with the company gets terminated, an option that has been regularly included in contracts before.[47] Among other things, the Ministry of Economy claimed that certain simulations and mathematics behind such a decision show that maximum payouts according to the new model would be lower than those that were collectable under the 'golden parachute' option.

From everything that was said so far it is evident that different approaches may be detected. While it is up to private companies to decide about remuneration policies and contracts with management members, in state-owned companies (which in Croatia still represent a fairly large number of joint-stock companies) the Government has decided to put things under strict control. Obviously, sole reliance on the provision(s) of the Companies Act – about the need to tie the total compensation of the management board to the company's actual benefit has not been sufficient or adequate enough to result in practices that would prevent poor management practices and excessive risk-taking behavior.

Essentially, both Hungarian civil and company law base the concept of executive remuneration on the principle of contractual freedom,[48] but

[46] Decision on the determination of salaries and other payments of the president and members of management boards [Odluka o utvđivanju plaća i drugih primanja predsjednika i članova uprava trgovačkih društava, NN 83/2009]. Later, this Decision has been amended several times (NN 3/2011, 3/2012, 46/2012, 22/2013).

[47] See Decision on the amendment of the Decision on the determination of salaries and other payments of the president and members of management boards (NN 46/2012) together with an answer to the question of parliamentary representative Dragutin Lesar to the Minister of Economy with regard to the termination of certain rights arising from managerial contracts; available at *www.vlada.hr/hr/content/download/220133/.../43.%20-%2033.3.pdf* (19.05.2013).

[48] Cf. Zs. Ercsey, *Az Szja- és az Áfa-szabályozás igazságossága a magyar adórendszerben* [Fairness of personal income tax and value added tax in the

the Corporate Governance Recommendations of the Budapest Stock Exchange (BSE provide soft-law rules, through the transplantation of Anglo-Saxon and EU recommendations on best practice. Therefore, it is important to suggest the relevance of international principles in the Hungarian code of best practice.

Section 3.4 of the Corporate Governance Recommendations of the BSE provides that members of the board shall establish a remuneration committee by mandate of the general assembly. The role of the remuneration committee is to help the board of directors to form principles on the remuneration of executives, supervisory board members and managers.

Remuneration practices have recently been revolutionized by two techniques in the United States, which have also gained ground worldwide. These techniques are, on the one hand, the performance based remuneration, and on the other hand, linked to the foregoing, remuneration by way of options, the incentive share options.[49] Nowadays, the linking of remuneration to performance constitutes the fundamental principle of the compensation policy of large corporations. This tendency can be observed also in the Corporate Governance Recommendations of the BSE. The recommendation emphasizes that upon the determination of the remuneration, the responsibilities and the extent of the liability of the members must be taken into consideration. The extent to which the company was able to achieve its objectives, as well as its economic and financial condition is also to be taken into consideration.[50]

The increasing significance of share options, the high level of compensation achievable by their application, the complicated nature of such schemes and the risks involved in their application rightly raise the issue which organ of the company is to exercise control over option based benefits? For this reason, we consider it is necessary to review the regulations of some relevant corporate governance codes in this respect.

Hungarian tax system] PhD Thesis (Pécs, 2013) pp. 76-77; available at *http://doktori-iskola.ajk.pte.hu/files/tiny_mce/File/Vedes/Ercsey/ercsey_nyilv_ertekezes.pdf* (08.07.2013).

[49] See J. G. Hill, 'Regulatory Responses to Global Corporate Scandals', 3 *Wisconsin International Law Journal* (2005) p. 408.

[50] See Budapest Stock Exchange, *Corporate Governance Recommendations* 2.7.1, available at *http://www.bet.hu/data/cms61378/FTA_080516.doc.* (28.03.2011).

According to the Corporate Governance Recommendations of the BSE, in the case of share-based compensation schemes the elements of the schemes and in the case of the board of directors and the members of the supervisory board also the amount of actual benefits are approved by the general meeting. In the case of the members of the management, the approval of the amount of the actual benefits falls within the scope of authority of the board of directors, instead of the general meeting. The Recommendations of the BSE emphasize the significance of ensuring that shareholders receive appropriate access to information. Consequently, the provisions of the Recommendations propose that prior to voting shareholders should be provided with detailed information on the share-based remuneration schemes (and any possible amendments thereto) and the costs such schemes entail. The source of shares intended to be granted as compensation should also be identified. In the case of share based compensation schemes, the prior approval of the general meeting is required for the determination of the relevant parts of the compensation contract. The Recommendations also propose that the company determine the compensation schemes for the board of directors, the supervisory board and the management in such manner that it serves the strategic interests of the company, and thereby those of the shareholders.[51]

The control mechanisms of publicity have a key role in corporate governance. This is particularly true as regards the issue of remuneration. In order to ensure the operation of such control mechanisms it is essential to prescribe that information regarding remuneration and the principles of the remuneration policy should be accessible to the shareholders. This objective can be achieved by the publication of the remuneration policy or the so-called remuneration statement (statement). According to the relevant provisions of the Corporate Governance Recommendations of the BSE, the company should prepare a report for the owners, which report is to be submitted to the general meeting. The report should present the remuneration of executive officials and members of the management, namely, the Recommendations of the BSE propose full disclosure for each person

[51] Budapest Stock Exchange, Corporate Governance Recommendations 2.7.4, available at *http://www.bet.hu/data/cms61378/FTA_080516.doc.* (28.03.2011).

separately. The remuneration committee provides for the preparation of the annually published remuneration statement.[52]

IV. Concluding remarks

Executive compensation shall be in parity with company performance and the personal achievements of the directors. However, rising tendencies in executive remuneration draw the attention to a questionable practice and the lack of a strong ethical background. To provide sufficient guarantees and to serve the interests of both shareholders and the public, the best practice shall be put on a strong theoretical footing. Therefore, it is essential to both analyze the relevant major theories and compare the governance practices contained in them. While in the US and Britain 'say on pay' remains not binding, it seems that European States will in future show further inclination to limit executive compensation schemes in various manners. Some steps have already been taken by several countries, especially in the banking sector, where further regulations on bankers' bonuses will probably take effect within the EU because of the still ongoing debt crisis. It is also reasonable to expect that, if the crisis and austerity measures continue, limits on bonuses and compensation schemes will spread not only in the banking but also in all other business sectors, especially in companies in which the government acting *iure gestionis* has a prevailing interest and influence. As members of the EU, Hungary and Croatia will have to follow legislative developments in the body of European law, but at the same time both countries have an opportunity to approach the issue of board remuneration independently, thus departing from the concept of pure contractual freedom toward more rigid rules which would better align the interests of the management board with those of the company in question.

[52] Budapest Stock Exchange, *Corporate Governance Recommendations* 3.4.5., available at *http://www.bet.hu/data/cms61378/FTA_080516.doc.* (28.03.2011).

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European regional perspective on environment and human rights

I. Introduction

Since the Stockholm Conference in 1972, a remarkable process is noticeable in the field of environmental protection.[1] At the normative level, the number of international treaties concluded in this field is numerous.[2] Similarly, environmental standards in the European Union, now one of the highest in the world, have developed over decades.[3] Despite the increased international concern for environmental protection, implementation of these standards has been less successful.

Linkages between human rights and the environment are manifold. Firstly, human rights protected by the various international and regional human rights treaties may be directly affected by adverse environmental factors. Toxic smells, excessive noise, vibration might have a negative impact on the right to life, the right to respect for private and family life as well as the home, and the right to property. Secondly, adverse environmental factors may give rise to certain procedural rights for the individual concerned, including the right of access to information, participation in decision-making, and access to justice in environmental cases. Thirdly, the protection of the environment may also be a

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[1] On environmental law see e.g. P. Sands, et al, *Principles of International Environmental Law* (Cambridge University Press 2012); E. Fisher, *Environmental Law: Text, Cases & Materials* (Oxford University Press 2013).

[2] See e.g. ECOLEX, the gateway to environmental law, operated jointly by FAO, IUCN and UNEP, available at *http://www.ecolex.org/start.php*, or the IEA website of the University of Oregon, available at *http://iea.uoregon.edu/page.php?file=home.htm&query=static* (31.05.2013).

[3] See, e.g. the incorporation of principles of sustainable development and environmental integration in the EU environmental policy and in the EU Treaties in Z. Horváth, 'Greening of Production and Consumption: Towards Sustainability in the EU Integrated Product Policy', in V. Rebreanu, ed., *Sustainability – Utopia or Reality?* (Babes Bolyai University, Sfera Juridica, Cluj-Napoca 2010) pp. 143-173. See also N. de Sadeleer, 'Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases', 81 *Nordic Journal of International Law* (2012) pp. 39-74.

legitimate aim justifying interference with certain individual human rights. Thus, protection of the environment may justify restrictions on the right to property.[4]

Full realization of human rights has a positive impact on the environment, while the effective enjoyment of human rights cannot be realized without a healthy, ecologically sound and secure environment.[5] Human rights defenders and environmental activists are linked by the common goal of reducing the reserved domain of States. Nevertheless, there is a slight friction between these two groups: environmentalists allege that human rights defenders put human rights first, thus in their approach, human rights and the human race enjoy priority over other species and ecological processes, and the environment is regarded important only inasmuch as it benefits humans. This approach is met with disagreement by environmentalists, who argue that human beings are not separated from, and not situated above, the natural environment they live in; and that all species should enjoy the same protection. [6]

This paper highlights the potential for using human rights to address environmental problems. It concentrates on the issue whether, and to what extent, international law provides for a human right to an environment of a particular quality. In doing so, it starts with a brief survey of the evolution of the right to environment in universal and regional human rights treaties, either expressly or through other, closely related rights. Then it goes on to analyse the rights that might be invoked in the protection of the right to environment. The next part sets out the relevant case law of the European Court of Human Rights, focusing on Croatia and Hungary. Finally, in line with the project within the framework of which the research was conducted, the paper describes bilateral relations (in particular bilateral treaties) between Croatia and Hungary.

[4] Council of Europe, *Manual on Human Rights and the Environment* (Council of Europe, Strasbourg 2012) (hereinafter Council of Europe Manual) pp. 7-8.

[5] A. Fabra Aguilar and N.A.F. Popović, 'Lawmaking in the United Nations: The UN Study on Human Rights and the Environment' 3 *Review of European Community & International Environmental Law* (1994) p. 197; Council of Europe Manual, p. 30.

[6] On the criticism of the antropocentric approach, see e.g. C. Redgewell, 'Life, The Universe and Everything: A Critique of Anthropocentric Rights', in A. Boyle and M.R. Anderson, eds., *Human Rights Approaches to Environmental Protection* (Oxford, Clarendon Press 1996).

II. Right to environment in international human rights treaties

International environmental law has little to offer to individual victims of environmental problems. Since international environmental law does not protect individuals as such, the right to environment usually does not appear in environmental treaties: these are formulated as State obligations, and do not grant rights to individuals or interest groups living in that State. Likewise, human rights treaties, with a few exceptions, do not formally encompass a right to a sound, quiet and healthy environment.[7] However, a range of civil, political, economic, social and cultural rights rely on environmental quality for their full realisation. This link provides the basis for the use of human rights to address environmental concerns. The human rights which might be relevant in this context include the right to life; the right to health, adequate standard of living (including food, clothing and housing); the right to family life and privacy; the right to property; culture; freedom from discrimination; self-determination; and just and favourable conditions of work.

This part of the paper provides a brief enumeration of those human rights treaties which contain an express right to environment, then it goes on to list those rights which can be deemed indirect environmental rights, whether of a substantive or a procedural nature.

1. The right to a clean and healthy environment: Express provisions

The African Charter on Human and Peoples' Rights[8] was the first human rights treaty expressly providing for the so-called third generation of human rights. Article 24 provides that all *peoples* shall have the right to a general satisfactory environment favorable to their development.[9]

[7] F. Francioni, 'International Human Rights in an Environmental Horizon', 21 *European Journal of International Law* (2010) pp. 41-55; S. Fiorletta-Leroy, 'Can the Human Rights Bodies be Used to Produce Interim Measures to Protect Environment-Related Human Rights?' 15 *Review of European Community & International Environmental Law* (2006) p. 66.

[8] Adopted in Nairobi, Kenya, 28 June 1981, entry into force: 21 October 1986, available at *http://www.achpr.org/instruments/achpr/* (31.05.2013).

[9] Emphasis added. Other collective rights include right of all peoples to equality and rights, right to self-determination, right to free disposal of wealth and natural resources, the right to economic, social and cultural development, right to national and international peace and security. Arts 19-23.

It should be noted that the right holders of the right to environment are the people. Thus, the right to environment depends on the definition of 'people', and on the justiciability of third generation rights, in general.[10] Furthermore, this right appears in a document of a region especially struggling with the reconciliation of development with environmental protection.[11] Finally, there is an implementation gap: the monitoring mechanism in the African system is somewhat underdeveloped. While the Charter provides for communications other than those of States Parties, which can be submitted to the African Commission on Human and Peoples' Rights,[12] individuals have direct access to the African Court on Human and Peoples' Rights only if the complainant is from a country which made a specific declaration allowing individuals to directly institute cases before the Court.[13] As of March 2013, only six countries had made such a Declaration.[14]

Article 11 of the Protocol of San Salvador additional to the American Convention on Human Rights[15] provides that everyone shall have the right to live in a healthy environment and that States Parties shall

[10] See e.g. I. Brownlie, 'Rights of Peoples in Modern International Law', pp. 104-119, R. Rich, 'Right to Development: A Right of Peoples', pp. 120-135, J. Crawford, 'Rights of Peoples: Peoples or Governments', pp. 136-147, E. Kamenka, 'Human Rights, Peoples Rights', pp. 148-159, all in 9 *Bulletin of the Australian Society of Legal Philosophy* (1985) Special Issue: The Rights of Peoples.

[11] On sustainable development see e.g. the 2002 World Summit on Sustainable Development in Johannesburg, e.g. Johannesburg Declaration on Sustainable Development, A/CONF.199/20, 4 September 2002, available at *http://www.un-documents.net/jburgdec.htm*; Plan of Implementation of the World Summit on Sustainable Development, A/CONF.199/20, 4 September 2002, available at *http://www.un-documents.net/jburgpln.htm* (31.05.2013).

[12] Art. 55 of the African Charter.

[13] Art. 5(3) and Art. 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

[14] Those countries are Burkina Faso, Ghana, Malawi, Mali, Rwanda, and Tanzania. – The Court delivered its first judgment in 2009. As of June 2012, the Court has received 24 applications. It has already finalized 12 cases and rendered decisions thereon, available at *http://www.african-court.org/en/index.php/about-the-court/brief-history.* For the list of cases see *http://www.african-court.org/en/index.php/2012-03-04-06-06-00/list-cases* (31.05.2013).

[15] Additional Protocol to the American Convention On Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador', signed in 1988, entry into force in 1999, available at *http://www.oas.org/juridico/english/sigs/a-52.html* (31.05.2013).

promote the protection, preservation, and improvement of the environment. As is obvious from the provision, while the first paragraph uses a rights-based language, the second paragraph is formulated as imposing obligations on the States Parties. Effective realization of the right to a clean environment is, however, curbed by the soft-law language of the Protocol,[16] as well as the weakness of the Protocol's monitoring mechanism.[17]

2. Implicit recognition of the right to a clean and healthy environment

While only a few human rights documents provide for an express right to a clean environment, such a right can be derived from, or implied in, other human rights.[18] Indeed, treaty monitoring bodies have been innovative in the application of human rights to address environmental concerns. While various substantive provisions can be linked to an environmental human right, in many cases procedural rights prove to be just as useful or even more effective tools in the exercise and enforcement of such a right. Nevertheless, a specific human right to environment would represent a cohesive, comprehensive, and effective framework and would afford a proactive engagement with a view to preventing environmental harms.[19]

[16] Article 1 of the Protocol provides that the States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, *to the extent allowed by their available resources, and taking into account their degree of development*, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol.

[17] Article 19 only provides for State reporting; thus no individual complaint mechanism is envisaged. Individuals have no right of access to the Inter-American Commission or Court. Pursuant to Article 19(7), however, the Commission may formulate such observations and recommendations as it deems pertinent concerning the status of the economic, social and cultural rights established in the Protocol in the States Parties.

[18] M. Fitzmaurice and J. Marshall, 'The Human Right to a Clean Environment – Phantom or Reality? The European Court of Human Rights and English Courts Perspective on Balancing Rights in Environmental Cases' 76 *Nordic Journal of International Law* (2007) p. 105.

[19] Asia Pacific Forum, Human Rights and the Environment. Final Report and Recommendations. The 12th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions. Sydney, Australia, 24-27 September 2007, p. 30.

2.1. Substantive rights

The right to health inevitably encompasses the notion of a healthy environment. The obligation of States to protect and improve health includes the obligation to do so through addressing environmental factors. The right to health appears in various international human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979) and the Convention on the Rights of the Child (1989).[20] Article 12 of the ICESCR states that the States Parties recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. It also elaborates ways in which States can achieve the full realization of this right, including improving all aspects of environmental and industrial hygiene, and preventing, treating and controlling diseases. Besides these universal treaties, regional documents also recognise the right to health.[21]

The right to an adequate standard of living, provided for in Article 11 of the ICESCR, includes the right to adequate food, clothing and housing, and to the continuous improvement of living conditions. The right to water is a further essential element of this right inasmuch as water is one of the most fundamental conditions for survival.[22]

[20] The text of these core human rights treaties is available at *http://www.ohchr.org/Documents/Publications/CoreTreatiesen.pdf,* and *http://www.ohchr.org/Documents/Publications/newCoreTreatiesen.pdf* (31.05.2013). On the protection of human rights in general, see A. Komanovics, 'Protection of human rights at the universal level Pécs-Osijek, 2012', pp. 45. Teaching material developed in the framework of the project 'Strengthening University Cooperation Osijek-Pécs' (SUNICOP), available at www.sunicop.eu. (31.05.2013).

[21] See the European Social Charter and the Revised European Social Charter (Article 11 in both treaties), the African Charter (Article 16), Additional Protocol to ACHR (Article 10).

[22] See General Comment No. 15. (2002) of the Committee on Economic, Social and Cultural Rights, on the right to water (Article 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/2002/11, 20 January 2003. See also para. 4 of General Comment No. 12 of the CESCR on the right to adequate food (Article 11). See also M. Szappanyos, 'Enforcement of the Human Right to Water through the Universal Periodic Review' 40 *Kyungpook National University Law Journal* (2012) pp. 777-806.

Cultural and indigenous rights are relevant from two aspects. Firstly, environmental degradation may affect an indigenous group's traditional practices, such as hunting, fishing, land ownership and use. Thus, resource extraction in rainforest lands inhabited by indigenous peoples threatens the health, culture, and survival of those peoples. Secondly, maintaining their traditional lifestyle and traditional subsistence activities may just as much threaten the environment.[23] In this context, ILO Convention No. 169 provides that subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development.[24]

The UN Declaration on the Rights of Indigenous Peoples stipulates that appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.[25] In its jurisprudence, the Human Rights Committee also recognized that

> 'culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.'[26]

The scope of the protection of the right to privacy covers a variety of interests, such as private life, family life, home and correspondence. The concept of private life, in turn, covers physical integrity, which has been interpreted by the European Court of Human Rights to include

[23] Asia Pacific Forum, loc. cit. n. 19, at p. 13.

[24] Art. 23 of the Convention concerning Indigenous and Tribal Peoples in Independent Countries, adoption: Geneva, 27 June 1989, entry into force: 5 September 1991.

[25] Art. 32; Res. 61/295 of 13 September 2007.

[26] Communication No. 167/1984 (*Bernard Ominayak, Chief of the Lubicon Lake Band* v *Canada*), views adopted on 26 March 1990, and Communication No. 197/1985 (*Kitok* v *Sweden*), views adopted on 27 July 1988]. See UNHRC General Comment No. 23. The Rights of Minorities. CCPR/c/21/Rev1/Add.5, para. 7. See also L. Heinämäki, 'Protecting the Rights of Indigenous Peoples – Promoting the Sustainability of the Global Environment?' 11 *International Community Law Review* (2009) pp. 3-68.

environmental hazards such as noise, smells, and pollution. Thus, environmental factors may give rise to issues of private life.[27]
Finally, the right to work may also be used to address environmental concerns inasmuch as it includes, among others, the right to safe and healthy working conditions.[28]

2.2. Procedural rights

It can be argued that procedural rights are more effective and flexible in achieving environmental justice.[29] Indeed, full enjoyment of the substantive rights, more specifically, the right to protection against environmental hazards, are facilitated by various procedural rights, including the right to access to information, the right to fair trial, the right to participate in decision-making and the right to effective remedies.[30] These rights are so important that besides existing procedural guarantees in international human rights law, a specific treaty has been developed and adopted in the framework of the United Nations Economic Commission for Europe (UNECE). The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters[31] established various procedural rights of the public (individuals and their associations) with regard to the environment. The Convention has three pillars: the first pillar guarantees the right of everyone to receive environmental information that is held by public authorities (access to environmental information). The second pillar is public participation, which is based on two principles: the early public participation and the effective public participation. The third pillar, access to environmental justice is the least developed area of the Convention.[32]

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[27] See Harris, et al., *Law of the European Convention on Human Rights* (Oxford University Press 2009) p. 367. See also the cases listed below in Part III.
[28] Art. 7 ICESCR.
[29] Fitzmaurice and Marshall, loc. cit. n. 18, at p. 106.
[30] ICCPR Arts 14, 19, 25; ECHR Arts 6, 10, 13, and ACHR Arts 8, 13, 23.
[31] Adopted on 25 June 1998 in Aarhus (Århus), entry into force on 30 October 2001.
[32] Fitzmaurice and Marshall, loc. cit. n. 18, at p. 107. See also the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo (Finland), on 25 February 1991, encompassing public participation and consultation, see Art. 2(2) and (6), available at *http://www.unece.org/env/eia/eia.html and http://www.unece.org/fileadmin/DAM /env/eia/documents/legaltexts/conventiontextenglish.pdf* (31.5.2013).

III. The regional approach: case-law of the European Court of Human Rights with relevance to the environment

1. Introduction

In the last 20-25 years, the Court has been frequently called on to decide various applications relating to noise pollution, industrial pollution, deforestation and urban development, and even passive smoking. Development started with the so-called airport noise cases.[33] In the majority of these cases, having regard to the minor nature of the nuisance, and the State measures taken to reduce the impact of the noise disturbance on local residents, the Court found that State authorities had struck a fair balance between the economic well-being of the State and the individual's ability to enjoy his home, private or family life.

The next group of cases is related to neighbouring noise, resulting from e.g. nightclubs, heavy traffic, coal mines and factories, or a commercial centre.[34] In most of them, the Court found that exposure to such noise interfered with the applicant's private and family life, in violation of Article 8. The Court was also invited to consider the issue of industrial pollution caused by e.g. a plant treating waste from the leather industry, a chemical factory producing fertilisers, a mining permit authorising the use of cyanide leaching process for gold extraction, a methane explosion occurring at a rubbish tip, the operation of a big steel plant, emissions

[33] *Arrondelle* v *UK*, application no. 7889/77, admissibility decision of 15 July 1980; *Powell and Rayner* v. *UK*, application nos. 9310/81, judgment of 21 February 1990; followed by *Hatton* v *UK*, application no. 36022/97, judgment of 8 July 2003, and *Flamenbaum and others* v *France*, application no. 3675/04 and 23264/04, judgment of 13 December 2012. On *Hatton*, see H. Post, 'Hatton and Others: Further clarification of the "indirect" individual right to a healthy environment', 2 *Non-State Actors & International Law* (2002) pp. 259-278; H. Post, 'The Judgment of the Grand Chamber in *Hatton and Others* v *the United Kingdom* or: What is left of the "indirect" right to a healthy environment?', 4 *Non-State Actors & International Law* (2004) pp. 135-157.

[34] See e.g. *Moreno Gomez* v *Spain*, application no. 4143/02, judgment of 16 November 2004; *Deés* v *Hungary*, application no. 2345/06, judgment of 9 November 2010; *Mileva and others* v *Bulgaria*, application nos. 43449/02 and 21475/04, judgment of 25 November 2010; *Dubetska and others* v. *Ukraine*, application no. 30499/03, judgment of 10 February 2011; *Zammit Maempel and others* v *Malta*, application no. 24202/10, judgment of 22 November 2011; *Pawlak* v *Poland*, application no. 29179/06, judgment of 12 October 2011.

from a plant for the treatment of waste, or an active stone quarry.[35] Again, in the majority of these cases the Court concluded that such activities violated Article 8, or even Article 2.[36]

In *Hamer*, a case relating to a house built in breach of relevant forest legislation, and thus forcefully demolished, the Court used a very strong language:

> '[...] while none of the Articles of the Convention is specifically designed to provide general protection of the environment as such [...], in today's society the protection of the environment is an increasingly important consideration. [...] The environment is a cause whose defence arouses the constant and sustained interest of the public, and consequently the public authorities. Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the State has legislated in this regard. The public authorities therefore assume a responsibility which should in practice result in their intervention at the appropriate time in order to ensure that the statutory provisions enacted with the purpose of protecting the environment are not entirely ineffective.'[37]

In view of this, and due to the growing concern of environmental problems, the issue will presumably constitute a permanent item on the Court's agenda.[38]

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[35] See e.g. *Lopez Ostra* v *Spain*, application no. 16798/90, judgment of 9 December 1994; *Guerra and others* v *Italy*, application no. 14967/89, judgment of 19 February 1998; *Taskin and others* v *Turkey*, application no. 46117/99, judgment of 10 November 2004; *Öneryildiz* v *Turkey* [GC], application no. 48939/99, judgment of 30 November 2004; *Fadeyeva* v *Russia*, application no. 55723/00, judgment of 9 June 2005; *Giacomelli* v *Italy*, application no. 59909/00, judgment of 2 November 2006; *Martinez Martinez and María Pino Manzano* v *Spain*, application no. 61654/08, judgment of 3 July 2012.

[36] In the *Öneryildiz* v *Turkey* case.

[37] Para. 79 of *Hamer* v *Belgium*, application no. 21861/03, judgment of 27 November 2007. References omitted.

[38] See also *Tatar* v *Romania*, application no. 657021/01, judgment of 17 March 2009 (a gold mine using sodium cyanide in its extraction process); *L'Erablière* v *Belgium*, application no. 49230/07, judgment of 24 February 2009 (access to court in environmental issues); *Mangouras* v *Spain* [GC], application no. 12050/04, judgment of 28 September 2010 (excessive amount of bail in connection with a

2. Deés v Hungary

The *Deés* v *Hungary*[39] case related to noise pollution, arising from an unregulated heavy traffic in the applicant's street. The facts of the case can be summarised as follows. From early 1997, the volume of cross-town traffic in the applicant's municipality increased since a toll had been introduced on the neighbouring, privately owned motorway. Thus, heavy traffic that would normally have taken a nearby stretch of motorway took an alternative route along the street where the applicant lived. The Government has responded with various measures to alleviate the level of environmental harm.[40] Thus, the initially very high charges had been slightly lowered; then, in 2002, following a partial governmental buyout of the motorway, a sticker system had been introduced entailing a substantial reduction of the toll charges. In addition, further measures were introduced to reduce the adverse environmental effects, including the building of roundabouts, intersections provided with traffic lights, a 40 km/h speed limit at night, and road signs prohibiting access of vehicles of over 6 tons. However, in the applicant's view, these measures were not effectively enforced.

Before the national courts, the court-appointed expert concluded that the level of noise exceeded the statutory limit. Nevertheless, this was found to be not strong enough to cause damage to the applicant's house. In other words, the national court found no causal link between the heavy traffic and the damage to the house; and concluded that the authorities had struck the correct balance between competing interests.[41]

Before the European Court of Human Rights, the applicant complained that cracks appeared in the walls of his house, and because of the noise,

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criminal procedure/a serious environmental offence); *Di Sarno and others* v *Italy*, application no. 30765/08, judgment of 10 January 2012 (state of emergency in relation to waste collection); *Kyrtatos* v *Greece*, application no. 41666/98, judgment of 22 May 2003 (urban development leading to the destruction of physical environment, the scenic beauty and natural habitat for wildlife); and *Florea* v. *Romania*, application no. 37186/03, judgment of 14 September 2010 (passive smoking).

[39] Application no. 2345/06, judgment of 9 November 2010. See also L. Fodor, 'Az emberi jogok európai Bíróságának ítélete a zajterhelés csökkentésére tett intézkedésekről és a bírósági eljárás időtartamáról [Judgment of the European Court of Human Rights on State measures to limit noise disturbance and on the length of court proceedings]', 3 *JEMA*, (2011) pp. 86-92.

[40] Paras 7, and 19-20.

[41] Paras 9-13.

vibration, pollution and smell caused by the heavy traffic in his street, his home had become almost uninhabitable, in breach of Article 8. Furthermore, though this is less important for our purposes, he complained about the length of the related court proceedings, violating Article 6.

The first issue was whether the complaint fell in the scope of protection of Article 8. Relying on a by now robust case law to this effect, the Court recalled that the right to respect for private and family life and the home implies respect for the quality of private life as well as the enjoyment of the amenities of one's home; and breaches of Article 8 may include noise, emissions, smells, and other similar forms of interference.[42] In this situation, the interference did not concern direct interference by public authorities but involved those authorities' failure to take action to put a stop to third-party breaches of Article 8.[43]

Inevitably, States enjoy a certain margin of appreciation to balance between the interests of road-users and those of the inhabitants of the surrounding areas. The Court recognized the complexity of the State's task; nevertheless, the measures taken by the State authorities were found to be insufficient. The applicant's exposure to excessive noise disturbance over a substantial period of time created a disproportionate individual burden for the applicant. The Court also noted that notwithstanding the fact that the noise significantly exceeded the statutory level; the authorities took no appropriate measures to comply with their own rules.[44]

The applicant's other complaint related to the length of court proceedings, six years and 9 months in the case at hand. The Court agreed with the applicant and found this length to have failed to meet the 'reasonable time' requirement.[45]

Clearly, this case exemplifies the extent of the obligation to remedy violation resulting from a private third party. Even though the Government tried to remedy the situation, the measures taken consistently proved to be insufficient. State authorities have a positive obligation when environmental harm results from private sector activities.

[42] Para. 21.
[43] Para. 23.
[44] Para. 23.
[45] Para. 27.

3. Oluić v Croatia

In the last 30 years, the European Court of Human Rights has delivered judgments in a number of environmental cases. Since the right to a healthy environment is not explicitly codified by the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: European Convention), the Court has adjudicated on this issue in the context of few other conventional rights: the right to life, prohibition of torture, the right to freedom and safety, the right to a fair trial, the right to respect for private and family life and home, freedom of assembly and association and the right to protection of property.[46]

The case of *Oluić* v *Croatia* is a confirmation of the close link between environmental protection and Article 8 of the European Convention granting the right to respect for private and family life.[47] This Article has become the most frequent legal basis for submitting an application to the Court in cases referring to environmental protection since it provides individuals and their homes with effective protection from negative consequences of inadequate environmental protection.[48]

[46] The list and summaries of the most important cases, including *Deés* v *Hungary* and *Oluić* v *Croatia*, see in Human Rights and Environment, The Case Law of the European Court of Human Rights in Environmental Cases, Legal Analysis – Justice and Environment 2011, November 2011, available at *http://www.justiceandenvironment.org/_files/file/2011%20ECHR.pdf* (31.05.2013). See also L. Collins, 'Are We There Yet? The Right to Environment in International and European Law', 3 *McGill International Journal of Sustainable Development Law and Policy* (2007) pp. 138-139; M. Fitzmaurice, 'Environmental Degradation', in D. Moeckli, et al., eds., *International Human Rights Law* (New York, Oxford University Press Inc. 2010) pp. 628-632; S. Kravchenko and J. E. Bonine, 'Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights', 25 *Pacific McGeorge Global Business & Development Law Journal* (2012) pp. 250-276.

[47] Article 8 stipulates as follows: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette (Narodne novine, NN) – International Treaties 18/1997, 6/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010.

[48] See M. Pallemaerts, 'A Human Rights Perspective on Current Environmental Issues and Their Management: Evolving International Legal and Political Discourse

Environmental pollution can have various sources, for instance hazardous waste, air polluters, noise or vibrations. In order to be subsumed under the provisions of Article 8 of the European Convention, the Court has to confirm that respective forms of environmental pollution severely violate national and international environmental provisions (e.g. they are not regarded as occurrences inherent to contemporary urban life), while their intensity and duration can directly jeopardize the physical and mental health of individuals and the quality of their life. The burden of proof is on the applicant. The particular value of Article 8, which facilitates its efficiency and broad application in environmental pollution cases, lies in the fact that it imposes on states the positive obligation to protect individuals from interference with the right to protection of their private and family life and home. It should be noted that this provision does not provide for protection of the environment as such but for protection of the right of an individual who can be exposed to environmental pollution and inadequate environmental standards.[49]

The scope of the case of *Oluić v Croatia* referred to noise pollution coming from a night club, which used to exceed national and international standards for years.[50] The application was based on the applicant's allegation that the state had failed to protect her and her family from the noise coming from a neighbouring club for which the sanitary inspection had confirmed on several occasions that it had exceeded the noise levels prescribed by the Bylaw on the Maximum Permitted Levels of Noise in Areas Where People Work and Live.[51] Excessive exposure to noise resulted in violation of the applicant's right to protection of her home and such interpretation was possible because the relating right does not refer only to an actual physically defined area, but also to a quiet enjoyment of the respective area. For that reason, the breach of the right to home does not exclusively entail activities of a physical nature (such as unauthorized entry into a person's home) but also noise, emissions, smells and other interferences with one's

on the Human Environment, the Individual and the State' 2 *Human Rights & International Legal Discourse* (2008) pp. 152-162.

[49] Human Rights and Environment, op. cit. n. 46, at pp. 29-30.

[50] *Oluić v Croatia*, Application no. 61260/08, Judgment, Strasbourg, 20 May 2010 (final, 20 August 2010).

[51] Bylaw on the Maximum Permitted Levels of Noise in Areas Where People Work and Live, NN 145/2004.

enjoyment of home amenities. The harmfulness of the repercussions of such interferences can be assessed by comparing the interest of the individual with the interest of the community as a whole. In this light, the Court is guided by the fact that conventional rights should be practical and effective and not theoretical and illusory. The epilogue of the case was a unanimous judgment of the Chamber confirming violation of Article 8 of the European Convention, which represents a significant contribution of the Court to setting environmental standards according to which excessive noise fits into the category of environmental pollution and in the scope of Article 8 of the European Convention.[52] Further confirmation of those standards can be found in the judgments delivered in the cases of *López Ostra* v *Spain*[53], *Moreno Gómez* v *Spain*[54], *Borysiewicz* v. *Poland*[55], *Deés* v *Hungary*[56], *Mileva and Others* v *Bulgaria*[57], *Grimkovskaya* v *Ukraine*[58] and *Zammit Maempel* v *Malta*.[59]

However, the Court's practice is not uniform with regard to condemnation of excessive noise pursuant to Article 8 of the European Convention, so there are cases in which such noise has been regarded as tolerable and excusable. For instance, the judgments in the cases of *Powell and Rayner* v *the United Kingdom*[60] and *Hatton and Others* v *the United Kingdom*[61] in which the court was deciding upon the permissiveness of high levels of noise coming from London Heathrow Airport, reflected the Court's view that enormous economic and transportation interests of the community related to the most important international airports have priority over the right to protection of family life and home. A similar judgment was delivered in the case of *Flamenbaum and Others* v *France*[62] in relation to the noise from the

[52] *Oluić* v *Croatia*, loc. cit. n. 50, paras. 44-47, 65-66.
[53] *López Ostra* v *Spain*, loc. cit. n. 35.
[54] *Moreno Gómez* v. *Spain*, loc. cit. n. 34.
[55] *Borysiewicz* v *Poland*, Application no. 71146/01, Judgment, Strasbourg, 1 July 2008 (final, 1 October 2008).
[56] *Deés* v *Hungary*, loc. cit. n. 34.
[57] *Mileva and Others* v *Bulgaria*, loc. cit. n. 34.
[58] *Grimkovskaya* v *Ukraine*, Application no. 38182/03, Judgment, Strasbourg, 21 July 2011 (final, 21 October 2011).
[59] *Zammit Maempel* v *Malta*, loc. cit. n. 34.
[60] *Powell and Rayner* v *The United Kingdom*, loc. cit. n. 33.
[61] *Hatton and Others* v *The United Kingdom*, loc. cit. n. 33.
[62] *Flamenbaum et autres* c. *France*, loc. cit. n. 33.

airport of the French town of Deauville. A comparison can be drawn between the above-mentioned aircraft noise tolerance cases and the judgments in which the Court dealt with the permissiveness of noise, the sources of which were an electric transformer, a wind turbine, a tailor shop, a truck maintenance workshop and a workshop for cutting and grinding metal, and a dental surgery.[63] In the context of (aircraft) noise, one can also, for the sake of comparison, pay attention to the fact that such noise was also connected with serious environmental pollution in some cases of the Court of Justice of the European Union, e.g. *European Air Transport SA v Collège d'environnement de la Région de Bruxelles-Capitale, Région de Bruxelles-Capitale.*[64]

4. The regional approach: conclusions

Applicants have relied on various provisions of the Convention to address environmental concerns. Analysis of these cases shows the crystallization of numerous principles. Thus, the Court's case law on Article 2 demonstrates that States have a positive obligation in the context of dangerous activities, including nuclear tests, the operation of chemical factories with toxic emissions, or waste-collection sites. This obligation is applicable irrespective of whether carried out by public authorities or by private companies. In addition, States are also required to hold ready appropriate warning and defence mechanisms in relation to natural disasters. In both circumstances, public authorities must provide an adequate response (investigation, punishment of those liable, etc.).[65]

Jurisprudence relating to Article 8 shows that environmental problems may trigger the applicability of this provision. Environmental degradation in itself is not enough to constitute a breach of Article 8. Environmental factors must directly and seriously affect private and

[63] Examples of these cases see in *Oluić* v. *Croatia*, loc. cit. n. 50, para. 50.

[64] *European Air Transport SA* v. *Collège d'environnement de la Région de Bruxelles-Capitale, Région de Bruxelles-Capitale*, C-120/10, Judgment of the Court (First Chamber), 8 September 2011. For more details on the EU noise policy and on noise as a source of environmental pollution see L. Krämer, *Casebook on EU Environmental Law* (Oxford and Portland, Hart Publishing 2002) pp. 275-282. See also The EU Policy on environmental noise, available at *http://ec.europa.eu/environment/noise/home.htm* (31.5.2013).

[65] Council of Europe, Manual on Human Rights and the Environment, loc. cit. n. 4, at pp. 18-19. See e.g *Öneryildiz* v *Turkey* [GC], judgment of 30 November 2004; *Budayeva and others* v *Russia*, judgment of 22 March 2008.

family life or the home. Protection of private life also entails positive obligations for States.[66]

The linkage between the protection of property and the environment is twofold. Firstly, the protection of the environment can justify certain restrictions on the individual right to the peaceful enjoyment of one's possession. At the same time, protection of the right to property may require positive steps by of public authorities, such as to ensure certain environmental standards.[67]

Access to information regarding environmental matters is instrumental to the full realization of the environmental aspects of Articles 2 and 8. The obligation to ensure access to information guaranteed by Article 10 is complemented by the positive obligation of the public authorities to provide information on dangerous activities or to inform the public about life-threatening emergencies, including natural disasters.[68]

Finally, as far as procedural rights are concerned, the effective enjoyment of any right is dependent on its justiciability and enforcement probability. In this context, the right of access to court (Article 6), as well as the right to an effective remedy (Article 13) play a crucial role. In addition, in case of very serious environmental offences, there is a strong public interest to prosecute those responsible.[69]

IV. Bilateral Croatian-Hungarian relations within the sphere of environmental protection

1. Regional agreements on environmental protection

Bilateral agreements represent an important addition to environmental protection since the respective legal regulations defined at regional or

[66] Council of Europe, Manual on Human Rights and the Environment, loc. cit. n. 4, at pp. 19-20. See the cases listed above, including *Powell & Rayner*, *Moreno Gómez*, *Giacomelli*, *Hatton*, *Deés*, *Fadeyeva*, *López Ostra*, *Tatar*, *Guerra*.

[67] Council of Europe, Manual on Human Rights and the Environment, loc. cit. n. 4, at p. 21. See e.g. *Pine Valley Developments Ltd and others* v. *Ireland*, judgment of 29 November 1991; *Fredin* v *Sweden*, judgment of 18 February 1991; *Kapsalis and Nima-Kapsali* v *Greece*, decision of 23 September 2004; *Hamer* v *Belgium*, judgment of 27 November 2007; *Öneryildiz* v *Turkey*; *Budayeva and others* v *Russia*.

[68] Council of Europe, Manual on Human Rights and the Environment, loc. cit. n. 4, at p. 22. See e.g. *Öneryildiz* v *Turkey* [GC], *Budayeva and others* v *Russia*; *Guerra and others* v *Italy*; *Tatar* v *Romania*.

[69] Council of Europe, Manual on Human Rights and the Environment, loc. cit. n. 4, at pp. 24-25. See e.g. *Öneryildiz* [GC], *Hatton* [GC], *Mangouras* v *Spain*.

global level are accommodated to the specific needs and particularities of contracting parties.[70] Generally speaking, international cooperation in the field of environmental protection is a relatively new aspect of interstate relations, which emerged in its distinctive form only in the last century. Its positioning among the main forms of contemporary interstate cooperation is a feature of the last three to four decades.[71]

The origins of international cooperation between Croatia and Hungary, on the grounds of which common environmental policies have been shaped, date back to the very beginnings of Croatian statehood in the early 1990s. Soon after Hungary had recognized Croatian independence on 15 January 1992, both countries signed the *Agreement on Friendly Relations and Cooperation* (on 16 December 1992).[72] As suggested by

[70] For more details on international agreements on environmental protection at a regional and global level see D. M. Ong, 'International law for environmental protection', in B. Çali, ed., *International Law for International Relations* (New York, Oxford University Press Inc. 2010) pp. 308-310; R.K.M. Smith, *Textbook on International Human Rights* (New York, Oxford University Press Inc. 2010) pp. 377-378; C. Redgwell, 'International Environmental Law', in M. D. Evans, ed., *International Law* (New York, Oxford University Press Inc. 2010) pp. 689-717; J. Crawford, *Brownlie's Principles of Public International Law* (Oxford, Oxford University Press 2012) pp. 355-356, 360-364.

[71] E. R. DeSombre, 'The Evolution of International Environmental Cooperation' 1 *Journal of International Law and International Relations* (2004-2005) p. 75. See also Pallemaerts, op. cit. n. 48, at pp. 169-170; C. W. Henderson, *Understanding International Law* (Malden-Oxford-Chichester, Wiley-Blackwell 2010) pp. 320-324.

[72] Act on the Ratification of the Agreement between the Republic of Croatia and the Republic of Hungary on Friendly Relations and Cooperation, NN – International Treaties No. 13/1993. The Act came into force on 21 December 1993. See Announcement of the entry into force of the Agreement between the Republic of Croatia and the Republic of Hungary on Friendly Relations and Cooperation, NN – International Treaties No. 10/2000. The conclusion of this Agreement of a general character was preceded by several agreements which codified specific segments of the bilateral cooperation such as road transportation of passengers and goods, commercial and economic relations and cooperation, reception of people at the joint state border, fight against terrorism, smuggling, drug abuse and organized crime. See Regulation on the Ratification of the Agreement between the Government of the Republic of Croatia and the Government of the Republic of Hungary on the International Road Transport of Passengers and Goods, NN – International Treaties No. 2/1993; Regulation on the Ratification of the Agreement between the Government of the Republic of Croatia and the Government of the Republic of Hungary on Trade and Economic Relations and Cooperation, NN – International Treaties No. 8/1993; Act on the Ratification of the Agreement between the Government of the Republic of Croatia and the Government of the Republic of

its name and explicitly confirmed in its Preamble, the Agreement resulted from the friendship between the Croatian and Hungarian state and their nations and is as such a foundation of future joint endeavours, implying a wish for deepening cooperation in all areas preliminarily indicated therein.[73] A certain number of these areas has (or may have) implicit repercussions for environmental protection, though the most valuable contribution of the Agreement to this segment of the interstate cooperation refers to its Article 14 which explicitly codifies the roots of the environmental policies of the two states. The respective provision stipulates that the contracting parties shall pay particular attention both to elimination of imminent threats to the environment and to environmental protection. For that purpose, the states are bound to exercise their influence to harmonize their regional and international environmental strategies and thus cater for permanent environmentally friendly development within Europe.

The Agreement was in principle made for a period of time of ten years, foreseeing the possibility of its extension for a subsequent five years if

Hungary on the Acceptance of Persons at Common State Borders, NN – International Treaties No. 10/1993; Act on the Ratification of the Agreement on Cooperation between the Government of the Republic of Croatia and the Government of the Republic of Hungary in the Fight Against Terrorism, Smuggling and Drug Abuse and Against Organized Crime, NN – International Treaties No. 10/1993.

[73] For instance, supporting the idea of European integration based on human rights, democracy and rule of law (Article 3), decreasing the armed forces and armament and exchanging opinions on state safety and defense issues (Article 5), strengthening the cooperation within the framework of international organizations (Article 7), encouraging the bilateral cooperation at all levels, meaning between state bodies and institutions, social and other organizations, including local bodies (Article 8), encouraging the relations and experience exchange between the parliaments (Article 9), supporting cooperation between regions, towns, municipalities and other territorial units (Article 10), supporting the economic relations (Article 11), developing and deepening scientific cooperation (Article 13), providing assistance to each other in case of disasters and severe accidents (Article 15), cooperation aimed at improvement of traffic connections (Article 16), respecting national minorities protection standards (Article 17), cooperation in the field of education, science, culture, sports and tourism (Article 18), cooperation in providing legal aid in criminal, civil, status and administrative matters and in combating all forms of crime, particularly the organized one, international terrorism, illegal entry into and transit through the state and trafficking in drugs (Article 20), etc. Act on the Ratification of the Agreement between the Republic of Croatia and the Republic of Hungary on Friendly Relations and Cooperation.

neither party cancels it prior to its expiration [Article 23(2)].[74] Since there was no cancellation, the Agreement has kept on being one of the key legal foundations of the cooperation between Croatia and Hungary.

The multilateral *Cooperation Agreement on the Forecast, Prevention and Mitigation of Natural and Technological Disasters* of 1992 signed, beside Hungary and Croatia, by Austria, Italy, Poland and Slovenia, can be considered part of the corpus on environmental protection as well.[75] The Agreement was determined by the awareness of the danger of natural and technological disasters which each signatory state was exposed to. Its effective implementation is reviewed by a Joint Committee that was entitled, if necessary, to nominate subcommittees in charge of particular sectors.

Moreover, taking into account the highly delicate issue of watercourse pollution, the Governments of the Republic of Croatia and the Republic of Hungary concluded the *Agreement on Water Management Relations* in 1994. This Agreement regulates issues and activities having immediate impact on the status of the environment and the quality of the water in the watercourses constituting the joint state border. Like the aforementioned agreement, this agreement also foresees the establishment of a (Permanent) Hungarian-Croatian Committee in charge of water management, the competences of which include issues, measures, and works which are of significant importance for the water regime, the status of waters and aquatic habitats.[76]

In the chronological overview of the bilateral codification framework for environmental protection, the *Treaty on Cooperation towards Protection from Natural and Civilization Catastrophes* signed in

[74] Since the cooperation between Croatia and Hungary was proactive even prior to the succession of the former Yugoslavia, the Agreement foresaw legal continuity of the documents concluded between the Socialist Federal Republic of Yugoslavia and People's Republic of Hungary within the framework of the relations between Hungary and Croatia, bearing in mind the notice that the two states are to make a subsequent agreement on their validity and application [Article 23 (3)].

[75] Regulation on the Ratification of the Cooperation Agreement between the Government of the Republic of Croatia and the Governments of the Republic of Austria, the Republic of Italy, the Republic of Hungary, the Republic of Poland and the Republic of Slovenia on the Forecast, Prevention and Mitigation of Natural and Technological Disasters, NN – International Treaties No. 14/1993.

[76] Regulation on the Ratification of the Agreement between the Government of the Republic of Croatia and the Government of the Republic of Hungary on Water Management Relations, NN – International Treaties No. 10/1994.

Budapest by the Croatian minister of foreign affairs and the Hungarian minister of interior on 9 July 1997 is distinctive due to its dramatic content entailing the complexity of environmental issues.[77] Its purpose encompasses the protection of life, safety, and material goods of the population (Article 1) from natural and civilization catastrophes which are designated as natural disasters, industrial accidents and other harmful events of a natural and civilization origin with devastating effect, which to a great extent and severely cause damage to or directly endanger life, its conditions, material goods and *the natural environment* and in case of which special protective measures need to be undertaken (Article 2. A).

The performance of the tasks set forth in the Agreement was entrusted to a Permanent Mixed Croatian-Hungarian Committee.

The *Agreement on the Early Exchange of Information in the Event of a Radiological Emergency* signed in Zagreb on 11 June 1999 is complementary to the Treaty on Natural and Civilization Catastrophes.[78] The former Agreement is binding for Croatia and Hungary in terms of timely information and exchange of best practices on nuclear safety, safety of radiation sources, and protection from radiation originating from various plants and activities. The facilities exhaustively listed in the Agreement are nuclear reactors, any other plant used for nuclear fuel cycle, plants utilized for nuclear waste treatment and radioactive isotopes intended for agricultural, industrial, medical, and related

[77] Decision on the Proclamation of the Act on the Ratification of the Treaty between the Government of the Republic of Croatia and the Government of the Republic of Hungary on Cooperation Towards Protection from Natural and Civilization Catastrophes, NN – International Treaties No. 6/1998. The Agreement came into force on 1 May 1998. See Announcement of the Entry into Force of the Treaty between the Government of the Republic of Croatia and the Government of the Republic of Hungary on Cooperation Towards Protection from Natural and Civilization Catastrophes, NN – International Treaties No. 8/1998.

[78] Regulation on the Proclamation of the Agreement between the Government of the Republic of Croatia and the Government of the Republic of Hungary on the Early Exchange of Information in the Event of a Radiological Emergency, NN – International Treaties No. 11/1999. The Agreement came into force on 10 December 1999. See Announcement of the entry into force of the Agreement between the Republic of Croatia and the Republic of Hungary on the Early Exchange of Information in the Event of a Radiological Emergency, NN – International Treaties No. 3/2000.

scientific and research purposes as well as for electricity generation in space facilities.[79]

Although most of the aforementioned legal documents foresee the establishment of a monitoring body, Hungary and Croatia opted, by a separate Protocol of 25 January 2002, for the establishment of a Joint Committee for cooperation with very broad competences.[80] The purpose of the Committee is to complement the work of the existing joint committees regarding bilateral issues for which those committees do not have competences. A broad range of these issues correlate to those stated in the 1992 Agreement on Friendly Relations and Cooperation, so this assertion casts doubt upon the real efficiency of the body responsible for a plethora of various areas: from agriculture, Euro-Atlantic integration, and protection of monuments to environmental protection and rescue from civilization catastrophes.[81]

In line with the already existing Hungarian-Croatian intergovernmental regional cooperation, the Trans-Border Regional Forum for Coordination was founded in September 2009 based on an Agreement concluded in Barcs.[82] The task of the Forum as a coordinative body refers to the development of cooperation, the foundations of which were laid down in 2007 by the *Agreement on Cooperation between the Central State Office for Administration of the Republic of Croatia and the Ministry of Local Government and Regional Development of the Republic of Hungary*.[83] Article 2 (1) of the Agreement stipulates that the Forum shall encourage sustainable development of the border areas of

[79] Preamble and Art. 1(2).

[80] Decision on the Proclamation of the Protocol between the Government of the Republic of Croatia and the Government of the Republic of Hungary on the Establishment of a Joint Committee for Cooperation, NN – International Treaties No. 4/2002.

[81] Art. 4.

[82] Regulation on the Proclamation of the Agreement between the Government of the Republic of Croatia and the Government of the Republic of Hungary on the Establishment of the Trans-Border Regional Forum for Coordination, NN – International Treaties No. 10/2012. The Agreement came into force on 20 January 2013. See Announcement of the entry into force of the Agreement between the Republic of Croatia and the Republic of Hungary on the Establishment of the Trans-Border Regional Forum for Coordination, NN – International Treaties No. 1/2013.

[83] In this context, the activities of the Forum are based on the ideas of both respective internal legal documents and regional codifications such as the European Charter of Local Self-Government (1985) and the European Framework Convention on Cross-border Cooperation of Territorial Communities and Authorities (1980).

the contracting parties, coordinate Croatian and Hungarian ideas beyond a local and regional level, support local initiatives and realization of projects that have effect on both sides of the border via inclusion of all interested parties at the state, regional and local level and all the other institutions and professional associations which express the wish to participate therein and put efforts into catering for a broad range of cooperation in the border areas of the contracting parties.

Environmental protection is singled out as one of the priority areas of the Forum's activities [Article 2(3)]. The Agreement reinforces the synergy of the Forum with the Joint Committee in which the Forum represents a link with the representatives at regional and local level [Article 2(4)]. It is interesting to point out that the range of the cooperation of the parties anticipated by the Agreement has exceeded the competences of the Joint Committee [Article 2(5)]. Established in such a way, the Forum could become the intersection point of Croatian-Hungarian interests in the context of environmental protection. However, there is the issue of real implementation of the Agreement and thus of the efficiency of the Forum due to the fact that the members of this body with broad competences are only obliged to meet once a year, with no indication of how many workdays this meeting shall last [Article 4(1)]. What is positive is the fact that the Agreement, as a certain form of monitoring mechanism, prescribes annual programmes for the parties regarding the allocation of stipulated tasks [Article 4(6)].

Despite the importance of the abovementioned international agreements, the most important *lex specialis* in the domain of environmental protection at the bilateral Croatian-Hungarian level is the *Agreement between the Government of the Republic of Croatia and the Government of the Republic of Hungary on Cooperation in the Field of Environmental Protection and Nature Conservation* concluded in Budapest on 26 January 2006.[84] The Agreement regulates cooperation aimed at prevention and joint evaluation of harmful impacts on the

[84] Regulation on the Proclamation of the Agreement between the Government of the Republic of Croatia and the Government of the Republic of Hungary on Cooperation in the Field of Environmental Protection and Nature Conservation, NN – International Treaties No. 4/2007. The Agreement came into force on 10 May 2007. See Announcement of the entry into force of the Agreement between the Government of the Republic of Croatia and the Government of the Republic of Hungary on Cooperation in the Field of Environmental Protection and Nature Conservation, NN – International Treaties No. 6/2007.

environment, sustainable use of natural resources, finding solutions for long-term advancement of the environment and nature, and obtaining international and EU funds. *In concreto*, the determined cooperation areas include general affairs and environmental and nature policy; the process of the Croatian accession to the European Union, regional cooperation in the capacity of member states; monitoring, assessment and comprehensive analysis of the environment and nature, access to information on the environment; protection of environmental media, sustainable use of natural resources, particularly in border areas; environmental safety, mutual assistance in case of emergencies with cross-border effects; waste management; protection, development and maintenance of the nature and landscape; climate protection; environmental and nature protection education, participation of the public; development of direct relations between local authorities, institutions and organizations in charge of environmental and nature protection; and research and development (Article 2). The monitoring of the implementation of these tasks was entrusted to the Croatian-Hungarian Joint Committee for Environmental Protection and Nature Conservation[85] which, after the entry into force of the Agreement, substituted the Subcommittee for Environmental Protection of the Joint Committee that held its last session in July 2007.[86] The contracting parties are bound to contact each other in case of emergencies with cross-border effects and/or a danger of their occurrence. The transparency of the action of the contracting parties in the sphere of environmental protection is enhanced by their obligation to inform the public on the status of the environment and measures undertaken for the purpose of prevention, monitoring and mitigation of harmful effects on

[85] The activities of the Committee encompass preparation of cooperation programmes and their coordination, and these activities shall be performed in compliance with state bodies: Croatian and Hungarian Ministries of Environmental Protection. The Committee is constituted of seven representatives of competent ministries and institutions of each contracting party and they meet at least once a year, one year in Croatia and the other in Hungary, with the possibility of summoning special sessions if required by either contracting party. The Committee acts via its two Subcommittees: for environmental and nature protection, while an *ad hoc* expert group is foreseen for dealing with some specific issues. In line with Article 3(3) of the Agreement, the first session of the Committee was planned within six months after the entry into force of the Agreement.

[86] Ministry of Environmental Protection of the Republic of Croatia, Hungary, available at *http://www.mzoip.hr/default.aspx?id=7498* (31.05.2013).

the environment and prevention of accidents which might have a cross-border effect.[87]
The intention and idea of the Agreement are compatible with some key international documents and initiatives in the field of environmental protection: the strategic objectives stated in the Environment for Europe process (commenced in 1991), the UN Conference Declaration on Environment and Development (the so-called Rio Declaration) of 1992, regional agreements concluded within the framework of the UN Economic Commission for Europe and relevant standards and policies of the European Union.[88]

2. Regional environmental initiatives

Cross-border cooperation bridges anachronistic frontiers and contributes to the cohesion of the European continent, having a stimulating effect on the creation of innovative socio-economic solutions and regional development in general.[89] This makes the support provided lately to regional initiatives by the most important international organizations, primarily by the United Nations, the European Union, and the Council of Europe, altogether logical.[90] These tendencies are reflected in the Croatian and Hungarian efforts to implement the abovementioned multilateral and bilateral agreements on environmental protection in practice through designation and establishment of specific joint mechanisms of cross-border cooperation. The most recent activities in this field have resulted in proclamation of the 'Mura-Drava-Duna' Transboundary Biosphere Reserve which was bestowed with the official status of protected area by the UNESCO at the 24th session of the International Co-ordinating Council of the 'Man and the Biosphere (MAB) Programme' of 11 July 2012. For both states, this is the first bioreserve of a transboundary character which caters for successful

[87] See Article 8 of the Regulation on the Proclamation of the Agreement between the Government of the Republic of Croatia and the Government of the Republic of Hungary on Cooperation in the Field of Environmental Protection and Nature Conservation.
[88] See the Preamble.
[89] M. Dziembała, 'The Regional Cooperation in the Enlarged European Union – Towards a United and More Competitive Europe' 7 *Romanian Journal of European Affairs* (2007) p. 33.
[90] C. Mătuşescu, 'European Juridical Instruments of Territorial Cooperation – Towards a Decentralized Foreign Policy in Europe' 87 *AGORA International Journal of Juridical Sciences* (2012) pp. 87-93.

foundations for pentalateral cooperation since this area is expected to be officially expanded to three river basins in Austria, Serbia, and Slovenia in June 2013.[91] The purpose of the proclamation of the Reserve is the comprehensive preservation of unique ecosystems and development and modernization of environmental management and tourism, which is to provide the locals with better living conditions in accordance with nature and economic prosperity.[92]

The institutionalization of the cooperation between Croatia and Hungary in the field of environmental protection is developed within several regional initiatives and international organizations among which the Central European Initiative (CEI) and the Regional Environmental Centre for Central and Eastern Europe (REC) should be particularly emphasized due to their activities and relevance.

The Central European Initiative was founded in Budapest in 1989 as the first forum promoting regional cooperation between central and eastern European countries aimed at the enhancement of the socio-economic and political capacities of its member states, particularly of non-EU Member States.[93] Environmental protection and sustainable development as well as appertaining interregional and cross-border

[91] United Nations Educational, Scientific and Cultural Organization, Ecological Sciences for Sustainable Development, Mura-Drava-Danube, available at *http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves/europe-north-america/croatiahungary/mura-drava-danube/* (09.05.2013); International Union for Conservation of Nature (IUCN), Transboundary UNESCO Biosphere Reserve 'Mura-Drava-Danube', available at: *http://iucn.org/about/union/secretariat/offices/europe/?10560/Transboundary-UNESCO-Biosphere-Reserve-Mura-Drava-Danube* (09.05.2013); Amazon of Europe, A Transboundary Biosphere Reserve for the Benefit of Nature and People, available at *http://www.amazon-of-europe.com/en/menu20/* (09.05.2013).

[92] United Nations Educational, Scientific and Cultural Organization, Ecological Sciences for Sustainable Development, Mura-Drava-Danube (Croatia/Hungary), available at *http://www.unesco.org/new/en/media-services/multimedia/photos/mab-2012/croatiahungary/* (10.05.2013).

[93] Along with Austria and Italy, Croatia and Hungary were the founders of this international organization (Croatia indirectly as a federal republic of the former Yugoslavia), the formal legal origins of which can be found in the Joint Declaration on the Forming of the Quadrigonal. Today, this Initiative has 18 member states. For more details see Central European Initiative, available at *http://www.cei.int/content/cei-glance* (12.05.2013); Republic of Croatia, Ministry of Foreign and European Affairs, Multilateral relations, available at *http://www.mvep.hr/hr/vanjska-politika/multilateralni-odnosi/srednjoeuropska-inicijativa-(sei)/* (12.05.2013).

cooperation belong to the corpus of key activities and priority areas that were most recently defined in the Action Plan 2010-2012. The CEI is an example of a horizontal instrument for coordination of the activities of its member states and dissemination of achievements at subregional and local levels[94] and reaffirms the strong connection between various international actors in the field of environmental protection. Namely, in order to conduct its task to promote environmental protection and sustainable development, the Initiative acts in synergy with the UN Economic Commission for Europe, the UN Environment Programme, the Organization for Economic Co-operation and Development, the European Union, etc.[95]

The Regional Environmental Centre for Central and Eastern Europe has gradually developed into a significant platform for the harmonization of environmental policies, and Hungary played a key role in its establishment in 1990. The REC promotes cooperation between key stakeholders involved with environmental protection: governments, non-governmental organizations, private sector entities, etc. It deals with information by providing the public with the possibility to participate in decision-making processes and helps finding environmental and sustainable development solutions at a global, regional, and local level.[96]

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[94] Central European Initiative Plan of Action 2010-2012, Meeting of the Heads of Governments of the Member States of the Central European Initiative, Bucharest, 13 November 2009, available at *http://www.cei.int/sites/default/files/attachments/docs /CEI_PoA_2010-12.pdf* p. 22. (13.05.2013)

[95] Republic of Croatia, Ministry of Environmental and Nature Protection, Central European Initiative (CEI), available at *http://www.mzoip.hr/default.aspx?id=9927* (14.05.2013).

[96] Beside Hungary, the USA and the European Commission were the cofounders of the Regional Environmental Centre for Central and Eastern Europe. The special Hungarian contribution to the Centre establishment was given credit by choosing the town of Szentendre for the Centre's seat. The wide network of activities is reflected in the establishment of regional offices in 17 member states, including those in Croatia and Hungary. It was the Hungarian presidency of the Council of the European Union in 2011 that provided the Centre with new horizons related to EU priorities in the field of environmental protection such as participation in the meeting of the Council of the European Union dedicated to the environment. Regional Environmental Centre, Mission Statement, available at *http://www.rec.org/about.php?section=mission* (15.05.2013); Charter of the Regional Environmental Center for Central and Eastern Europe (REC) – consolidated version, January 2011, available at *http://documents.rec*

The Croatian accession to the European Union in the near future will result in the creation of a new dimension of cross-border cooperation. Among 35 thematic chapters of the *acquis communautaire* defined within the framework of the Croatian pre-accession negotiations, Chapter 27 comprised the *acquis* in the field of environmental protection, i.e. the liability of harmonization of the Croatian legislation with more than 200 legal documents in the domain of horizontal legislation, water and air quality, waste management, nature protection, industrial pollution control and risk management, chemicals and genetically modified organisms, noise, and forestry. The results of the screening by the European Commission conducted in 2006 have been published in a separate report which also relates to Hungarian-Croatian environmental activities. By way of example, the report specifies that the bilateral agreements aimed at the partial incorporation of Council Directive 80/68/EEC on the protection of groundwater against pollution caused by certain dangerous substances and of Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources into Croatian legislation.[97] The pathway of the harmonization of Croatian environmental legislation with the *acquis communautaire* corresponds with the Hungarian one[98] and it is very likely that the two states will be experiencing a similar epilogue in this view. Namely, the greatest share of national legal environmental regulations is directly related to the implementation of EU documents: to be more precise, 80% of them have been determined by EU environmental regulations.[99]

/about/2011_01_Consolidated _Version_of_the_REC_Charter.pdf (15.5.2013); Regional Environmental Centre, Annual Report 2011: Lasting Impressions, available at *http: //documents.rec.org/publications/AR2011_ENG_Sep12.pdf* (15.05.2013).

[97] Screening Report – Croatia, Chapter 27 – Environment, 1 February 2007, available at *http://www.mzoip.hr/doc/EI/Screening_report_2007.pdf* pp. 2, 11, 12 (20.5.2013).

[98] Gy. Bándi, et al., *The Environmental Jurisprudence of the European Court of Justice* (Budapest, 2008) p. 9.

[99] Bándi, et al., op. cit. n. 98, at p. 12; Gy. Bándi, 'ECJ Environmental Jurisprudence – The Role of Explanatory Provisions', in G. Bándi, ed., *The Impact of ECJ Jurisprudence on Environmental Law* (Budapest, 2009) p. 10.

V. Conclusion

Even though it constitutes one of most recently developed areas of international law, international cooperation in the field of environmental protection is ranked highly on the scale of activities which are of fundamental importance for the functioning and existence of the international community. Environmental issues are becoming more complex and dynamic, and in the process of trying to accommodate the existing legal framework to new circumstances and tendencies, these issues have gradually become some of the most codified and propulsive areas of international law. The link between environmental law and human rights has turned out to be particularly significant in this context both at universal and regional level. European states have done their fair share in the evolution of this interrelation.

The European regional environmental perspective has been shaped by common key actors on the international stage: the Council of Europe and the European Union. Although the Convention for the Protection of Human Rights and Fundamental Freedoms does not contain an explicit provision on the right to a healthy environment and its protection, the case law of the European Court of Human Rights has reaffirmed that this right has been incorporated into the provisions on the right to life, to respect for private and family life and home, and the protection of property and health. Due to the significance and publicity of environmental law in the 21st century and the fact that it is the *conditio sine qua non* for the exercise of a number of the above-mentioned rights, it seems possible that the provision on the right to a healthy environment will get explicitly incorporated into the European Convention in the future.

With the aim of enriching the international law framework of environmental protection tailored at universal and regional level, and adapting it to their specific needs and circumstances, Croatia and Hungary have concluded several important international agreements which directly or indirectly deal with environmental protection. The core of these bilateral relations is the 2006 Agreement between the Government of the Republic of Croatia and the Government of the Republic of Hungary on Cooperation in the Field of Environmental Protection and Nature Conservation. Previous experiences facilitate the optimism and faith that the good-neighbourly relations between the two countries with respect to the designation of environmental law standards will intensify after the Croatian accession to the European Union. Due

to the transnational character of the greatest share of environmental issues, cross-border cooperation seems to be an inevitable necessity.

Ljiljana Siber*

Information and education in environmental matters: how efficient are they regionally?

I. Introduction

People in modern societies face the need to act globally responsibly every day for the sake of development in accordance with people's needs and environment. Societies striving for constant economic development and raising living standards are the causes for natural resources exploitation and great environmental burden. The right to a healthy and preserved environment is one of the basic human rights. The right to exploit natural resources must not and cannot be taken for granted and must not be endangered for generations to come. 'Future development should be based on sustainable development and management, which means that exploiting natural resources and discarding secondary waste products must be reasonable so that these can be restored and kept in environmental balance.'[1] There is no doubt that environmental protection is a prerequisite of sustainable development. Environmental protection is, pursuant to Article 3 of the Environmental Protection Act a set of interrelated and harmonized decisions and measures, the purpose of which is to achieve integrated environmental protection, to avoid and reduce environmental risk and to improve and achieve efficient environmental protection.[2] Accordingly, the accomplishment of the goals requires application of basic instruments: legal instruments or regulations, market-oriented or economic, scientific, technological and those aiming at education and information sciences.[3] The main focus of this paper is on the latter. The paper deals with the issue of access to information on environmental protection in the light of the Aarhus

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[1] O. P. Springer, 'Predgovor hrvatskom izdanju [Preface to Croatian edition] in N. Carter, *Strategije zaštite okoliša: ideje, aktivizam i djelovanje* [Environmental Protection Strategies: Ideas, Activism and Acting] (Zagreb, Barbat 2004) p. X.

[2] Environmental Protection Act, Official Gazette, Narodne novine, NN 110/07.

[3] R. Odobaša, *Pravo okoliša (pravo zaštite okoliša, ekološko pravo) – pravna grana i interdisciplinarni predmet*, skripta [Environmental Law (environmental protection law, ecology law) – branch of law and interdisciplinary subject], course materials p. 92., available at *http://www.pravos.unios.hr/gospodarske/datoteke /PRAVO_ OKOLISA-skripta.pdf* (8.06.2012).

Convention and its implementation into European and national legislation. Furthermore, it deals with basic issues of environmental education, analyses activities of the participants in the programmes and projects on regional level aiming at educating the public in raising and developing environmental protection.

II. Environmental protection information access and education basics

1. Information, access to information on environmental protection

1.1. International legal framework

Aiming at changes in behavior and also at raising the level of awareness of individuals regarding environmental protection on international, national and local level includes availability and accessibility of information, and the participation of the public in planning and implementation of environmental protection policy. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters[4] adopted on 25 June 1998 in the Danish city of Aarhus on the 4th Ministerial Conference as part of the programme 'Environment for Europe'[5] (hereinafter: the Aarhus Convention) was developed under the auspices of the United Nations Economic Commission for Europe (hereinafter: UNECE) and is considered to be 'the most comprehensive legally binding instrument for public environmental rights protection, [...] the Convention guarantees environmental rights based on the implementation of the Tenth principle

[4] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters Aarhus, Denmark, 25 June 1998. Authentic text available at: *http://www.unece.org/env/pp/treatytext.html* (07.06.2013).

[5] *Environment for Europe Process-EFE* is a unique partnership of the UNECE region member states, United Nations agency in the region, other intergovernmental organizations, regional environmental centers, civil society organizations, business sector and other social groups. The Environment for Europe Process and the Environmental Protection Ministerial Conference that are part of that process make the platform on a high level for discussion among different participants, decision-making and joint action in solving priority environmental matters in 56 countries of the UNECE region in which Croatia participates as well. *Education for Sustainable Development Action Plan, a*vailable at *http://www.odraz.hr/media/96820/akcijski_plan_za_odrzivi_razvitak.pdf* (07.06.2013).

of the Rio Declaration',[6] establishing a number of closely connected procedural rights of individuals and their associations concerning environmental protection. Thus the Aarhus Convention comprises three main ideas, i.e. 'pillars: access to information on environment, public participation in decision making processes concerning environmental protection and access to justice in environmental matters. All Aarhus Convention pillars are closely interrelated'.[7]

Thus the main aim of the Aarhus Convention is to guarantee everyone the right to access to information, public participation in the decision-making process and access to justice in environmental matters, which ensures the contribution to the protection of the right of every person of the current and future generations to live in a healthy environment. The Aarhus Convention entered into force on 30 October 2001. Pursuant to Article 3 of the Aarhus Convention, environmental information refers to any information in written, visual, aural, electronic or any other material form on:

- the status of environmental elements, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph above, and cost-

[6] *Rio Declaration on Environment and Development* of 3-4 June 1999 in Rio De Janeiro is a confirmation of the charter of the United Nations Conference on the Human Environment passed in Stockholm on 16 June 1972 and intention of further development based on the goal that through new levels of cooperation among states important parts of the society and population create new and just partnerships worldwide aiming at international agreement that would respect interests of all and protect the integrity of the global system of development and environment, acknowledging indivisibility of the land and international relations. It is informally recognized as the Earth Summit, available at http://www.un.org/document/ga/conf151/aconf15126-1annex1.htm (08.06.2013)

[7] A. Pánovics and R. Odobaša, 'Environmental rights in the context of three legal systems – stepping into the EU legislature's shoes?', in T. Drinóczi, et al., eds., *Contemporary Legal Challenges: EU – Hungary -Croatia* (Pécs – Osijek, Faculty of Law, University of Pécs and Faculty of Law, J. J. Strossmayer University in Osijek, 2012) p. 723.

benefit and other economic analyses and assumptions used in environmental decision-making;

- the status of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the status of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph above.

It should be emphasized that besides the abovementioned Rio Declaration there were a number of international agreements on right to access public information that proceeded the Aarhus Convention. Pursuant to Article 19 of the International Covenant on Civil and Political rights[8] proclaims that everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. These rights have been acknowledged both in national legislation and international agreements such as the European Convention on Human Rights[9] in its article 10 speaks of freedom of expression: 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

1.2. European access to information on environmental matters in accordance with the Aarhus Convention

Environmental protection is one of the most successful EU policies. The European Union is an example of regional integration and it proves on global level as well that it is capable of taking over a part of responsibility concerning environmental protection.[10] The European Union became signatory to the Aarhus Convention on 25 June 1998 and ratified it on 17 February 2005 by passing the Decision of the Council of 17 February 2005 on the conclusion, on behalf of the European

[8] International Covenant on Civil and Political Rights, of 16 December 1966, available at *http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx* (08.06.2013).

[9] European Convention on Human Rights, amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1 June 2010, available at *http://www.echr.coe.int/Documents/Convention_ENG.pdf* (08.06.2013).

[10] Pánovics and Odobaša, op. cit. n. 7, at p. 634.

Community. It was signed with an aim to protect the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.[11]

The analysis of the Aarhus Convention Articles referring to access to information concerning environmental matters as well as the successive directives related to the implementation of the Convention[12] points to the significance of informing the public on environmental rights. Directive 90/313/EEC emerged from the need to implement the Convention and is an effort to improve public access to information. The act was replaced on 14 February 2005 by Directive 2003/4/EC consolidating the practice of the European Court of Justice regarding the previous Directive and, moreover, it expanded the current access to information concerning environmental matters. In addition to a broad definition of 'information on environment' that comprises all media and forms and every aspect of environment the central part of the Directive is Article 3 section 1 requiring from member states to make environmental information public, regardless of the specific applicant's expression of interest therein. This aims to make access to such information easier.[13]

'In the sense of the Directive 2003/4/EC public authority means any government or other public administration, including advisory bodies, at national, regional or local level, any legal and natural person performing public administrative functions in compliance with national law, as well as special duties, activities and services related to the environment and any natural and legal person entrusted with responsibility or function i.e. providing public services directly or indirectly referring to environment and controlled by the aforementioned body.'[14]

[11] D. Gračan, 'Pravo na pristup pravosuđu u pitanjima okoliša [Right to Access to Justice in Environmental Matters]', 1 *Zbornik radova Pravnog fakulteta u Splitu* (2010) p. 180.

[12] Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, OJ L 158, 23.06.1990; Directive 2003/4/EC of the European parliament and the Council 2003/4/EC of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EE, OJ L 41/26, 14.2.2003.

[13] P. Bačić, 'O značaju prava na informaciju u upravljanju okolišem i zaštiti ljudskih prava [On Importance of Right to Information on Environment Management and Human Rights Protection]', 4 *Zbornik radova Pravnog fakulteta u Splitu* (2008) p. 821.

[14] Gračan, loc. cit. n. 11, at p. 183.

1.3. National access to information on environment and the Aarhus Convention

The Aarhus Convention was signed by the Republic of Croatia on 25 June 1998 and ratified on 8 December 2006 by passing the Act on Ratification of the Convention on Access to Information, Participation of the Public in Decision-Making and Access to Justice in Environmental Matters.[15] It has been transposed into Croatian legislation by the Environmental Protection Act,[16] the Law on the Right of Access to Information,[17] the Regulation on Information and Participation of the Public Concerned in Environmental Protection Matters,[18] the Regulation on Environmental Impact Assessment,[19] and the Regulation on Strategic Environmental Assessment of Plans and Programmes.[20]

Pursuant to Article 3 of the Environmental Protection Act environmental information is any information in written, visual, aural, electronic or other material form which refers to the environment, its components and burdens, and especially to environmental burdening: missions, emissions, waste, biological and landscape diversity, space, cultural heritage, natural phenomena, procedures conducted by public authorities pertaining to the adoption of regulations, general and specific acts in connection to environmental protection and/or pertaining to the adoption of strategies, plans, programmes and reports on environment, environmental components and burdens, as well as information on the status, measures and manner of maintaining the initial design status of installations and other facilities which may pollute the environment and environmental components, that is, which may affect burdens and/or procedures related to the environment.

The aforementioned laws, acts and regulations form an integral legal framework by which the right of the public to access information on environmental matters is guaranteed completely in accordance with the principles of the Aarhus Convention and EU Directive 2003/4/EC.

[15] NN – International Agreements No. 01/07.
[16] NN 110/07.
[17] NN 172/03.
[18] NN 64/08.
[19] NN 64/08.
[20] NN 64/08.

Access to information on the environment implies a relation between two main parties: the 'public', the holder of the right to information on one hand and 'public authorities' on the other. The right of the public to claim and to receive information implies the obligation of the authority to make the access to required information possible as well as the obligation of releasing information regardless of specific claim for such information.

According to the Environmental Protection Act and the Law on the Right of Access to Information, providing information on the environment that public authorities have, dispose of and supervise must comply with the following basic principles:[21]

- information accessibility;
- information publicity;
- information quality (complete, accurate, timely and comparable);
- information access equality;
- freedom of information expression (the public has the right to freely dispose of and publicly express information it possesses).

Authorities are obliged to guarantee the right to access information on environmental matters so as to regularly, duly and precisely publish information they collect, possess, dispose of or supervise, including national reports on the status of environmental matters.[22] The web pages of the Croatian Environment Agency offer a simple and well laid-out way of giving information and an insight into integral documents of national and regional and local reports on the status of the environment and environmental issues. The public is informed about these through

[21] *Pristup javnosti informacijama o okolišu: priručnik za provedbu* [Access of the Public to Information on Environmental Matters: Implementation Manual] (Zagreb, Ministarstvo zaštite okoliša, prostornog uređenja i graditeljstva 2008) available at *http://www.mzoip.hr/doc/publikacije/INFOCRO_PPI_08.pdf* (07.06.2013).

[22] National reports on the status of the environmental matters in the Republic of Croatia are published and sent to over 200 addresses: the President of the Republic of Croatia, the Parliament (Sabor) and the Government of the Republic of Croatia, as well as to government authorities, regional self-government units, scientific and professional institutions (mainly also taking part in making the report). The reports are sent to Vice-chancellor's Offices of the Universities in the Republic of Croatia, natural studies that can make use of it in teaching and numerous non-governmental organizations as well as to the National and university library.

the media.[23] Environmental information on national, regional and local levels is regularly updated and published on web-pages of the environmental constituents authorities, as well as in information catalogues that have been set up. This refers to international agreements, conventions or agreements as well as legislation in the field of environment, strategies, planning, programmes and other instruments related to environmental protection and implementation reports. Furthermore, this includes reports on the status of the environment, studies and risk assessment in reference to the environmental constituents and other data important for environmental protection.[24] The projects on information access improvement and education promotion on the level of Osijek-Baranja county will be dealt with further on.[25]

2. Environmental protection education

2.1. International and national starting points

'Education motivates deeper understanding of environmental issues and has a key role not only in the development of environmental awareness and sustainable economies of a society but of the society as a whole. [...] There is an increasing number of contemporary scientists who consider that the only way to solve growing environmental problems is to renew environmentally sustainable society, i.e. to develop knowledge, awareness, values and new human relations, in one word, to invest into environmentally friendly education.'[26]

Modern European educational policy according to the Recommendation of the European Parliament and of the Council of 18 December 2006 on Key Competences for Lifelong-learning 2006/962/EC[27] put emphasis on environmental awareness for sustainable development in every scientific field. The Recommendation requires from every scientist not only basic

[23] Format of the Aarhus convention implementation report available at *http://www.unece.org/fileadmin/DAM/env/pp/Implementation%20reports%202008/Croatia_as_submitted_hr_28_04_09.pdf* (10.06.2013).

[24] Pristup javnosti informacijama o okolišu, op. cit. n. 21.

[25] See part III.

[26] R. Jukić, 'Ekološko pitanje kao odgojno-obrazovna potreba [Environmental issue as educational indispensability]', 20 *Socijalna ekologija* (2011) p. 271.

[27] Recommendation of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learining 2006/962/EC OJ L 394/10, 30.12.2006.

knowledge of natural sciences and notions but also comprehension of impact of science on nature, critical thinking ability and interest in ethical matters, respect of security and sustainability of an individual, family, community and global impact matters.[28] The decade of Education for Sustainable Development – DESD[29] 2005-2014 is a 'UN initiative aiming at the vision of the world where everybody is allowed access to quality education and possibility to learn about the values, behavior and life style required for sustainable future and positive social transformation. The aims of the decade include: importance of the main role of education and learning in common sustainable development realization, link and net availability, exchange and interaction among participants in education for sustainable development; space and possibility for improving and advertising the vision and transformation towards sustainable development.'[30]

In accordance with Article 178 of the Nature Protection Act for the purpose of education for environmental protection and sustainable development:

- the state guarantees the education of environmental protection and sustainable development within the educational system and motivates environment protection system development and environment protection improvement,
- aiming at common education for sustainable development the Ministry establishes in cooperation with the Ministry of education the curriculum guidelines in compliance with strategies for sustainable development of the Republic of Croatia."

Croatia is signatory to the document on sustainable development '*Agenda 21*'[31] paying particular attention to education and schooling for

[28] M. Domazet, "Društvena očekivanja i prirodo-znanstveno kompetentni učenici" [Social expectations and pupils with competencies in natural sciences] 184(2) *Sociologija i prostor* (2009) p. 166.

[29] *http://unesdoc.unesco.org/images/0014/001416/141629e.pdf* (10.06.2012)

[30] *http://www.min-kulture.hr/default.aspx?id=52* (10.06.2013)

[31] Sustainable development principles were the basis of the agenda of the Earth Summit in Rio in 1992 when 'the Agenda 21' was adopted for the 21st century, an instrument comprising measures for 'global partnership for sustainable development'. The instrument comprises 900 pages of numerous environmental and developmental issues in 40 chapters and deals with a number of environmental matters giving basic determinants for sustainable development enforcement that

sustainable development. 'Chapter 36 related to education, training and public awareness includes four goals:

- to promote and improve education quality: the purpose is lifelong learning including knowledge, skills and values acquisition needed by citizens to improve their quality of life,
- to redirect curricula from preschool to university level, education must be reconsidered and reformed so as to become the means of knowledge transfer, with meaningful forms and values needed for sustainable world creation,
- to raise the awareness of the public concerning the concept of sustainable development, which will help develop an active and responsible community on local, national and international level,
- in order to educate the work force, the continuous technical and professional education of managers and workers in particular those working in trade and industry shall contribute to attaining sustainable production and consumption models.'[32]

It should be noted that according to the mentioned instrument, environmental matters require action at all levels from global to local, and that the creation of lower levels of plans and programmes – so-called *local agendas* – within national strategies of sustainable development and programmes for environment should be supported, i.e. plans by which local development actors (population, administration, institutions, legal persons) determine the environment they strive for by making use of their basic right to a preserved environment, but also by sharing responsibility for its condition in best democratic tradition in a transparent and participative way, agreeing upon the ways to accomplish these aims.

2.2. Current status in Croatia

Aiming at the promotion of environmental education and awareness, public authorities with jurisdiction over single constituents of the environment and sustainable development organize campaigns to raise environmental awareness. Promotional-educational materials are

would make economic, social and environmental development sustainable in the whole world.

[32] Action plan for education for sustainable development, p. 4, available at *http://www.erisee.org/downloads/2013/2/b/Action%20plan%20for%20education%20for%20sustainable%20development%202011%20ENG.pdf* (10.06.2013).

published whereas TV and radio broadcast educational and advertising spots with the purpose of disseminating and informing the public on environmental protection.

Teaching environmental matters has a significant role in the national framework curriculum of the Republic of Croatia. "Through teaching environmental protection and sustainable development, pupils discover and see the multiple and diverse relations between natural, social, economic and cultural environmental dimensions. They develop an understanding of the complexity of matters related to the environment that are caused by changes in living conditions and social, economic and technological development. Pupils acquire a positive system of values connected to the necessity to preserve the quality of the environment and the rational use of natural resources; in particular the values such as consideration, moderateness, economy, solidarity and respect for themselves, for other people, and nature, their environment and its resources, supplies for present and future generations, biological and cultural diversity and planet Earth as a whole."[33] Numerous activities have been conducted in pre-school institutions, primary and secondary schools.

III. Regional environmental protection efficiency

1. Legal basis for regional programs of environmental protection

The strategic document for the protection of the environment at county level is the Environmental protection program. County environmental protection program has been defined by the Environmental Protection Act, pursuant to Article 19 county environmental protection program comprises basic goals, conditions and criteria for environmental protection in its entirety, priority environmental protection measures according to constituents and individual regional units and elaborates principles and guidelines for environmental protection comprised in the Environmental protection strategy. Article 20 sets the hierarchy of program instruments of various levels. Environmental protection program should comply with the National environmental protection strategy[34] whereas district and municipality programs should comply

[33] Ministry of science, education and sports of the Republic of Croatia, available at *http://public.mzos.hr/Default.aspx?sec=2685* (10.06.2013).

[34] National environmental protection strategy, NN 46/02. Over the long term the Strategy determines and directs environmental goals and management in accordance with the overall state economic, social and cultural development and herewith sets

with the county program. Finally, Article 21 sets measures for environmental protection in compliance with regional and local particularities and features thus in accordance with the starting points of the Environmental protection strategy. It could be concluded that there are two environmental protection instruments that are of significance for county environmental protection programs: the National Environmental Protection Strategy and the county Environmental Status Report. Schools and non-governmental organizations play an important role in raising the awareness and educating the public; important projects have been conducted by the Regional Development Agency – these will be dealt with later in more detail in the paper.

2. Activities of individuals, groups and the public

2.1. Pre-school and school environmental programs

There are 11 primary and 4 secondary schools in Osijek-Baranja county holding the title and implementing the programs of international ecology schools. Their programs aim at integrating education and learning focused on the environment in all areas of the educational system and the everyday life of pupils and school employees, i.e. to educate young generations to become aware of environmental issues and to equip them with the skills to make the right decisions. Environmental programs are financially supported in all schools of Osijek – Baranja County regardless of the school founder, i.e. both those founded by the city of Osijek (20 schools) and Osijek-Baranja County (51 schools). The kindergarten 'Mak' stands out among pre-school institutions focusing on educational activities to promote environmental awareness among the youngsters. These include games where children learn through interactive research. The kindergarten has established a center for research, recycling, composting, art in using natural materials, verbal, scene and musical expressions, physical activities and a Center for Imitation Games."[35]

guidelines at lower levels. *http://narodnenovine.nn.hr/clanci/sluzbeni/308683.html* (10.06.2013)

[35] *Izvješće o stanju okoliša na području Osječko-baranjske županije za razoblje 2005.-2008. godine* [Environmental Status Report in the Area of Osijek-Baranja county for the Period from 2005 to 2008] p. 6, available at *http://www.obz.hr/hr/pdf/prostor/2010* (10.06.2013).

2.2. Science and development

Osijek-Baranja county cooperates with scientific institutions and the University with an aim of integrating science into sector activities related to environmental protection matters and sustainable development firstly in the University postgraduate and interdisciplinary (PhD) study of Environmental protection. A university postgraduate and interdisciplinary PhD study has been conducted by Josip Juraj Strossmayer University in Osijek and the Institute Ruđer Bošković in Zagreb in the field of natural and biotechnological sciences.
The program of the university postgraduate and interdisciplinary (PhD) study of environmental protection is based on the field of natural and biotechnical sciences, i.e. three interest areas related to the protection and preservation of nature and environment, ecological agriculture and acceptable technologies which enable acquiring knowledge on causes, nature and consequences of pollution [i.e. quality of natural environment (soil, water, air)] and harmful effects of pollution on people, flora and fauna. Bearing in mind the awareness of the need to promote stronger connections between the European Higher Education Area (EHEA) and the European Research Area (ERA), the study emphasizes the importance of research work as an integral part of higher education, knowledge, skill transfer and promotion of multidisciplinary approach with an aim to improve the quality of higher education and enhance competitiveness.[36]

2.3. Non-governmental organizations

According to the most recent accessible Report of Osijek-Baranja County[37] there are 44 non-governmental organizations that promote environmental protection in the county area. Of outstanding importance is the Nature and Environmental Protection Organization Zeleni Osijek[38] the most important project of which is the 'Eko center Zlatna greda' established in 2003. The aim of the project was to preserve the natural resources and tradition of the central Danube basin and the 'Kopački rit' through education of the public and ecological tourism development. The purpose of the project of Local Capacities Enhancement for Nature

[36] More on the study and programmes available at *http://www.unios.hr* (10.6.2013).
[37] National environmental protection strategy, op. cit. n. 34.
[38] More on the organization and its projects available at *www.zeleni-osijek.hr* (10.06.2013).

2000 and nature and environmental protection was to motivate sustainable management and protection of natural resources of Osijek-Baranja county in the context of establishing a network of Natura 2000 ecological nature protection areas, i.e. rare, endangered and endemic species of wild life and flora through participation of the public, cross sector cooperation and implementation of relevant EU Directives (Birds Directive and Habitats Directive). Sustainability of the project means that the public is systematically informed on biodiversity. The target group and the final beneficiaries are: Institute for Biology, Josip Juraj Strossmayer University in Osijek, non-governmental organizations, State Institute for Protection of Nature, Croatian waterworks, Public institution „Nature Park Kopački rit", population of Osijek–Baranja county, local self-government of Osijek-Baranja county, legal persons, Agency for management of protected natural areas of Osijek – Baranja county, schools, educational institution, volunteers and the wider public.[39]

The CHEE Project for joint research and energy efficiency measures development in border areas has been selected by the Ministry of Regional Development and EU funds as one of the most successful local EU projects in Croatia in 2010-2012. The project partners were the Hungarian University of Pécs, the Interregional cluster of renewable energy resources and the Croatian Regional Development Agency, the Faculty of Economics in Osijek and the Institute for Renewable Energy Resources and Energy Efficiency in Osijek. The aim of the Project was joint research and the development of energy efficiency measures in cross-border area cities.

The city of Osijek as the Project leader has had significant experience in activities of energy efficiency and in EU projects related to realization of the project and energy efficiency measures. It has been the leader of two EU projects related to energy efficiency of the buildings – the first one being 'Energy education agency of Slavonia and Baranja' within the EU Program Cards 2004 and the second (under the title 'Energy efficiency in Slavonia and Baranja') within the EU Program Phare 2006. In a way, these were very introductory projects to a big project of UNDP Croatia in which the city of Osijek took part as one of the most active cities in Croatia. The city of Osijek conducted in cooperation with the 'EI Hrvoje Požar' a project dealing with the energetic reconstruction of

[39] Ibid.

an infant nursery where the thermal load of the facility was reduced by 70% compared to previous energy consumption levels. The sample project of an energy-independent house was started and built in cooperation with the company Solar System; the project has been used so far in two EU projects as demonstrational-educational object, unique in south-east Europe. The CHEE Project is a good continuation of earlier EE activities of the city of Osijek. The Project started on 1 July 2010 and lasted for 14 months. Beneficiaries of the project activities were the municipalities of the cities in two cross-border counties, educational institutions, professional organizations and citizens interested in the application of energy efficiency measures in their homes.[40]

For citizens, the efficient use of energy results in more developed economies as a direct consequence. Furthermore, the way we use energy has a direct and indirect influence on the environment and on climate change due to the emission of glass house gases as a result of fossil fuels in our heating systems and thermo-electric power plants. The usability of natural energy resources and the increase of energy efficiency are features of this project that every citizen, city, region and state should strive for. The CHEE Project was a good example, an educational program with an aim of informing the abovementioned parties about project. It also resulted in connecting and exchanging experience and cross-border cooperation with Hungary, which once more confirmed the good Croatian-Hungarian relations.

A direct benefit that the county and the state enjoyed thanks to the Project was an increase in energy efficiency by adapting the school premises and a house in Croatia and Hungary presenting transparent, visible and measurable activities of an EU project. The project is an example of good practice to other cities and institutions in increasing energy efficiency. There have been other projects that deserve to be praised, however, these cannot be dealt with herein due to space limitations, but can be read about on the web pages of the Agency.[41]

[40] *http://www.slavonija.hr/* (10.06.2013)
[41] Ibid.

IV. The Faculty of Law in Osijek and the Faculty Library: environmental information and education examples

1. Environmental law: a branch of law and an interdisciplinary subject

Both the subject and textbook on 'Environmental Law'[42] deal with a significant part of national legislation regarding environmental law and with international environmental law, contributing to environmental education and raising awareness among students and the public as well as enhancing interest in a number of issues relating to environmental protection and law. Croatia has decided to adopt the guidelines of sustainable development that at the same time guarantee economic development and social justice, as well as the protection of natural as the undoubtedly most important heritage. Although it is hard to reconcile all these goals, in particular the interests of the economy and the necessity to preserve and protect the environment at the same time, we must believe that sustainable development guidelines are reflected in legislation, and dealt with in the course of the subject and the textbook on Environmental Law.[43] The subject is taught in the course of the third year of professional studies at the Faculty of Law in Osijek. As a scientific discipline, Environmental law has been incorporated into the draft of the doctoral scientific study program at the Faculty of Law in Osijek.

2. The Faculty Library of the Faculty of Law in Osijek: Green booklet of energy efficiency (*ZeeK*)

One of the main missions of the librarian profession is to ensure free and undisturbed access to diverse information for library users. When it comes to information and education human society has been relying on libraries for centuries. Libraries realize their key role in education through their basic functions and active help for their users in finding the recorded knowledge from various information resources.[44] The role of a librarian in making sure that there is a free access to information has been noted in a number of international documents about libraries: the

[42] Textbook 'Environmental Law' is the basis of the adapted course materials for students.
[43] Odobaša, op. cit. n. 3, at p. 1.
[44] Green Booklet on energy efficiency *(Zeek*) available at *http://www.gskos.unios.hr* (08.06.2013).

IFLA (International Federation of Library Association and Institutions) guidelines for public libraries; the EBLIDA (European Bureau of Library, Information and Documentation Associations) which is an independent, non-profit umbrella association of public libraries, archive and information associations and institutions in Europe, established the undisturbed access to information in the digital age and the role of archives and libraries in achieving that goal.[45] Inquiries on information and accessible sources of environmental information are required on an everyday basis in the course of teaching for the purpose of conducting seminars in that field, as well as in preparing for taking exams in the subject 'Environmental law'.

The project 'Prompting energy efficiency in Croatia'[46] has developed three national components, with one of them being the systematic informing and education of citizens. The 'Green booklet of energy efficiency (*ZeeK*)' has been published within the project with an aim to realize a professional publication created within the project accessible to citizens, experts and students; and to motivate increase of energy efficiency through the implementation of energy efficient measures as well as the utilization of renewable sources of energy. The aforementioned publications can be found on specially created and recognizable shelves. The first Green booklet of energy efficiency was made available in the National and University Library in Zagreb and later on in other university libraries in the Republic of Croatia. By opening the seventh Green booklet at the Faculty of Law in Osijek the Faculty of Law has become the only higher education library in the

[45] E. Karoliny, Lj. Siber, T. Petrašević, 'Providing EU information in libraries – experiences from member states and candidate countries', in T. Drinóczi, et al., eds., *Contemporary Legal Challenges: EU – Hungary–-Croatia* (Faculty of Law, University of Pécs and Faculty of Law, J. J. Strossmayer University in Osijek, 2012) p. 203.

[46] National project Prompting energy efficiency in Croatia (EE Project) has been conducted by the United Nations Development Program Croatia (UNDP Croatia) in cooperation with the Ministry of Economy, Ministry of Construction and Physical Planning supported by the Environmental Protection and Energy Efficiency Fund. The main goal of the project is to apply the model of continuous and systematic energy management, strategic planning of energetics and sustainable management of energy resources on state (HIO program), local and regional level (SGE project). In this way costs of energy sources, their unnecessary consumption and emission of harmful gases in the atmosphere decrease at the same time prompting development of new activities and local entrepreneurship.

Republic of Croatia that is part of the Green library network within the mentioned project. Informing and educating the public about these matters is one of the key prerequisites in the process of changing attitudes and behavior of the public, which today is considered to be the basic precondition to rational energy usage.[47]

V. Concluding remarks

Preservation and protection of the environment are issues that could and must unite the whole world. The ecological crisis of the modern world poses a number of questions, with one of these being the following: How to educate and encourage future generations to act responsibly towards their environment? How is it possible to maintain the present status and gain knowledge and strength to correct the omissions, and to reestablish the endangered harmony where possible?[48] How do we achieve harmonious coexistence between nature and people?

It is obvious that if we want to live in a democratic world we must ensure activities for young generations that motivate democratic thinking –among other features, that must include respect for other people along with respect for the environment and the right to equality in using resources in a correct way, the right to information, in order to enhance awareness of the status of the environment in society and to change bad habits.

These are the values that must be cherished and systematically implemented into education.[49] Access to information and educating the public, in particular young people (since 'the young shall inherit the world') is the only way to influence the very cause of negative global changes and by doing so to prevent them from appearing again, in accordance with the saying 'think globally – act locally'. Legal solutions shall be only a support to environmental protection and sustainable development that every individual and society as a whole must give meaning to, being aware that today, much can be done for the coexistence with nature by acting positively.

[47] More on the project available at *www.ee.undp.hr* (11.06.2013).

[48] M. Bojanović, 'Ekološki odgoj u osnovnoj školi [Ecological education in primary school]', 44 *Narodni zdravstveni list* (2002) p. 9.

[49] A. Vrbičić, 'Odgoj i obrazovanje za održivi razvoj [Education and schooling for sustainable development]', available at *http://www.pedagogija.hr /ekvilibrij/ pdf/odgoj-i-obrazovanje-za-odrzivi-razvoj-zelena-pedagogija.pdf* (10.06.2013).

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Cooperation between Croatia and Hungary in the field of environmental protection with special reference to some core obligations regarding the protection of boundary rivers

I. Introduction

The right to a healthy environment is a distinctive example of human rights of global nature for multiple reasons. It is not a guarantee of interests of an individual or a group but of the survival of mankind. Furthermore, its realization requires cross-border cooperation, as efforts of a single state are not sufficient.[1]

The Fundamental Law of Hungary and the Constitution of the Republic of Croatia have several provisions regarding environmental protection. Both constitutions provide a basis for and guarantees of the possibility of access to public data. Below we give a short overview on the main elements of these provisions.

Articles XX and XXI of the Hungarian Fundamental Law read as follows: Article XX (1) Everyone shall have the right to physical and mental health. (2) Hungary shall promote the application of the right referred to in Paragraph (1) by an agriculture free of genetically modified organisms, by ensuring access to healthy food and drinking water, by organizing safety at work and healthcare provision, by supporting sports and regular physical exercise, as well as by ensuring the protection of the environment. Article XXI (1) Hungary recognizes and enforces the right of everyone to a healthy environment. (2) Anyone

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[1] J. Sári, *Alapjogok. Alkotmánytan II* [Fundamental Rights. Constitutional theory II] (Budapest, Osiris Kiadó 2004) p. 289. Quoted by J. Zeller, "Az egészséghez és az egészséges környezethez való jog" [Right to health and healthy environment] in T. Drinóczi, ed., *Magyar alkotmányjog III. Alapvető jogok* [Hungarian Constitutional Law III. Fundamental Rights] (Budapest – Pécs, Dialóg Campus Kiadó 2006) p. 558.

who causes damage to the environment shall be obliged to restore it or to bear the costs of restoration, as provided for by an Act. (3) It shall be prohibited to import pollutant waste to Hungary for the purpose of disposal.

Article 3 of the Croatian Constitution, among others, considers the conservation of nature and the environment as one of the highest values of the constitutional order of the Republic of Croatia. Article 50 designates these values as one of the constitutional justifications for the restriction of property rights. Article 52 provides an exemplifying enumeration of the protected components of the environment. Pursuant to this provision, the sea, the seashore, islands, waters, air space, mineral resources, and other natural assets, as well as land, forests, flora and fauna, and other components of the natural environment enjoy the protection of the Republic of Croatia. Article 70 of the Constitution of the Republic of Croatia lays down that the state has to ensure conditions for a healthy environment as a state obligation and stipulates that everyone shall, within the scope of their powers and activities, devote particular attention to the realization of this right; this is also reinforced regarding local governments in Article 135. When assessing this right, it is important to note that even though counties obviously adjust their scope of protection to the national specificities (such as Croatia's focus on the protection of the sea and its coast) they consider it as a value of such importance that, if necessary, it may serve as the constitutional basis for the restriction of a fundamental right.

When comparing provisions of the two constitutions, it seems that via its exemplificative enumeration, the Croatian constitution gives a more precise basis for interpretation for the state organ dedicated to protect the constitution, whereas the Hungarian Fundamental Law deserves attention due to the creation of a constitutional basis for the statutory regulation of the legal consequences of causing damages to the environment. The latter possibility is particularly modern – even though it was available under private law – because it gives the parliament an effective tool to create and shape an adequate regulatory framework. There is room for differentiation: the one who caused damages is expected to terminate it (depending on his/her skill, characteristics and the degree of the damage etc.); or if he/she is unable to undertake this properly, while adequately ensuring the protection of the environment, the damage may be terminated on his/her cost.

The prohibition of the importing of pollutant waste is also a new rule in the Hungarian constitution: it is not possible to bring pollutant waste into the country without facing legal consequences; however, it is prohibited only for the purpose of disposal: proper processing or utilization is allowed by the Fundamental Law. In comparison, the Croatian regulation is of importance due to points of reference in the enumeration.

It is an essential requirement in connection with the protection of the environment that the level of protection once achieved may not constitutionally be reduced: the Hungarian Constitutional Court in its decision 28/1994. (V.20.) established that the right to a healthy environment is an objective institutional protection which is a special fundamental right, the objective institutional protection element of which is more dominant and thus prevails over other aspects. The other reason why the right to a healthy environment should be given fundamental right protection is its close connection with the right to life; it eventually guarantees the natural basis and biological precondition of the right to life.[2] The need to ensure the right to a healthy environment is thus necessitated by the obligation of the state to protect life; covering also the protection of living conditions of future generations.[3] The Constitutional Court in decision 28/1994. (V.20.) also pointed out that the legislatively ensured degree of environmental protection may not be reduced, due to the fact that a healthy and undamaged environment is the physical condition necessary to enforce the right to human life; the natural basis of life is not everlasting and substantial parts of environmental damages are irreversible. It is an essential characteristic of this right, as is acknowledged by both constitutions, that its effective realization primarily requires the state to take preventive measures. The reason is that post factum sanctioning of irreversible damages cannot repair the status quo because environmental damages demolish non-everlasting goods and these are in most cases beyond recovery. Therefore, the Constitutional Court also emphasized that the state is not allowed to withdraw preventive measures and move forward a protection guaranteed by sanctions;[4] furthermore, when making

[2] Decision 28/1994. (V.20.) of the Constitutional Court.
[3] Decision 64/1991. (XII.17.) of the Constitutional Court.
[4] Decision 28/1994. (V.20.) of the Constitutional Court, ABH 1994. 134, 141.

decisions affecting the environment, the legislator is required to act with special consideration and prudence.[5]

The right to a healthy environment is closely connected to the right to access to public data. This latter is one of the guarantees of the prevalence of the right to a healthy environment; without this knowledge, data and information necessary to ensure a healthy environment as well as the successful implementation of preventive or corrective state measures would not be available. The Hungarian Constitutional Court has stated that it follows from the specificities of the right to a healthy environment that the state has to establish statutory and organizational guarantees, such as the right to access to public data, in order to be able to perform the same task that is, in other cases, provided for by the protection of fundamental rights.[6]

The right to access to public data is also included in both the Croatian and Hungarian constitutions. Pursuant to Article 38 of the Constitution of the Republic of Croatia, the right to access to information held by any public authority shall be guaranteed. Restrictions on the right to access to information must be a) proportionate to the nature of the need for such restriction in each individual case and b) necessary in a free and democratic society, as stipulated by law.

Pursuant to Article VI (2) of the Fundamental Law of Hungary everyone shall have the right to the protection of his or her personal data, as well as to access and disseminate data of public interest. Paragraph (3) stipulates the application of the right to the protection of personal data and to access data of public interest shall be supervised by an independent authority established by a cardinal Act.

The freedom of information can be considered as the right of any individual to be able to inform himself/herself via public data as well as a human right that forms the basis of the controllability of the state, thus it is an individual, subjective, and enforceable right to retrieve information concerning activities of public bodies using public funds. The freedom of information is also a state obligation to provide these pieces of information,[7] that is to guarantee an unhampered possibility to obtain such information.[8]

[5] Decision 30/2000. (I.11.) of the Constitutional Court, see also Drinóczi, ed., op. cit. n. 1, at p. 564.

[6] Decision 28/1994. (V.20.) of the Constitutional Court.

[7] See Zs. Kerekes, 'Az információszabadság az ombudsman gyakorlatában [Freedom of information in the practice of the ombudsan]', in L., Majtényi, ed., *Az*

Providing information is an obligation of the state (and its organs) to make available the required data. This is the framework in which state organs are obliged by law to provide the public with accurate, precise and fast information; this duty is complied with by regularly publishing or by making these data otherwise available.[9]
The state has to provide institutional guarantees to protect this right: the existence and functioning of bodies dealing with the enforcement of this right (and possible international co-operation) is necessary. The Danube River Protection Convention can be considered as such an example of cooperation in the area of environmental protection.

II. Sources of law and common projects

International treaties, multilateral or bilateral, which States enter into, are important sources of water law and law regarding the protection of the river environment. There are a number of international agreements that regulate relations on international rivers, such as: navigation, utilisation, delimitation, environmental protection, etc.
In the beginning, sources of law related to international water resources were concerned mainly with the question of boundary demarcation between States; as regulation of water resources for domestic purposes, irrigation, fishing, and other traditional water uses were regulated by national law in each State or by bilateral agreements between neighbouring States. Only navigation on the main courses of international waterways was considered at the international level as well, in the view of commercial interests. Thus, the law of international

odaátra nyíló ajtó [Door opening to over there] (Budapest, Adatvédelmi Biztos Irodája 2001) p. 122. In the British literature, freedom of information covers the obtain of information available at government or authorities, agencies. Information may relate to an individual or the operation of government. Making these information available is the obligation of the state. A. Mason, 'The Relationship Between Freedom of Expression and Freedom of Information', in J. Beatson and Y. Cripps, eds., *Freedom of Expression and Freedom of Information. Essays in Honour of Sir David Williams* (Oxford, Oxford University Press 2002) p. 238.

[8] This freedom protects suitable and accurate information from clear sources. The German practice considers as such mass media and satellite dish necessary for access to foreign transmission. See Art. 5 I S. 1 Halbs. 2 GG., BVerfG NJW 2001, 1633, 1634., BVerfGE 27, 71, 83; BVerfGE 90, 27, 32; R. Schmidt, *Grundrechte* 8 (Rolf Scmidt Verlag GmbH. 2003) p. 185., 194, 195., T. Maunz and G. Dürig, *Kommentar zum Grungesetz* (München, C. H. Beck'sche Verlagsbuchhandlung 1993) p. 29 and following. Quoted by Drinóczi, ed., op. cit. n. 1, at p. 341.

[9] Drinóczi, ed., op. cit. n. 1, at p. 349.

rivers and lakes was developed focusing on issues of navigation. From the beginning of the 20th century, new forms of river utilization have evolved on international rivers, especially for the production of hydropower, and numerous new international agreements for the exploitation of water resources shared by two or more States were concluded. Recently, agreements on the prevention of harmful effects of waters such as erosion or floods and on protection from natural disasters were also concluded. Today the protection of waters from pollution has become a major concern, and for this purpose a large number of treaties were concluded.[10]

However, it must be stressed that even if a formal agreement exists, the problems inhibiting cooperation will remain. 'Although most have the status of international treaties, and therefore oblige the parties to adhere to them under the principle of *pacta sunt servanda*, river agreements rarely contain explicit penalties for violation.'[11]

1. Universal and regional environmental treaties

International environmental law in general started to develop in the 1970s,[12] but despite of its relatively young age, there are today an extremely large number of provisions in international treaties, and also in national legislation, governing issues related to the environment. It is common to them that they emphasize the necessity of environmental protection while respecting its fundamental principles (the precautionary principle, the principle of prevention, the polluter pays principle, the principle of sustainable development).

Regulations governing environmental protection, according to their content and purpose can be divided into:

- regulations on the prevention of pollution – their purpose is to prevent pollution,

[10] D. A. Caponera, *Principles of Water Law and Administration: National and Internationa* (Rotterdam, A. A. Balkema 1992) p. 184.

[11] M. D. Stinnett and J. Tir, 'The Institutionalization of River Treaties' 14 *International Negotiation* (2009) p. 229 at p. 231.

[12] About the development of environmental law see O. Lončarić, et al., *Pravo okoliša* [Environmental Law] (Zagreb, Ministry of Environmental Protection and Physical Planning and Organizator 2003); M. Seršić, *Međunarodnopravna zaštita morskog okoliša* [International legal Protection of Marine Environment] (Zagreb, Faculty of Law University of Zagreb 2003); M. Črnjar, *Ekonomika i politika zaštite okoliša* [Economics and Environmental Protection Policy] (Rijeka, Faculty of Economics University of Rijeka – Glosa 2002).

- regulations on the suppression and limitation of pollution – including measures to be taken if pollution occurs,
- regulations of repressive nature – may refer to criminal sanctions, but also civil liability and compensation for damages (environmental damages).[13]

The most significant multilateral international treaties relevant for the topic of this paper are: the Convention on Cooperation for the Protection and Sustainable Use of the Danube River (Danube River Protection Convention or DRPC)[14] of 1994, the Convention regarding the regime of navigation on the Danube (Belgrade Convention)[15] signed in 1948 and the Protocol to the Convention of 1998,[16] the Convention on the Protection and Use of Transboundary Watercourses and International Lakes[17] of 1992, the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses

[13] I. Grabovac, *Suvremeno hrvatsko pomorsko pravo i Pomorski zakonik* [Contemporary Croatian Maritime Law and Maritime Code] (Split, Književni krug 2005) p. 23.

[14] Convention on Cooperation for the Protection and Sustainable Use of the Danube River, Sofia, 1994, 74/2000 (V.31.) Korm. rendelet a Duna védelmére és fenntartható használatára irányuló együttműködésről szóló, 1994. június 29-én, Szófiában létrehozott Egyezmény kihirdetéséről; Konvencija o suradnji na zaštiti i održivoj uporabi rijeke Dunav, Official Gazette (Narodne novine, NN) – International Agreements, No. 2/1996.

[15] Convention regarding the regime of navigation on the Danube, 1948, Belgrade, 1949. évi XIII. törvény a Dunán való hajózás rendjének szabályozása tárgyában Belgrádban, 1948. évi augusztus hó 18. napján kelt nemzetközi Egyezmény becikkelyezéséről; Konvencija o režimu plovidbe na Dunavu, NN – International Agreements, No. 18/1998.

[16] Amending Protocol to the Convention regarding the Regime of Navigation on the Danube of 18 August 1948, 1998, 2000. évi CXIV. törvény a Dunán való hajózás rendjének szabályozása tárgyában Belgrádban, 1948. augusztus hó 18. napján kelt Egyezmény 1998. március hó 26-án kelt Kiegészítő Jegyzőkönyve és annak Aláírási Jegyzőkönyve kihirdetéséről; Dotanti protokol uz Konvenciju o režimu plovidbe Dunavom, NN – International Agreements, No. 13/1998.

[17] Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 March 1992, Helsinki; 130/2000. (VII. 11.) Korm. rendelet a határokat átlépő vízfolyások és nemzetközi tavak védelmére és használatára vonatkozó, Helsinkiben, 1992. március 17-én aláírt Egyezmény kihirdetéséről; Konvencija o zaštiti i uporabi prekograničnih vodotoka i međunarodnih jezera, NN – International Agreements, No. 4/1996.

and International Lakes[18] of 1999, the Convention on Access to Information, Public Participation in Decision – Making and Access to Justice in Environmental Matters (Aarhus Convention)[19] of 1998. Both Croatia and Hungary are parties to these conventions.[20]
It should be noted that 'Modern bilateral and regional treaties have tended to adopt the basin approach, because it is the most efficient means of achieving control of pollution and water utilization'.[21]

2. Bilateral agreements

The Republic of Croatia and Hungary have also signed a number of bilateral agreements, such as the Treaty between the Government of the Republic of Croatia and the Government of the Republic of Hungary on cooperation towards protection from natural and civilization catastrophes (hereinafter: Treaty)[22] in 1997 and an Agreement on Co-

[18] Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 June 1999, London, 2331 UNTS 5; 213/2005 (X. 5.) Korm. rendelet a határokat átlépő vízfolyások és nemzetközi tavak védelmére és használatára vonatkozó, Helsinkiben, 1992. március 17-én aláírt egyezményhez kapcsolódó Víz és Egészség Jegyzőkönyv kihirdetéséről; Protokol o vodi i zdravlju uz Konvenciju o zaštiti i uporabi prekograničnih vodotoka i međunarodnih jezera iz 1992. godine, NN – International Agreements, No. 4/2006.
[19] Convention on Access to Information, Public Participation in Decision – Making and Access to Justice in Environmental Matters, 25 June 1998, Aarhus; 2001. évi LXXXI. törvény a környezeti ügyekben az információhoz való hozzáférésről, a nyilvánosságnak a döntéshozatalban történő részvételéről és az igazságszolgáltatáshoz való jog biztosításáról szóló, Aarhusban, 1998. június 25-én elfogadott Egyezmény kihirdetéséről; Konvencija o pristupu informacijama, sudjelovanju javnosti u odlučivanju i pristupu pravosuđu u pitanjima okoliša, NN – International Agreements, No. 1/2007.
[20] UN Treaty Collection, Status of Treaties, available at http://treaties.un.org/Pages/ParticipationStatus.aspx (17.04.2013).
[21] P. W. Birnie and A. E. Boyle, *International Law & the Environment* (Oxford, Oxford University Press 2002) p. 299.
[22] Treaty between the Government of the Republic of Croatia and the Government of the Republic of Hungary on cooperation towards protection from natural and civilization catastrophes, Budapest, 9 July 1997; Hungarian national act: 114/1998. (VI.11.) Korm. rendelet a Magyar Köztársaság Kormánya és a Horvát Köztársaság Kormánya között a természeti és civilizációs katasztrófák elleni védelemről szóló, Budapesten, 1997. július 9-én aláírt Egyezmény kihirdetéséről; Ugovor između Vlade Republike Hrvatske i Vlade Republike Mađarske o suradnji na području zaštite od prirodnih i civilizacijskih katastrofa, NN – International Agreements, No. 6/1998.

operation between the Government of the Republic of Croatia and the Government of Republic of Hungary in the field of Environmental Protection and Nature Conservation (hereinafter: Agreement)[23] in 2006.

2.1. Treaty on cooperation towards protection from natural and civilization catastrophes

The subject matter of the Treaty concluded in 1997 is very limited, since it basically creates obligations for States in case of emergency or its immediate danger. According to the Treaty, the most basic obligation of the Contracting Parties is to share information in case of catastrophes with the final purpose of protecting the civilian population.[24] Sharing information is an obligation also before the emergency situation occurs, for the prevention of catastrophes.[25] Besides sharing data, the Parties to the Treaty can ask each other for help through their designated organs when a catastrophe occurs.[26] Since most articles of the Treaty are closely connected to a special topic analysed in point four of this paper, they will be examined in that section in details.

2.2. Agreement on Co-operation in the field of Environmental Protection and Nature Conservation

The Agreement concluded in 2006 is not the first bilateral environmental international treaty between the two governments, but undoubtedly it is the most general in the field of co-operation, the scope of which has been determined widely. From the point of view of this paper the most important fields of co-operation are the 1. General topics of environmental and nature conservation policy; 3. Monitoring, evaluation and thorough analysis of the condition of the environment and nature, access to environmental information; and finally, 5. Environmental security, mutual assistance in case of exceptional events

[23] Agreement on Co-operation between the Government of the Republic of Croatia and the Government of Republic of Hungary in the field of Environmental Protection and Nature Conservation, Budapest, 26 January 2006, Hungarian national legislation 127/2006. (V.30.) Korm. rendelet a Magyar Köztársaság Kormánya és a Horvát Köztársaság Kormánya között a környezetvédelem és természetvédelem terén való együttműködésről szóló Egyezmény kihirdetéséről; Sporazum o suradnji između Vlade Republike Hrvatske i Vlade Republike Mađarske na području zaštite okoliša i prirode, NN – International Agreements, No. 4/2007.
[24] Art. 2, point b).
[25] Art. 3(1).
[26] Art. 10.

with transboundary effects.[27] The general co-ordination of the execution of the Agreement is the duty of the ministries responsible for environmental protection in each State,[28] while the concrete tasks of execution are delegated to the Mixed Committee, established by the Contracting Parties to the Agreement.[29] The competence of the Committee is among others to advance the professional visits for information sharing, to build relations among experts,[30] and to harmonize the methods of information sharing.[31] The Agreement contains quite a number of regulations concerning information sharing and information to the public to be analysed in other sections. The Agreement clarifies its own relation to other international treaties concluded by the two governments, declaring that it does not affect their applicability.[32] Similarly, the States laid down that the Agreement does not influence the obligations deriving from the membership of the European Union.[33]

3. Common projects

A large number of the world's rivers are located within the territory of two or more States, which requires the cooperation of riparian States in their use. Cooperation in the field of water allows better management that leads to better protection of rivers, lakes, wetlands and associated ecosystems, and indirectly the coast and the sea. Croatia and Hungary share a portion of the basin of one of Europe's most important rivers – the Danube River, and other rivers flowing through the territory of both countries (Drava, Mura). Hungarian – Croatian cross-border co-operation started in 2002, when local actors along the border initiated the creation of the Hungary – Croatia Pilot Small Projects Fund within the framework of the Hungarian National Phare Programme. The Hungary – Croatia IPA Cross-border Co-operation Programme 2007-2013 was approved by the European Commission on the 13th of March 2008.[34] The programme involves Community support for specific

[27] Art. 2.
[28] Art. 4.
[29] Croatian-Hungarian Environmental and Nature Protection Mixed Committee; Art. 3.
[30] Art. 3, point 6 c).
[31] Art. 3, point 6 d).
[32] Art. 10(2).
[33] Ibid.
[34] *http://www.hu-hr-ipa.com/en/overview* (17.04.2013)

Hungarian and Croatian regions that are situated along the common border. The Programme offers a wide range of opportunities for the potential beneficiaries in the framework of two priorities: 1. Sustainable Environment and Tourism and 2. Co-operative Economy and Intercommunity Human Resource Development. The aim of the first priority is to promote environmental sustainability in the border region, as well as eco-tourism development within the Mura – Drava – Danube river area and its immediate surroundings.

Some examples of finalised IPA projects are: Waste water treatment plants on the Mura river, revitalization and landscape development of riverine ecosystem in the Drava – Danube area, developing of flood forecast system at the Drava River referring to the Croatian – Hungarian hydrographical stations, further development and extension plans for a Complex Disaster Management Information System along the Drava river, cross-border protection of the Middle Danube. There is a project still under implementation: rehabilitation of land mine contaminated sites in the Drava – Danube area.

One of the most important natural assets in the area is the Mura – Drava – Danube river system with its special landscape and ecosystem. The border region is characterised by the fact that it runs along the Drava, flowing into the Danube. This valuable environmental treasure is protected within the framework of the Danube – Drava National Park.[35]

It should be also noted that the UNESCO, at a session of the International Coordination Council of the Man and the Biosphere Programme, held in July 2012 in Paris declared the Mura – Drava – Danube area between Croatia and Hungary a transboundary biosphere reserve,[36] and it is the most important result of the co-operation in the field of nature protection between the two countries.

[35] See Hungary-Croatia IPA Cross-border Co-operation Programme, Programming Document for the Programming Period 2007-2013, p. 29, available at *http://ec.europa.eu/enlargement/pdf/croatia/ipa/hu-hr_op_final_en.pdf* (17.04.2013).

[36] UNESCO proglasio prekogranični Rezervat biosfere Mura-Drava-Dunav između Republike Hrvatske i Republike Mađarske, available at *http://www.zastita-prirode.hr/Novosti-i-dogadanja/UNESCO-proglasio-prekogranicni-Rezervat-biosfere-Mura-Drava-Dunav-izmedu-Republike-Hrvatske-i-Republike-Madarske* (17.04.2013); UNESCO Press, 20 new Biosphere Reserves added to UNESCO's Man and the Biosphere (MAB) Programme, available at *http://www.unesco.org/new/en/media-services/single-*

The border area between Croatia and Hungary is rich in water resources of good average groundwater quality, except for the Danube and its tributary system which is polluted. Water connections through the Danube and the Drava offer many opportunities for further co-operation. In order to increase environmental awareness and knowledge, all results of the activities should be disseminated to the local community and their relevant organisations.

III. Information sharing

It is more or less common opinion on public international law that in some fields it is not efficient enough. This mainly concerns politically sensitive topics, such as human rights and State responsibility or some general principles, e.g. the principle of non-intervention. On the other hand, in other fields the efficiency of public international law is unquestionable, for example in the case of the law of treaties. Even if the members of the international community do respect their international obligations, except for the above mentioned politically sensitive topics, it was still necessary to work out some methods of control for ensuring the appropriate execution of international treaties. One of the most frequently used methods is the establishment of an obligation for States parties to submit certain data (usually to an international organization or a commission, established by the treaty itself).

Besides, to make the cooperation effective, many international treaties contain rules about information sharing among the States parties to the treaty. Therefore, the majority of environmental international treaties contain obligation for the Contracting Parties to share certain information. This information sharing basically has two directions: on the one hand, the common organisation or institution controls the implementation of the treaty, and on the other hand, States share data necessary for co-operation with each other. This is also true regarding the relevant environmental treaties enumerated in the previous sections. In the following sections, the most relevant international environmental treaties will be presented, started with the Danube Rives Protection Convention because of its relevance, followed by the examination of the Aarhus Convention and the bilateral treaties between Croatia and Hungary.

view/news/20_new_biosphere_reserves_added_to_unescos_man_and_the_biosphere_mab_programme/ (17.04.2013).

1. Danube River Protection Convention

1.1. Obligation of reporting

Every Contracting Party to the Danube River Protection Convention is obliged to share information on basic topics in the form of a reporting process. These basic topics are determined partly by the DRPC itself, and partly by the International Commission for the Protection of the Danube River (ICPDR) entrusted with their elaboration. According to Article 10 of the DRPC the following information should be submitted by the Contracting Parties:

- documents determined by the Convention itself or by the ICPDR;
- information related to international treaties, 'regulating the protection and water management of the Danube River and of waters within its catchment area or being relevant for questions concerned';[37]
- every relevant law and general regulation concerning the abovementioned questions and all important elements (timeframe, financial expenses for implementing) of their preparation process;
- the competent institutions responsible for the implementation of the DRPC;
- all relevant information on plans, projects, 'which for reason of their character are likely to cause transboundary impacts'.[38]

1.2. Exchange of information, consultations

The DRPC obliges the Contracting Parties to exchange different kinds of information, for example legal acts and data, collected through environmental surveys. According to the convention, the following data should be submitted: (a) the general conditions of the riverine environment within the catchment area of the Danube River; (b) experience gained in the application and operation of best available techniques and results of research and development; (c) emission and monitoring data; (d) measures taken and planned to be taken to prevent, control and reduce transboundary impact; (e) regulations for waste water discharges; (f) accidents involving substances hazardous to water.[39]

[37] DRPC, Art. 10, point b).
[38] Point f).
[39] Art. 12(1).

Furthermore, the regulations pertaining to emission limits are also subject to information sharing.[40] The methods of sharing information are not determined by the DRPC but the ICPDR is entrusted with this task, and performs it via the elaboration of guidelines and principles.[41] Exchange of information is based on mutuality and is free of charge, but if Contracting Party requests information not immediately available and its collection and exchange requires expenditure, reasonable payment may be a condition of compliance.[42] One aim of the exchange of information among the Contracting Parties is the achievement of best available techniques in every State.[43] Since the performance of the obligation of information sharing occasionally means that other States become privy to industrial or commercial secrets, or confidential data, the DRPC regulates the protection of these confidential data strictly.[44]

When there is no reporting obligation based on the DRPC or other international treaties but it seems necessary, the Contracting Parties can – following exchange of information – enter into further consultations on planned activities possibly having transboundary impacts. The results of these consultations should be taken into consideration in national decision-making processes.[45]

Parties to the convention have an immediate reporting obligation as well. If a competent authority identifies a sudden increase of hazardous substances in the Danube River or in waters within its catchment area or receives note of a disaster or of an accident likely to cause serious impact on the water quality of Danube River and to affect downstream Danubian States this authority shall immediately inform the contact points designated and the International Commission according to the way of procedure introduced by the Commission.[46] This obligation exists towards the downstream States also in case of floods, including ice-hazards.[47]

[40] Art. 12(2).
[41] International Commission for the Protection of the Danube River, Publications, Technical Papers, available at *http://www.icpdr.org/main/publications/technical-papers* (18.03.2013).
[42] DRPC, Art. 12(3).
[43] Art. 12(4).
[44] Art. 12(6), Art. 13.
[45] Art. 11.
[46] Art. 16(3).
[47] Ibid, Article 16(4).

2. The Aarhus Convention (Article 10), the Treaty (Article 3) and the Agreement (Article 5, 6)

The Aarhus Convention limits the obligation of Contracting Parties to exchange information through reports in regular consultations. Also the reports are restricted to the information on "the policies for and legal and methodological approaches to access to information, public participation in decision-making and access to justice in environmental matters, with a view to further improving them"[48] and they exchange information on relevant international treaties and their experiences.[49] The Aarhus Convention does not contain further obligations of information sharing towards the other Contracting Parties, but does establish the obligation to inform the public in the event of any imminent threat to human health or the environment.[50] The Treaty obliges the two States to share all information relevant from the aspect of the field of co-operation.[51]

Since the Agreement is a bilateral international treaty it evidently does not contain reporting obligations (to a committee) and does not mention the exchange of information among the Contracting Parties either, because it is indispensable from the co-operation between States. The Agreement only declares that information relevant from the aspect of co-operation can be available for third States as well, based on an agreement and in accordance with the national regulations and international obligations of the Contracting Parties.[52] The Contracting Parties also have an immediate obligation to inform each other when an event or its imminent threat possibly having transboundary impacts occurs.[53]

3. Croatian and Hungarian national legislation

Evidently, laws with purely national origin do not contain explicit obligations for information sharing with international organizations, institutions or Contracting Parties of international treaties. Concerning this topic the Constitution of the Republic of Croatia and the

[48] Aarhus Convention, Article 10 (2) point a).
[49] Ibid, Article 10(2) point b).
[50] Ibid, Article 5(1)1 point c).
[51] Treaty, Article 3(1).
[52] Agreement, Article 5.
[53] Ibid, Article 6(1).

Fundamental Law of Hungary should also be examined, since these documents regulate the relations between international and national law. The national act LIII of 1995 on the general rules of environmental protection is also laconic and contains only general rules on this matter with reference to the international treaties binding on Hungary.[54] These rules are complemented by the declaration that even in the lack of international treaties, the environmental interests of other States should be considered in the prevention of threat and harm to the environment,[55] an obligation which naturally includes the duty of information sharing as well. The duty to inform (and to co-operate) exists also towards the European Union and its Member States, which can possibly be impacted by a damage to the environment.[56]

The Fundamental Law of Hungary accepts the dualist concept concerning the relation between Hungarian national law and international law, namely, norms of an international law origin are applicable within the State if they are promulgated by a national law.[57] The obligation to share information is obviously not a general rule of public international law, thus it needs to be published in the form of legislation.[58] According to the Fundamental Law, Hungary ensure[s] harmony between international law and Hungarian law in order to fulfil its obligations under international law.[59] Public international law does not determine conditions for the promulgation in the form of legislation (except for the determination of the form of expression of the consent to be bound by the treaty), but it does require from the State to fulfil its international obligations – if it does not do so, the international responsibility of the State can be invoked.[60] The Hungarian practice

[54] Act LIII of 1995, Art. 11(1).
[55] Art. 11(2).
[56] Art. 102/C.
[57] M. Tamás, 'Az új Alaptörvény rendelkezései a nemzetközi jog és a belső jog viszonyáról', in T. Drinóczi and A. Jakab, eds., *Alkotmányozás Magyarországon 2010-2011: Volume I.* (Budapest – Pécs, Pázmány Press 2013) p. 88.
[58] Fundamental Law of Hungary, Art. Q(3).
[59] Art. Q(2).
[60] International Law Commission (ILC), Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, available at *http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf* (19.02.2013). Besides general rules environmental treaties can also contain lex specialis of international responsibility of States. G. Kecskés, 'A környezeti kárfelelősség intézményesedésének egyes kérdései a nemzetközi jogban', in T.

shows that usually in the national law promulgating the international treaty, only the original text is included along with rules determining the competent institution responsible for the implementation and/or authorisation for the institutions to work out more detailed rules.[61]

The right of access to information concerning the environment in the Republic of Croatia is also regulated by the Environmental Protection Act[62] (see *infra* IV.4.). The Environmental Protection Act also provides a framework for reporting to international bodies and organizations. It prescribes that the delivery of data, information and reports and their exchange with international bodies and organizations shall be performed in the manner and within the deadlines set out by each individual document on assuming obligations.[63] A copy of these materials must be delivered to the Croatian Environment Agency. It is important to say that the texts of international treaties, conventions or agreements, regulations governing the field of environmental protection must be ensured by public authorities.

The Croatian Environment Agency is the central Croatian information authority for coordinating reporting and reporting to the European Commission on the implementation of specific environmental protection regulations, performing the tasks of co-ordinating reporting and the reporting itself. Thus the Agency co-operates with the European Environmental Agency and reports in accordance with the requirements of the European Environment Information and Observation Network (EIONET).

Nótári and G. Török, eds., *Prudentia Iuris Gentium Potestate: Ünnepi tanulmányok Lamm Vanda tiszteletére* (Budapest, MTA Jogtudományi Intézet 2010) pp. 239-251.

[61] E.g. 74/2000. (V.31.) Korm. rendelet a Duna védelmére és fenntartható használatára irányuló együttműködésről szóló, 1994. június 29-én, Szófiában létrehozott Egyezmény kihirdetéséről 3. § (2); 2001. évi LXXXI. törvény a környezeti ügyekben az információhoz való hozzáférésről, a nyilvánosságnak a döntéshozatalban történő részvételéről és az igazságszolgáltatáshoz való jog biztosításáról szóló, Aarhusban, 1998. június 25-én elfogadott Egyezmény kihirdetéséről, 4. § (4)-(5); 127/2006. (V.30.) Korm. rendelet a Magyar Köztársaság Kormánya és a Horvát Köztársaság Kormánya között a környezetvédelem és természetvédelem terén való együttműködésről szóló Egyezmény kihirdetéséről, 4. § (4); 114/1998. (VI.11.) Korm. rendelet a Magyar Köztársaság Kormánya és a Horvát Köztársaság Kormánya között a természeti és civilizációs katasztrófák elleni védelemről szóló, Budapesten, 1997. július 9-én aláírt Egyezmény kihirdetéséről, 3 § (2).

[62] NN 110/2007.

[63] Art. 130(1).

The Constitution of the Republic of Croatia prescribes that international treaties which have been concluded and ratified in accordance with the Constitution, published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law.[64]
It can be thus stated that the Croatian Constitution is pretty close to the monistic view.[65]

IV. Information to the public in case of natural disasters

In addition to sharing information, States are obliged to co-operate in cases of accidents or emergencies that could cause transboundary harm. 'The general principle that states must notify each other and co-operate in cases of emergency to avert harm to other states applies also to international watercourses.'[66] In the event of a natural disaster, it is necessary to collect all relevant data and inform the public as soon as possible in order to prevent unnecessary losses, preserve and protect human life and health, provide assistance to those in need, eliminate the danger, stop the spreading of harmful effects, and start restoring the affected areas as soon as possible. Great accidents are the result of natural or human activities. Climate change has led to a rising number of extreme weather conditions (floods, droughts, fires, earthquakes) and thus to an increased number of natural disasters. On the other hand, the development of industry, trade and transport, as well as population growth also contribute to additional environmental pollution, and increase the risks of damage that can also cause environmental pollution. When an environmental accident occurs it is essential to inform the relevant institutions, bodies, and the public in order to be able to provide a fast and effective response to the situation. In reducing risks of damage and reaction to unexpected situations, already existing and collected information is of great importance. A problem can arise if a

[64] Art. 141 of the Constitution of the Republic of Croatia.
[65] P. Bačić, 'Konstitucionalizam, europske organizacije i sustav zaštite prava čovjeka u Republici Hrvatskoj', 43 *Zbornik radova Pravnog fakulteta u Splitu* (2006) pp. 81.-82. See also J. Andrassy, et al., *Međunarodno pravo 1* [International Law 1] (Zagreb, Školska knjiga 2010) p. 7.
[66] Birnie and Boyle, op. cit. n. 21, at p. 322.

large number of bodies, authorities, organizations, etc. collect data, but coordination and co-operation among them is not satisfactory.
Basic characteristics of environmental accidents on waters, but also in general, are the following: it is unpredictable due to the time, place and type; location of the incident is often without proper equipment and skilled professionals; it is specific regarding the possible consequences and the way of reparation; and it requires speed and efficiency in the rescue operation.

1. Danube River Protection Convention (Articles 16-17)

Accidental pollution incidents in the Danube River Basin can cause widespread damage to the environment, imperil the health of people, and have a negative impact on local economies. Two well-known such accidents were the Baia Mare cyanide spill in Romania in 2000 and the Ajka red sludge spill in 2010 in Hungary.
The provisions of the Convention on the Protection and Sustainable Use of the Danube River on systems for communication, warning and alarm refer to the whole Danube river basin and in fact serve only to supplement the systems that have been established and function on a bilateral level.[67]
The Convention prescribes that Contracting Parties shall in the framework of the International Commission inform each other about competent authorities or points of contact designated for this purpose in case of emergency events such as accidental pollution, other critical water conditions, floods and ice-hazards. Accordingly the competent authorities shall cooperate to establish joint emergency plans, where necessary, supplementary to existing plans on the bilateral level.[68]
In accordance with Article 16(3), in cases when a competent authority identifies a sudden increase of hazardous substances in the Danube river or in waters within its catchment area or receives note of a disaster or of an accident likely to cause serious impact on the water quality of Danube river and to affect downstream Danubian States, it must

[67] In article 16(1) is stipulated that the contracting parties shall provide for coordinated or join communication, warning and alarm systems in the basin wide context to the extent this is necessary to supplement the systems established and operated at a bilateral level. Parties to the Convention are also obliged to consult on ways and means for harmonizing domestic communication, warning and alarm system and emergency plans.
[68] Art. 16(2).

immediately inform designated contact points and the ICPDR, according to the way of procedure introduced by the ICPDR. In addition, in order to control and reduce the risks from floods including ice-hazards, the competent authorities must immediately inform the downstream Danubian States likely to be affected, and the ICPDR. The ICPDR is trying to prevent accidental pollution and to improve response capability by listing all relevant 'Accident Risk Spots'[69] in inventories, and by providing recommendations on guidelines for the Danube States to improve the standard of safety measures at risk sites and checklists to help controlling technical safety levels at Accident Risk Spots.

The ICPDR also has an important role in flood protection. The ICPDR decided in 2000 to establish the long-term Action Programme for Sustainable Flood Prevention in the Danube River Basin which is based on sustainable flood protection programmes developed in the various Danube countries and on existing networking structures as well. The Action Programme represents an overall framework which needs to be specified in further detail for sub-basins. In 2009, the ICPDR published 17 sub-basin flood action plans covering the entire Danube catchment.

The Danube Flood Alert System[70] (Danube – EFAS) was developed by the EC Joint Research Centre (EC JRC) as a part of the European Flood Alert System[71] (EFAS). The cooperation framework between Croatia and Hungary was established in the Pannonian Central Danube sub-

[69] The Accident Risk Spots inventory includes operational industrial sites associated with a major risk of accidental pollution, due to the nature of the chemicals being produced, stored or used at the plants, as well as contaminated sites including landfills and dumps in areas liable to flooding. The inventory of operating industrial sites was finalised in 2001 for most of the Danube countries, and the inventory of contaminated sites in flood-risk areas is under preparation. *http://www.icpdr.org/main/issues/accidental-pollution* (21.04.2013).

[70] 'Danube-EFAS information is available through a password-protected website, 24 hours a day, through an online service managed by the JRC. The system currently includes 700 rainfall stations in the Danube Basin, with plans for an increase to around 3,000 stations. Information includes rainfall and flood forecasts throughout the river basin, and maps showing rivers potentially reaching critical alert levels for all Danube tributary rivers with upstream areas larger than 4,000 km^2.' *http://www.icpdr.org/main/activities-projects/flood-management* (21.04.2013)

[71] 'Around 25 operational authorities across Europe, all together responsible for more than 85% of the major trans-national river basins, are receiving EFAS information as early flood warning reports for floods in the next 3-10 days.' ICPDR, *Report on Achievements in Flood Protection in the Danube River Basin* (ICPDR, 2010) p. 6.

basin and in the Drava-Mura sub-basin.[72] In the interest of enhanced cooperation and in order to facilitate compliance with obligations of the Convention, in particular where a critical situation in river conditions arises, the Convention requires that contracting parties shall provide mutual assistance upon the request of other contracting parties.[73]

2. Agreement (Articles 6 and 8)

An area of cooperation between the two countries is, among others, environmental safety and mutual assistance in case of accidental events that have transboundary effects.[74] As it has already been mentioned, in case of accidents causing transboundary effects and/or in case of the risk of their occurrence, Croatia and Hungary must promptly notify each other and exchange relevant information. It is also an obligation of both counties to provide assistance, at the request of the other country in accordance with the applicable agreements between them with international multilateral agreements, and the rules of procedure[75] which the Mixed Committee has to lay down.[76]
Both States are also obliged, according to Article 8 of the Agreement, to inform the public on environment and on the measures taken to prevent, monitor, reduce harmful effects on the environment and prevent accidents in the border areas that may have transboundary impact.

3. Treaty (Article 7)

The Treaty defines natural and civilization catastrophes as natural disasters, industrial accidents, and other adverse events of natural origin or origins of civilization with devastating effects, which significantly and severely damage or pose a direct threat to life and its conditions, to property and the natural environment, case in which it is necessary to take emergency protective measures.[77]
The procedure for informing each other about relevant dangers is regulated by Article 7 of the Treaty. Both countries must report on the dangers, and the risk of natural and civilization catastrophes that can put

[72] ICPDR, op. cit. n. 71, at p. 8.
[73] Art. 17(1).
[74] Art. 2, point 5.
[75] We could not find information about whether the rules of procedure were adopted or not.
[76] Art. 6.
[77] Art. 2, point A.

the other State in danger. For that purpose, each country has to collect the necessary data and information in its territory and announce them directly to the competent authorities of the other country. States are also obliged to report on natural disasters and civilization catastrophes arising in their area. The notification must include a description of the existing danger or events, information on the place, time, extent and consequences thereof, and the measures taken.[78] The country which is providing assistance in case of a catastrophe notifies the other state (that one that is asking for support) on the rescue forces that it has available, as well as on the possibilities and ways of providing assistance.
The Ministry of Internal Affairs is entitled in both States to retrieve and pass on information related to the risk of catastrophes or already incurred events in both States.

4. Croatian national legislation on information to the public in case of natural disasters

According to Article 38(4) of the Constitution of the Republic of Croatia[79] the right to access to information held by any public authority shall be guaranteed. Restrictions on the right to access to information must be proportionate to the nature of the need for such restriction in each individual case and necessary in a free and democratic society, as stipulated by law. The Croatian Law on the Right of Access to Information[80] that governs the right on access to information and the re-usage of information which is possessed by public authorities sets out the principles of freedom of information and re-use of information, restrictions on the right to access to information and reusing information, procedures for protecting said rights, the scope, mode and conditions for the appointment and dismissal of the Commissioner for Information, and the inspection of the implementation of the Act. But in Article 1(5) it prescribes that its provisions are not applicable to information that is classified information owned by international organizations or other countries, as well as classified information by public authorities arising from (or exchanged in the framework of) cooperation with international organizations or other countries.
Accessing environmental information is regulated by the Environmental Protection Act. The public has the right of access to environmental

[78] Art. 7(2).
[79] NN 85/2010., consolidated text.
[80] NN 25/2013.

information held by public authorities, persons supervised by public authorities and persons holding information for public authorities. It also has the right to be duly informed on environmental pollution, including the right to information on dangerous substances and activities, information on measures undertaken and in connection, the right to access to environmental information.[81] Activities of collecting and integrating collected environmental data and information for the purpose of ensuring and monitoring the implementation of the environmental protection and sustainable development policy is performed by the Croatian Environment Agency.[82]

The Croatian Environmental Protection Act prescribes that in the event of a major accident which has occurred on the territory of the State and which can cause transboundary effects on human health and the environment in another country, the Ministry shall notify, through the central state administration body competent for safety and rescue, that country and provide all the information needed in order to undertake necessary measures to the competent bodies of that country.[83] In accordance with Article 133(3), in the event of an immediate hazard to human health, material assets and/or the environment, public authorities must immediately notify the public through mass media or in any other appropriate way regardless of whether the hazard has been caused by human activity or natural phenomena. Paragraph 4 adds that public authorities and polluters shall, immediately upon discovery, notify the public of any exceeding of prescribed limiting values of the emissions to the environment without delay.

We should also mention the Protection and Rescue Act[84] which prescribes that every person has a right to full and prompt information about all the threats of catastrophe occurrence, and possibilities, methods, measures and activities of protection and rescue.[85] The

[81] Art.16(1) and (2).

[82] Environment Agency is responsible, among others, for the implementation or participation in implementation of international agreements and treaties in the field of environmental protection to which the State is a party, in the part relating to reporting in accordance with undertaken obligations; participating in projects and programmes in the field of environmental protection implemented pursuant to international agreements, upon authorisation from the Ministry, ensuring conditions for access to environmental information, held by it and under its supervision.

[83] Art. 115.

[84] NN 174/2004, 79/2007, 38/2009, 127/2010.

[85] Art. 16.

National Protection and Rescue Directorate performs among others the following tasks: in a unique geoinformation system, it collects, analyses, and directs information about threats and consequences of catastrophes and major accidents; operates a unique information database of operational and rescue forces, material resources, equipment, and the measures taken in the field of protection and rescue; it performs tasks of informing and alerting the population, and manages a unique warning system in the Republic of Croatia, and coordinates all participants in the system; it cooperates with the competent authorities of other countries and international organizations in protection and rescue activities; upholds a unique information database of all types of accidents and their consequences.[86]

5. Hungarian national legislation on information to the public in case of natural disasters

The Hungarian Fundamental Law ensures the right to access to and to the dissemination of data of public interest for everyone.[87] The right to access to data of public interest is not limited to access to environmental information, but in any case includes it.[88] The access of the civil population to information is regulated by other legal instruments as well, namely Act CXII of 2011 on informational self-determination and the freedom of information and also Decree 311/2005. (XII.25.) on the process of access to environmental information by the public.

Also, Act LIII of 1995 contains a few regulations regarding this topic. It firstly declares that every authority is obliged to share environmental information with the public.[89] The precondition of the fulfilment of this obligation is naturally the systematic collection and analysis of these data.[90] This act also briefly regulates the participation of the public in environmental protection, declaring that individuals, legal persons and other entities without legal personality can take part in procedures

[86] See Art. 35 (1).
[87] Fundamental Law of Hungary, Article VI(2).
[88] A. Pánovics, *Az Aarhusi Egyezmény és alkalmazása az Európai Unió jogában* PhD thesis (Pécs, 2010). available at *http://www.kothalo.hu/doksik/aarhus/panovics.pdf* (06.07.2011) p. 96.
[89] Act LIII of 1995, Art. 12(1)-(7).
[90] Art. 49-50-

concerning environmental protection.[91] The act deals with the rights of associations protecting the environment in details.[92]
These laws do not contain rules which would oblige State institutions to inform the public in cases of emergency, with one exception: namely, local authorities should inform the civilian population affected by a smog emergency situation.[93]
Only Decree 311/2005. (XII. 25.) on the process of access to environmental information by the public regulates the obligation to inform the public in case of emergency situations explicitly. In 6 §, it declares that in the event of an imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information held by or for public authorities which could enable the public likely to be affected to take measures to prevent or mitigate harm arising from the threat is disseminated, immediately and without delay.[94]
In the near past, warning systems underwent an examination. On 4th October 2010, the wall of a red mud reservoir had broken and 800 hectares of territory had been flooded by red mud and alkaline water. Besides the personal injuries and material damage, the industrial accident also caused huge environmental damage in the Torna and Marcal rivers: all vegetation has been exterminated by the pollution.[95] According to official reports, even though the Ph. value of the water flowing into the Mosoni Danube was higher than the normal level, the pollution did not spread to the Danube thanks to of the efforts made by the experts involved.[96] Since the pollution did not spread to international rivers, there was no direct threat of transboundary damage. Right after the catastrophe, Hungary has alarmed the Monitoring and Information Centre of the European Commission through the national authority

[91] Art. 97(1).
[92] Art. 98-99.
[93] Art. 48(6) point c).
[94] The text of this article is identic to the EU Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, Article 7(4).
[95] Z. Vágföldi, 'A vörösiszap katasztrófa környezeti hatásai, kárelhárítási folyamata, alkalmazott módszerei', 1 *Hadmérnök* (2011) p. 263.
[96] 'Vörösiszap' tragédia, Official website of the Hungarian government, available at *http://vorosiszap.bm.hu/?cat=9* (2.4.2013).

responsible for civil emergency situations.[97] According to the news in Croatia, the Croatian National Protection and Rescue Directorate was notified by the Monitoring and Information Centre of the EU mechanisms for cooperation in civil protection. Immediately upon receipt of the information, the National Protection and Rescue Directorate contacted the directorate for catastrophes of Hungary and was in direct contact with colleagues from Hungary until the immediate threat was averted.[98]

V. Conclusion

Cooperation in the field of environmental protection between the Republic of Croatia and Hungary is regulated by multilateral treaties. These norms are complemented by bilateral treaties, determining the details of the co-operation. This cooperation is especially important in the case of pollution of transboundary waters, since water contamination spreads rapidly. Several projects were elaborated with the aim of efficient co-operation. There are especially important fields of this co-operation, notably including mutual notification in cases of emergency. The following chart shows the relevant norms regulating the core obligations of this area in national and international law.

Obligation	DRPC	Treaty	Agreement	Aarhus Convention	Croatian national law	Hungarian national law
Reporting obligation (to an organization)	Article 10	–	–	–	Environmental Protection Act, Article 130(1)	–
Exchange of information (among Contracting Parties)	Articles 11-12	Article 3	Article 5	Article 10	–	–

[97] European Commission, Humanitarian Aid and Civil Protection, Monitoring and Information Centre, available at *http://ec.europa.eu/echo/policies/disaster_response/mic_en.htm* (02.04.2013).

[98] 'DUZS: nema opasnosti za Hrvatsku zbog industrijske nesreće u Mađarskoj', available at *http://www.monitor.hr/clanci/duzs-nema-opasnosti-za-hrvatsku-zbog-industrijske-nesrece-u-madarskoj/39879/* (02.05.2013).

Information to the public	Article 14	–	Article 8	–	Constitution of the Republic of Croatia, Article 38(4); Law on the Right of Access to Information; Environmental Protection Act, Protection and Rescue Act	Fundamental Law of Hungary, Article VI (2) Act LIII of 1995 Act CXII of 2011
Immediate information to Contracting Parties	Article 16	Article 7	Article 6 and 8	–	–	–
Immediate information to the public	–	–	–	Article 5	Environmental Protection Act, Article 133(3) and 4, Protection and Rescue Act	311/2005. (XII. 25.) regulation on the process of access to environmental information by the public, 6§

The fulfilment of the obligations related to this latter area has already passed the examination with credit, for example at the occasion of the red mud catastrophe.

Based on the experiences, the co-operation of Croatia and Hungary is one of the most successful collaborations in the region. Mechanisms of the European Union (e.g. Monitoring and Information Centre of the European Commission) also play an important role and the accession of the Republic of Croatia to the European Union will only strengthen the cooperation further.

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Some measures of greening the economy in the EU and their reflections in regional development

I. Green economy as a central concept of the strategy for sustainable development

1. The concept of sustainable development

The idea of sustainable development was conceived at the international level first in the Stockholm Declaration adopted by the United Nations Conference on the Human Environment in 1972. It called for more prudent care for environmental consequences of human activities to avoid irreversible harm to the earthly environment on which human life and wellbeing depend. Principle 2 of the Declaration emphasized that natural resources must be safeguarded for the benefit of present and future generations through careful planning and management.[1] The most often quoted definition of sustainable development, however, was given by the Brundtland Report in 1987:

> 'Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. […] [I]n essence, sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations.'[2]

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[1] *http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503* (28.05.2013).
[2] Report of the UN World Commission on Environment and Development (WCED) '*Our Common Future'*. It dealt with the deterioration of the human environment and natural resources and its consequences for economic and social development (Oxford University Press, 1987). UN Documents, A/42/427, Chapter 2: Towards

This definition was reinforced and further developed as a principle of international environmental policy by the 1992 Rio Declaration on Environment and Development.[3] The UNCED adopted "Agenda 21", an action programme for sustainable development, reflecting a global consensus and political commitment at the highest level on development and environmental cooperation. The programme aims at the elaboration and implementation of sustainable development patterns to be applied worldwide.[4]

These commitments were confirmed at the next World Summit on Sustainable Development conveyed in Johannesburg in 2002. The summit addressed a range of measures: inter alia, instruments to eliminate poverty and environmental degradation. The Johannesburg Declaration on Sustainable Development and the Plan of Implementation further evolved the concept of sustainable development, emphasizing that it's interdependent and mutually reinforcing three pillars – economic development, social development and environmental protection – have to be advanced and strengthened at the local, national, regional and global levels.[5] In the meantime, the UN conveyed the Millennium Summit in New York, in 2000 with a view to foster a global partnership in order to reduce extreme poverty and to promote, inter alia, environmental sustainability. The UN Millennium Declaration – the resolution adopted – known as "Millennium Development Goals" (further: MDGs) sets out a series of targets with a deadline of 2015. One of these goals is to ensure environmental sustainability, to integrate principles of sustainable development into country policies and programmes and to reverse the loss of environmental resources.[6]

Sustainable Development, points 1, 15., available at *http://www.un-documents.net/ocf-02.htm#I* (28.05.2013).

[3] The Rio Declaration on Environment and Development. S. P Johnson, *The Earth Summit, The United Nations Conference on Environment and Development* (UNCED) (London, Graham & Trotman 1993) p. 118.

[4] Agenda 21, Preamble, Johnson, op. cit. n. 3, at pp.125-130.

[5] The Johannesburg Declaration on Sustainable Development, points 5. and 8. UN Report A/CONF.199/20*, available at *http://www.un.org/jsummit/html/documents /summit_docs/131302_wssd_report_reissued.pdf* (28.05.2013).

[6] UN Millennium Declaration (2000), A/RES/552, available at *http://www.un.org/millennium/declaration/ares552e.pdf* (28.05.2013). The 8 Millennium Development Goals are: 1) eradicate extreme hunger and poverty, 2) achieve universal primary education, 3) promote gender equality and empower women, 4) reduce child mortality, 5) improve maternal health, 6) combat

Despite the efforts and certain positive results of international organizations and national governments around the world, including the European Union and its Member States, to implement these strategies and programmes, and to cooperate to this end, unsustainable trends still exist, and there are continuing concerns over unsatisfactory economic and environmental and social developments. To mention only a few signals: the worldwide financial and economic crisis that started in 2008 resulted in recession slowing down economic growth, many environmental challenges still persist and became even more acute. Increasing demand for resources (i.e. land, water, forests, and natural ecosystems) has led to increasing depletion and degradation; biodiversity loss could not be sufficiently slowed down, global greenhouse gas emissions continue to rise, the impact of climate change is growing, depletion and pollution of water resources and marine environment pose increasingly serious problems; and many others could be listed. As for the social pillar of sustainable development, there are still millions of people in the developing world who live in extreme poverty, one sixth of the world's population is undernourished, lacking food, clean drinking water, basic sanitation, education, etc.[7] Progress towards the MDGs is very uneven geographically; many of them can hardly be reached by the set deadline. These negative economic, environmental and social impacts will be exacerbated by the increasing world population that reached 7 billion in 2011 and expected to rise to 9 billion by 2050.[8] These trends are definitely not sustainable in the original sense of the concept, i.e. to increase economic growth and well-

HIV/AIDS, malaria and other diseases, 7) ensure environmental sustainability, 8) develop a global partnership for development; available at *http://www.unmillenniumproject.org/goals/index.htm* (28.05.2013).

[7] Every fifth people in the developing world lacks access to sufficient clean water; about half of the developing world's population – 2,6 billion people – do not have access to basic sanitation, more than 660 million people of without sanitation live on less than US$ 2 a day, more than 385 million on less than US$ 1 a day (UNDP data 2005); in 2010 there were still 1,212 million people living in extreme poverty, i.e. on 1.25$ a day. See for more statistics and analysis on progress: *UNDP Human Development Report 2013 The Rise of the South: Human Progress in a Diverse World*, available at *http://www.undp.org/content/dam/undp/library/corporate/HDR/2013GlobalHDR/English/HDR2013%20Report%20English.pdf* (31.05.2013). On the right to healthy environment see e.g. A. Komanovics and N. Mazur Kumrić, *European regional perspective on environment and human rights*, in this volume.

[8] Commission, *Rio+20: towards the green economy and better governance*, COM(2011)363, Brussels, 20.6.2011, p. 3.

being today which will not result in reducing growth and well-being tomorrow entitling future generations to same economic opportunities and welfare as is available to current generations.[9]

To find new, more effective solutions and to accelerate changes necessary for attaining sustainable development goals, twenty years after the first 'Earth Summit' the second UN Conference on Sustainable Development was conveyed again in Rio de Janeiro in 2012. The Rio+20 Conference focused on two main themes: how to build a 'green economy' to achieve sustainable development and lift people out of poverty, including support for developing countries that will allow them to find a green path for development; and how to improve international coordination within a renewed institutional framework for sustainable development. The outcome document of the conference titled 'The future we want' reaffirms the former commitments, objectives and principles of sustainable development, and the states readiness to further develop and implement the Rio Agenda 21 and the Johannesburg Plan of Implementation adopted in 1992 and in 2000, and to achieve the Millennium Development Goals. In assessing the progress to date and remaining gaps, the outcome document devotes a chapter to the '*green economy*' in the context of sustainable development and poverty eradication. The Conference decided to establish a universal intergovernmental High Level Political Forum to replace the former Commission on Sustainable Development, and detailed a framework for action and follow up. It lists a series of thematic areas and cross-sectoral issues where implementation gaps should be eliminated to achieve sustainable development. This includes, *inter alia*, poverty eradication, agriculture, energy efficiency, sustainable cities and human settlements, transport, climate change, biodiversity, desertification, land degradation, drought, water and sanitation, health care, employment, social protection, education and so on. Under the heading of sustainable consumption and production, the document urged the development of a 10 year framework programme for the realization of indispensable

[9] United Nations Environment Programme (UNEP), *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication*, (Nairobi, Kenya, UNEP 2011) p. 17., available at *www.unep.org/greeneconomy* (25.05.2013).

fundamental changes in the current consumption and production patterns.[10]

2. Green economy in the context of sustainable development

Chapter III of the Rio+20 outcome document, the 'Future we want' considers *green economy* as one of the important tools available for achieving sustainable development and that it could provide options for policymaking, however without being a rigid set of rules. It emphasizes that 'it should contribute to eradicating poverty as well as sustained economic growth, enhancing social inclusion, improving human welfare and creating opportunities for employment and decent work for all, while maintaining the healthy functioning of the Earth's ecosystems'.[11] The document states that the green economy in the context of sustainable development should be guided by the same principles defined in declarations, programmes and action plans adopted by former world conferences, namely, the 1992 Rio Declaration, the Agenda 21 and the Johannesburg Plan of Implementation; and operates by almost the same set of instruments identified in them. Green economy policies should be consistent with international law and respect national sovereignty over their natural resources. It should be led by national governments with the participation of all relevant stakeholders, via strengthened international cooperation. Green economy should promote sustained and inclusive economic growth, and address trans-boundary or global environmental problems. The document considers urgent action on unsustainable patterns of production and consumption as fundamental in addressing environmental sustainability and promoting conservation and sustainable use of biodiversity and ecosystems, regeneration of natural resources and the promotion of sustained inclusive and equitable global growth. For this to be achievable, the integration of economic and environmental factors is necessary. This policy should operate through a mix of instruments, including regulatory, voluntary and other means applied at the national level; and consistent with obligations under international agreements.[12]

[10] UN Conference on Sustainable Development, Outcome Document, *The future we want*, A/CONF.216/L.1*, (Rio de Janeiro, UN 2012), available at *http://sustainabledevelopment.un.org/futurewewant.html* (25.05.2013).
[11] UN Conference on Sustainable Development, op. cit. n. 10, at p. 9.
[12] UN Conference on Sustainable Development, op. cit. n. 10, at pp. 10-11.

To find more effective ways to get out of the economic and financial crisis, as well as for the preparation of the Rio+20 Conference, the concept of green economy, as a tool to support sustainable development, has received significant international attention. Although a generally accepted definition or agreement on its guiding principles and policy measures is still lacking, several characteristics can be identified as commonly mentioned in the various concepts that have emerged so far.[13] In a leading contribution to the Rio+20 Conference, the green economy is defined as one that results in 'improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities' (UNEP 2010). 'In its simplest expression, a green economy is low-carbon, resource efficient, and socially inclusive. In a green economy, growth in income and employment are driven by public and private investments that reduce carbon emissions and pollution, enhance energy and resource efficiency, and prevent the loss of biodiversity and ecosystem services.'[14]

The expression '*green economy*' shows the inherent failure and distortions of the current economic model aiming at economic growth by encouraging wasteful use of natural resources and environmental degradation. It created new wealth through a '*brown economy*' model based on fossil fuels, while not substantially addressing social marginalization, environmental degradation and resource depletion. In contrast, the future 'green economy' would reverse these unsustainable trends, encouraging a transition to a new model in which economic growth, material wealth will not be at the expense of growing environmental risks, depletion of natural resources and ecological scarcities, and social inequalities. Green economy will not be an obstacle to growth, on the contrary, it will be a new engine of growth; it will generate new green jobs (which will offset job losses in a transition to green economy); it is a strategy to eliminate persistent poverty. The growth aspect of green economy is expressed by the concept of '*green*

[13] For a good collection of publications see A. Cameron and S. Clouth, *A guidebook to the Green Economy, Issue 1: Green Economy, Green Growth, and Low Carbon Development – history, definitions and a guide to recent publications* (New York, UNDESA 2012), available at *http://www.uncsd2012.org/content /documents/528Green%20Economy%20Guidebook_100912_FINAL.pdf* (25.05.2013).

[14] UNEP, op. cit. n. 9, at p. 16.

growth'; however, there are no considerable differences between the objectives and tools of the two concepts.[15]

There are many changes required for the transition to a green economy, e.g. the role of policy-making in controlling excessive environmental degradation, it requires, inter alia, the use of market-based instruments as well as regulatory measures, such as changes in fiscal policy, i.e. reform and reduction of environmentally harmful subsidies, more efficient pricing of natural resources, greening public procurement, energy and resource savings, energy and material efficiency in manufacturing industry and better waste management. In this context, sustainable production distribution and consumption of goods and services must also be mentioned as an important factor of green economy.

The concept of 'green economy' does not replace 'sustainable development': it can be considered as a new model of the economy, a transformation of the current 'brown economy' to a sustainable one, as a way to reach its ultimate objective, that is sustainable development, through reconciling the economic and environmental pillars, however without ignoring social aspects.[16] This is expressed by the definition given by the UN SD Knowledge Platform: 'Sustainable development emphasizes a holistic, equitable and far-sighted approach to decision-making at all levels. It emphasizes not just strong economic performance but intragenerational and intergenerational equity. It rests on integration and a balanced consideration of social, economic and environmental goals and objectives in both public and private decision-making. The concept of green economy focuses primarily on the intersection between environment and economy. This recalls the 1992 Rio Conference: the United Nations Conference on Environment and Development.'[17] This is the reason for the presence of many aspects and measures in the concept of green economy which are also found in the concept of sustainable development.

[15] See the comparison between concepts of green economy, green growth and low carbon economy in Cameron and Stuart, op. cit. n. 13, at pp. 6-10, 60-62.
[16] Cameron and Stuart, op. cit. n. 13, at p. 61.
[17] *http://www.uncsd2012.org/index.php?menu=62* (25.5.2013)

3. Green economy in the EU strategy towards sustainable development

Sustainable development has been an overarching objective of the European Union since the adoption of its Sustainable Development Strategy (hereinafter EUSDS) in 2001, renewed in 2006 and reviewed again in 2009. The EUSDS is based on the abovementioned international concepts and principles, and the three pillar approach: economic and social development and environmental protection. The main aims of the EUSDS are: a continuous improvement of quality of life for present and future generations, promotion of effective management of natural resources, economic prosperity, environmental protection and social cohesion. The main challenge is to change current unsustainable consumption and production patterns and to integrate the environmental dimension into policy-making, in order to break the link between economic growth and harmful environmental consequences and environmental degradation (de-coupling).

To turn the economic and financial crisis into an opportunity, the EU considers it crucial 'to address financial and ecological sustainability and develop a dynamic low-carbon and resource efficient, knowledge-based, socially inclusive society'. The focus is on '*green growth*', since green measures help to revive the economy and create jobs, and stimulate new technologies and reduce the impact on climate change, the depletion of natural resources and the degradation of ecosystems.[18] This is reflected in a key policy document for the EU sustainable growth strategy adopted in 2010, the 'Europe 2020'. Priorities of the strategy are: smart growth – development of an economy based on knowledge and innovation; sustainable growth – promoting a more resource efficient, greener and more competitive economy; inclusive growth – fostering a high-employment economy delivering social and territorial cohesion. Flagship initiatives attached to the strategy envisages a range of policy measures, e.g. on resource and energy efficiency, biodiversity, action on raw materials, decarbonise the economy, use of market-based

[18] Commission, *Mainstreaming sustainable development into EU policies: Review of the European Union Strategy for Sustainable Development*, COM(2009)400, Brussels, 24.7.2009, pp. 1-2.

instruments, greening of tax systems, phasing out of environmentally harmful subsidies, etc.[19]

During the preparations for the 2012 Rio+20 Conference on Sustainable Development, the Commission presented its view on the EU attitude towards 'green economy'. It sated that responses to challenges posed by growing world population and environmental pressures 'will not come from slowing growth, but rather from promoting the right kind of growth'. Conventional model of economic progress should be fundamentally changed: 'What is needed is an economy that can secure growth and development, while at the same time improving human well-being, providing decent jobs, reducing inequalities, tackling poverty and preserving the natural capital upon which we all depend. Such an economy – a green economy – offers an effective way of promoting sustainable development, eradicating poverty and addressing emerging challenges and outstanding implementation gaps.'[20] The EU efforts for greening its economy can build on its existing strategies, such as: climate change, biodiversity, sustainable consumption and production, research and innovation. To achieve the transition to a green economy three policy dimensions should be addressed: 1) investing in the sustainable management of key resources and natural capital ('what'); 2) establishing the right market and regulatory conditions ('how'); 3) improving governance and private sector involvement ('who'). Important role should be given to regulatory instruments combined with market-based ones, such as eco-taxes, tradable permits and environmental subsidies.

Sustainable development is a fundamental objective of the EU environmental policy. The fifth Environmental Action Programme adopted after the 1992 Rio Conference has the title 'Towards Sustainability'. The Programme is based on the Rio concept of sustainable development; it can be considered as the implementation of the Rio Declaration and the Agenda 21 at EU level. It calls for significant changes, inter alia, in current patterns of development, production and consumption and behavior.[21] The Sixth EAP titled 'Our

[19] Commission, *Europe 2020, A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020, Brussels, 3.3.2010.

[20] Commission, *Rio+20*, op. cit. n. 8, at p. 5.

[21] Resolution of the Council and the Representatives of the Governments of the Member States on the *Community programme of policy and action in relation to the*

Future, Our Choice' also aims at a contribution to the EU Sustainable Development Strategy; it forms a basis for its environmental dimension. Its priorities are: tackling climate change, preservation of nature and biological diversity, protection of environment and human health, improvement of quality of life, improvement of resource efficiency, resource and waste management. In its proposal the Commission considered sustainable development as a major opportunity for Europe: 'If we can support and encourage the development of a greener market place, then business and citizens will respond with technological and management innovations that will spur growth, competitiveness, profitability and job creation.'[22]

The Commission has already prepared the new, Seventh Environmental Action Programme for the EU.[23] The title of the programme 'Living well within the limits of our Planet' reflects the idea of 'one planet living', which require a significant shift in global consumption patterns, to stop the growing human impact on the planet, which destroys nature and the natural resources upon which humanity ultimately depends for its survival.[24] The draft Seventh EAP is an overarching framework for the EU environment policy to 2020, building on policy initiatives of the Europe 2020 strategy for smart sustainable and inclusive growth. As a follow up to the UN Rio+20 Conference, the programme sets as its objective to turn the Union into a resource efficient, green, competitive

environment and sustainable development (Fifth Environmental Action Programme) OJ C 138, 17 May 1993, p. 2.

[22] Commission Communication on the sixth environment action programme of the European Community, *Environment 2010: Our future, Our choice*, COM(2001)31, Brussels, 24.1.2001, p. 11.

[23] Commission, *Proposal on a General Union Environment Action Programme to 2020* '*Living well within the limits of our planet*' (Seventh EAP), COM(2012)710, Brussels, 29.11.2012

[24] 'We are living as if we have an extra planet at our disposal. We are using 50 per cent more resources than the Earth can provide, and unless we change course that number will grow very fast. On current trends, humanity will require 2.9 planets by 2050.' The WWF's one planet perspective proposes to manage, govern and share natural capital within the earth's ecological boundaries. This concept uses the ecological footprint accounting framework that tracks humanity's competing demands on the biosphere by comparing human demand against the regenerative capacity of the planet. WWF, *Living Planet Report 2012 (Spec. Ed.) On the road to RIO+20*, (Gland, Switzerland, WWF 2012), available at *http://awsassets.panda.org/downloads/lpr_2012_rio_summary_booklet_final_120509.pdf* (25.05.2013).

and low carbon economy, in the context of sustainable development and poverty reduction. Green economy is seen the one that secures growth and development, safeguards human health and well-being, provides decent jobs, reduces inequalities and invests in and preserves natural capital, as a central part of a broader strategy for sustainable development. The programme identifies principles and 9 priority objectives, *inter alia*, to protect, conserve and enhance the EU's natural capital and strengthen ecological resilience; to turn the EU into a resource efficient, green and competitive low carbon economy; to effectively address environment-related threats to health; to improve environmental integration and policy coherence, i.e. the way environmental concerns and requirements are reflected in other policies.
For building the green economy, the programme envisages measures to further improve the environmental performance of goods and services on the EU market over their whole life cycle through measures to increase the supply of environmentally sustainable products, and stimulate a significant shift in consumer demand for these products. This will be achieved using a balanced mix of incentives for consumers and businesses, market-based instruments and regulations to reduce the environmental impacts of their operations and products.[25]

II. The EU Integrated Product Policy

1. Integration of environmental requirement into product policy

The expression 'integrated product policy' indicates the implementation of environmental integration principle into product policy. Integration of environmental requirements into other policies is a key principle defined in international environmental policy. Principle 4 of the 1992 Rio Declaration states that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.
'Agenda 21' contains a whole chapter (Chapter 8) on integrating environment and development in decision-making, in which it explains the objectives and activities for policy-making, legislation, use of

[25] The programme envisages the review of existing product legislation such as the Eco-design and Energy Label Directives and the Eco-label Regulation, and the full implementation of waste legislation, with a view to improving the environmental performance and resource efficiency of products throughout their lifecycle, thus ensuring a more coherent framework for sustainable production and consumption in the EU. Commission, *Seventh EAP*, op. cit. n. 23, at p. 18.

economic instruments, environmental accounting and means of implementation.[26] This principle has been reinforced and further developed by subsequent international conferences on sustainable development.

The integration principle is one of the key principles of the EU environmental and sustainable development policies as well; both are expressed in the EU environmental action programmes and in the EU Treaties.[27] The Fifth and Sixth EAP are based on these principles requiring a considerable change in almost all major policy areas of the European Union to achieve sustainable development. The full integration of environmental protection requirements into the definition and implementation of other Community policies is considered as the necessary instrument, a 'basic strategy' in bringing about these changes. The EU integration strategy, the so-called 'Cardiff Process' was launched in 1998; it is based on a horizontal approach with the aim to review existing policies and to introduce integration strategies for action in key areas, such as agriculture, transport, energy, industry, etc.[28] The strengthening of the integration process is called for in almost all political documents in relation to sustainable development.

2. 'Life-cycle thinking' as a key concept of the IPP

The EU started to develop its Integrated Product Policy (IPP) by the Commission's Green Paper in 2001, followed by a communication in 2003.[29] The IPP aims at the reduction and elimination of negative effects of goods and services that their production and consumption, and the disposal of goods at the end of their use impose on the environment.

[26] 'Rio Declaration on Environment and Development', and 'Agenda 21' Report of the United Nations Conference on Environment and Development (Annex I) UN Doc A/CONF.151/26 (Vol. I).

[27] Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU), as a result of the Lisbon Treaty modifications, coming into force in 2009. Article 11 TFEU Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development. OJ C 326, 26, October, 2012, p. 1.

[28] Commission, Partnership for Integration – A strategy for Integrating Environment into EU Policies, Cardiff – June 1998, COM(98)333, Brussels, 27.5.1998.

[29] Commission, *Green Paper on Integrated Product Policy*, COM(2001)68, Brussels, 07.02.2001; Commission, *Integrated Product Policy, Building on Environmental Life-Cycle Thinking*, COM(2003)302, Brussels, 18.6.2003.

Traditionally, product related environmental policies focused, first of all, on large point sources of pollution, such as industrial emissions – production phase, or waste management issues – the phase after the useful life-time of products. The IPP intends to complement these policies by a policy that looks at the whole of the product life-cycle, including the use phase. This should ensure that environmental impacts of products are addressed in an integrated way throughout their life-cycle, and that the environmental burden is not just shifted from one part of the life-cycle to another. The integrated product policy is a supplement to existing environmental policies, and an integral part of the EU sustainable development strategy.[30] The consideration of the whole life-cycle of products covers all stages from the pre-production phase (choice of energy sources and materials, mining of raw materials, product design) to production processes, packaging, distribution, then the use phase and the final use (in which stages maintenance, repair and re-use of products have a role to play), to the end of the useful life-time and the management of waste.[31] In this final stage the so-called waste hierarchy[32] has to be applied, according to which recycling and/or recovery should be preferred, since the waste here is used as secondary raw material or energy source for the production of new products; burning and landfill of waste should be the last choice, when alternative solutions for its utilization are not possible. In the product life-cycle more attention should be paid to pre-production (energy, mining of raw materials) and post-production (consuming, use) phases since they have considerable harmful impacts on the environment.

3. Principles and tools of the IPP

The integrated product policy is defined as a 'public policy which explicitly aims to modify and improve the environmental performance of product systems'.[33] The Green Paper defines the role of public

[30] Commission, *Integrated Product Policy, Building on Environmental Life-Cycle Thinking*, op. cit. n. 29, pp. 4-5.
[31] See the scheme of the product life-cycle in the Commission Green Paper, op. cit. n. 29, p. 6.
[32] Commission, *Taking sustainable use of resources forward: A Thematic Strategy on the prevention and recycling of waste* COM(2005)666, Brussels, 21.12.2005, p. 4.
[33] Ernst & Young, *Developing the Foundation for Integrated product Policy in the EU*, Executive Summary, (Brussels, Commission, 2000) p. 9, available at *http://ec.europa.eu/environment/ipp/pdf/ippsum.pdf* (25.05.2013).

authorities within the IPP approach as the facilitation of these goals, which in most cases will be achieved through incentives and voluntary measures rather than through direct intervention (i.e. compulsory legislation). The role of the policy is to set the main objectives and provide the different stakeholders with the means and incentives to achieve these objectives. The integrated product policy intends to find business oriented solutions of environmental problems in co-operation with stakeholders. Under the IPP approach preference is given to non-binding instruments. Although legislation is not the primary focus of the IPP, it cannot be generally avoided: legislation should be a part of a mix of instruments, and has to be used where voluntary approaches don't deliver the envisaged results, and legal security is needed to avoid distortion of competition, and to protect health, safety and environment. This concerns the legal framework for voluntary action, and legislation to introduce life-cycle oriented approach into other types of legislation.

Five key principles of the IPP are defined: the application of the life-cycle approach; working with the market actors: encouraging the supply and demand for greener products via incentives; involvement of all stakeholders: all sectors who come into contact with products, e.g. industry, consumers, government etc.; continuous improvement to decrease a product's environmental impact across its life-cycle rather than setting precise thresholds; using a variety of policy instruments: mainly voluntary approaches, and mandatory ones depending on the effectiveness of the measure.[34]

In addition, more general environmental policy principles should also apply, such as prevention and rectification of environmental damage at source, high level of protection, the polluter pays principle, the principle of precaution, and most importantly the principle of integration of environmental requirements into other policies. Furthermore, some more specific principles of environmental policy will be particularly important in guiding actions in this area, such as substitution of dangerous substances by less dangerous ones and the principle of minimization (a product should make the smallest possible impact on humans and the environment). The principle of producer responsibility makes the producer responsible for the impact of products on the environment throughout the whole life-cycle of the product, i.e. not only during the production phase but prior to and after the manufacturing phase,

[34] Commission, *Integrated Product Policy, Building on Environmental Life-Cycle Thinking*, op. cit. n. 29, at p. 5.

extending the responsibility of producers for the selection of raw materials as well as for the use and waste management phases. The producer responsibility may take rather different forms, such as labeling and packaging requirements, obligations to warn users, to take back used products, or to collect waste.[35]

The addressees of this policy are, first of all, the market actors: producers and consumers, which is reflected in the choice of measures designed within the framework of the IPP. 'The challenges of making products more environmentally friendly have to be taken up first and foremost by businesses and consumers as the main decisions on the environmental impacts of products are taken at the design table and in the shops. Once a product is put on the market, there is relatively little than can be done to improve its environmental characteristics. Equally, all design efforts will be in vain if consumers do not buy greener products or use them in an environmentally friendly way. Therefore, the Integrated Product Policy approach will primarily focus on eco-design of products and the creation of information and incentives for an efficient take-up and use of greener products.'[36]

The constituent elements of the IPP can be grouped under three categories.

Tools for creating the right economic and legal framework:

- getting the prices right (to include the costs of all environmental impacts, polluter pays principle);
- environmental taxes and subsidies (e.g. energy related taxes);
- voluntary environmental agreements (between public authorities and the industry);
- standardization (environmental standards);
- public procurement (greening the tendering procedure);
- other product legislation (restriction/prohibition of the use/marketing of certain dangerous substances).

[35] The Sixth EU Environmental Action Programme refers to these principles, Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Action Programme, OJ L 242, 10.9.2002, p. 1. Examples for EU legislation establishing producer responsibility are: Directive 94/62 on packaging and packaging waste; Directive 2000/53 on end-of life vehicles; Directive 2012/19/EU on waste electrical and electronic equipment (WEEE); Directive 2006/66 (as amended) on batteries and accumulators and waste batteries and accumulators.

[36] Commission, *Integrated Product Policy, Building on Environmental Life-Cycle Thinking*, op. cit. n. 29, at p. 3.

Promoting the application of life-cycle thinking:

- Environmental Management and Audit System (EMAS) – a management tool for companies to evaluate, report and improve their environmental performance;
- product design (ecological design) a strategy for the systematic integration of environmental considerations into the design process across the product life cycle.

Giving consumers information for their green choice

- green public procurement (in 'green tendering procedure' public authorities set environmental requirements, e.g. the use of eco-label, eco-design, EMAS;
- environmental labeling (giving consumers credible information about environmental qualities of products).

4. Sustainable production and consumption, integrated industrial policy in the EU

Changing unsustainable production and consumption patterns is listed among the key priorities in all strategy documents on sustainable development. Production and consumption are sustainable when they use less raw material and energy, prevent waste generation, discharge less pollution, thus have lower impact and risks to the environment. To improve the effectiveness of the measures developed within the framework of the integrated product policy, the EU developed the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan (hereinafter: SCP/SIP)[37] which is a framework to improve the energy and environmental performance of products and foster their uptake by consumers. While many instruments adopted under the IPP served its goals satisfactorily, a number of shortcomings were identified, e.g. the connection between voluntary and regulatory instruments, implementation gaps, etc. Compared with the instruments developed within the IPP, the new Action Plan does not define new ones; rather, it intends to improve their effectiveness, first of all, via amendments of legal regulations and better coordination of their implementation by the Member States.

The economic and financial crisis refocused the attention to the EU industrial policy. The new approach to this policy would put the EU economy on a dynamic growth path strengthening EU competitiveness,

[37] Commission, *Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan*, COM(2008)397, Brussels, 16.7.2008.

providing growth and jobs, and enabling the transition to a low-carbon and resource-efficient economy.[38] This requires an understanding of industrial policy in a wider sense, i.e. to consider all other policy initiatives that can enhance its competitiveness, such as measures in transport, energy, environmental and consumer protection, single market and trade policies. Several measures applied within the IPP has been considered to contribute to an integrated, sustainable EU industry, such as adaptation of standardization to climate change, sustainability, energy efficiency, technological innovation, etc. solutions; ensuring access to raw materials and promotion of the increased use of renewable raw material, recycling and substitution, leading to resource efficiency and improving at the same time the environmental balance. Transition to a resource efficient Europe needs a longer term strategy to stimulate carbon and energy and resource-efficient industry with market-based environmental regulation. Therefore, the new, integrated industrial policy focuses on sustainable growth and job creation, including product policy with a life-cycle perspective, using instruments such as eco-design, energy and eco-labeling, encouraging voluntary instruments such as the EMAS system. To develop the EU market for 'greener' goods and services, encouragement of innovation, improvements to standardization and certification schemes, and the wider use of green public procurement are needed. The integrated industrial policy should be built on an enhanced corporate social responsibility, which requires, inter alia, the encouragement of sustainable growth, sustainable production and consumption through giving consumers the information enabling them to purchase environmentally friendly goods and services. This should include information on the ecological footprint of products and services.[39]

Inefficient information on resource efficient products constitutes a barrier to their market uptake. The right incentives for citizens and public authorities to choose green products and services should be provided by appropriate price signals and clear environmental information. However, there is no generally accepted, science based definition what green products and a green organization are. The

[38] Commission, *An Integrated Industrial Policy for the Globalisation Era, Putting Competitiveness and Sustainability at Centre Stage* COM(2010)614, Brussels, 28.10.2010.

[39] Commission, *An Integrated Industrial Policy for the Globalisation Era*, op. cit. n. 38, at p. 23.

Commission defines 'green products' as those that use resources more efficiently and cause less environmental damage along their life cycle, from the extraction of raw materials, to their production, distribution, use, up to the end of life (including reuse, recycling and recovery) compared to other similar products of the same category. 'Green products' exist in any product category regardless of being eco-labelled or marketed as green; it is their environmental performance that defines them as 'green'.[40] There are different methods used for measuring environmental performance of products, however, they vary in Member States, resulting in different results when applied to the same product or organization. This causes incomparability, unnecessary costs for businesses, difficulties in compliance with various labeling and verification requirements, which causes obstacles to free movement in green products. Furthermore, inefficient information results in the lack of consumers' trust in green claims. To reduce the current uncertainty on 'green characteristics' of products through providing clear, reliable and comparable information, the EU started to develop new methods for measurement. These are based on the calculation of the environmental footprint of products, using the life-cycle assessment approach. These methods will be tested and evaluated; the pilot phase starts in 2013.[41]

III. Economic incentives for environmental protection

The European Union aspires to become the most dynamic and competitive economy in the world. The Lisbon Strategy, launched by EU leaders in 2000 and subsequently revised and simplified in 2005, emphasizes the need to modernize Europe's economy and focus attention on growth and employment, in order to address the challenges of globalization and demographic change and to support our wider economic, social and environmental goals.[42] To achieve this, the updated strategy stresses the need for Europe to become a more attractive place to live and work, to develop knowledge and innovation for growth, and to create more and better jobs.

[40] Commission, *Building the Single Market for Green Products, Facilitating better information on the environmental performance of products and organisations* COM(2013)196, Brussels, 9.4.2013, p. 3.
[41] Commission, *Building the Single Market for Green Products*, op. cit. n. 40, at pp. 8-10.
[42] Commission, *Staff Working Document, Lisbon Strategy* SEC(2010)114, Brussels, 2.2.2010.

The current global economic crisis represents a significant setback in implementing Europe's economic agenda, with problems of loss of demand, unemployment and deteriorating public finances. In order to address these economic problems, restore growth and tackle unemployment, a European Economic Recovery Plan (European Commission, 2008) was launched, which sets out the actions the EU will implement to deal with the crisis.[43] The European Commission (DG Environment) commissioned the Goldman-Hodkin-Katz (a consulting firm: GHK), the VU University Amsterdam, Institute for Environmental Studies (*Instituut voor Milieuvraagstukken*, IVM), the Sustainable Europe Research Institute (SERI) and the Transport & Mobility Leuven (TML) to assess the role of environmental policy measures in the EU's economic development.

1. Economic outcomes of environmental policy

It is explained how environmental policy may benefit the economy by delivering eight key economic outcomes. Environmental policy can be beneficial to the economy as it:[44]

- enhances productivity,
- stimulates innovation,
- increases employment (and/or the quality of employment),
- improves balance of trade,
- strengthens the capital base,
- supports public finances,
- promotes economic cohesion,
- encourages the transition to a resilient and sustainable economy.

Delivery of these key economic outcomes is important both in stimulating economic recovery and in achieving the EU's longer term economic goals, as set out in the Lisbon Strategy.

[43] M. Rayment, et al., *The economic benefits of environmental policy*, A project under the Framework contract for economic analysis, ENV.G.1/FRA/2006/0073 – 2nd, Final report (Amsterdam, Institute for Environmental Studies Vrije Universiteit, November 2009) p. 15, available at *http://ec.europa.eu/environment/enveco/economics_policy/pdf/report_economic_benefits.pdf* (01.06.2013).

[44] H. W. Robert, *The impact of Economics in Environmental Policy*, BCSIA Discussion Paper 99-01, ENRP Discussion Paper E-99-01 (Kennedy School of Government, Harvard University, January 1999) p. 20, available at *http://live.belfercenter.org/files/The%20Impact%20of%20Economics%20on%20Environmental%20Policy%20-%20E-99-01.pdf* (01.06.2013).

1.1. Environmental policies and productivity

There is widespread agreement that environmental policy can enhance productivity by increasing the efficiency with which we use resources and energy. This will benefit the economy and the environment alike, thus being a true winning strategy for the EU's economy. Resource efficiency is vital, as oil, raw materials and food is becoming increasingly scarce and expensive, while EU imports are increasing. There is much evidence that many resource efficiency gains can be achieved relatively easily and cost effectively. For example, studies show that there is widespread scope for reductions in material throughputs of around 20% among EU manufacturers. Evidence on the marginal abatement costs for greenhouse gases highlights the scope for cost reductions through investments in building insulation, fuel efficiency in vehicles, and improvements in the efficiency of water heating and air conditioning systems. Studies of the EU eco-industries demonstrate that they have higher productivity and higher growth rates than the manufacturing sector as a whole.[45]

1.2. Environmental policies and innovation

Environmental policies can stimulate innovation and investment in innovation. By internalizing the external costs of pollution and natural resource use, policies change relative prices and stimulate research and development and uptake of alternative inputs, production methods and products. Similarly, restricting the use of certain processes and materials stimulates the commercialization and diffusion of cleaner alternatives. Environmental policies have led to innovations in conservation of energy and resources, pollution prevention and environmental clean-up. These innovations have reduced costs and reinforced the competitiveness of EU industries, as 'clean' technologies developed in Europe have become successful export products on the world market. Policy induced environmental innovation has directly and indirectly stimulated growth, competitiveness and jobs. The European Commission has estimated that the total commercial value of eco-innovative products and technologies in sustainable construction, renewable energy, bio-based products and recycling in the EU can grow

[45] Comission, *A resource-efficient Europe – flagship initiative under the Europe 2020 Strategy* COM(2011)21, Brussels, 26.1.2011.

from €92 billion in 2006 to €259 billion in 2020, creating more than 2.4 million new jobs.[46]

1.3. Environmental policies and employment

The net effects of environmental policies on employment are positive or neutral. While environmental policies can cause shifts in the composition of employment, evidence suggests that any negative effects on polluting products and processes are at least balanced by growth in less pollution-intensive ones.[47]

1.4. Environmental policies and the balance of trade

Environmental policies can improve the balance of trade by enhancing competitiveness, supporting export-oriented eco-innovation, and reducing material use and hence imports. While critics have argued that environmental policies increase costs and adversely affect competitiveness, evidence indicates that any negative effects are offset by growth in new environmentally friendly products and processes with significant export potential. Furthermore, progressive environmental policies require industries to innovate and adapt quickly, giving them first mover advantages and positioning them well against foreign competitors when the latter catch up. High environmental product standards drive innovation and create export opportunities over time.[48] The EU has a strong position in global environmental markets, with estimated market shares of 10% for material efficiency and natural resources, 30% for sustainable water management, 35% for sustainable mobility, 35% for energy efficiency, 40% for green power generation and 50% for waste management and recycling. Exports grew by 8% in 2005, and there was a trade surplus of environmental goods and services of over €600 million. The world eco-industry is expected to more than double in size between 2005 and 2020, when it is forecasted to be worth €2.2 trillion.

[46] OECD, *Towards Green Growth*, OECD Ministerial Council Meeting on 25-26 May 2011, available at *http://www.oecd.org/greengrowth/48224539.pdf* (1.6. 2013).
[47] Rayment, et al., op. cit. n. 2, at p. 59.
[48] Ibid.

1.5. Environmental policies and the public finances

Environmental policies have positive effects on the public finances[49] by:

- raising revenue and expanding the tax base through environmental taxes. Environmental taxes can be used either to enhance public revenues or to reduce labor and other taxes; the use of revenues determines the extent to which they have net benefits for the public finances or are used to deliver other economic outcomes (e.g. enhancing employment by reducing taxes on labor);
- reducing environmentally harmful subsidies. Considerable progress has been made in recent years in reforming or reducing environmentally harmful subsidies in the agriculture, energy and transport sectors

1.6. Environmental policies and the capital base

Environmental policies can greatly add to and enhance the quality of our capital base, contributing to the stock of buildings and infrastructure, plant and machinery, human capital and natural capital. This capital stock determines the long term output and income streams of the economy. Environmental investments make a key contribution to economic development, providing the infrastructure necessary for growth, driving the transition to a resource efficient economy, maintaining the health and productivity of the workforce, and delivering the ecosystem services on which people and the economy depend. Environmental policies drive investments in energy efficiency, renewables infrastructure, pollution control and waste management plants, and natural capital, enhancing the productive capacity of the economy and the health and wellbeing of the workforce.[50]

1.7. Environmental policies and cohesion

The environment has a key role to play in achieving the goals of the cohesion policy and vice versa. Since poor environmental quality is often a barrier to development, investing in the environment is essential in many cohesion areas to provide the right conditions for growth and

[49] United Nations Environment Programme (UNEP), 2010, *Green Economy, Driving a Green Economy Through Public Finance and Fiscal Policy Reform* p.10, available at *www.unep.org/greeneconomy* (3.6.2013).

[50] Commission, Proposal on a *General Union Environment Action Programme to 2020 'Living well within the limits of our planet'*, op. cit. n. 23.

the necessary infrastructure for sustainable development. Environmental activity offers opportunities for all cohesion regions but has a special role to play in peripheral areas with few alternative development opportunities for which high environmental quality may be one of the greatest economic assets. A better environment can enhance opportunities for tourism and recreation and attract mobile investors, businesses and workers. In areas which have suffered industrial decline and dereliction, environmental improvement may be a prerequisite for regeneration.[51]

1.8. Environmental policies and the transition to a sustainable and resilient economy

The EU's Growth and Jobs Strategy and certain aspects of the European Economic Recovery Plan (2009) aim at stimulating the transition towards a sustainable, low-carbon, low impact economy. This is needed, as by 2050, the global economy would need to grow to 15 times its current size for the global population to meet its aspirations of OECD levels of consumption.[52] The much greater demand for resources that this would involve is certain to drive underlying upward price trends in finite oil and natural resources, with the probable recurrence of spikes.

2. European Eco-label awareness

The European Eco-label was established by the European Union in 1992 and is part of a broader strategy to stimulate sustainable production and consumption. The label, designed as a European flower, is intended to be recognized as Europe's primary label for environment-friendly products and services.[53] The flower guides European consumers in finding products and services that are environmentally friendly, with their total environmental impact – from the extraction of the raw materials involved to eventual disposal – being taken into account. It is at the same time an award for manufacturers, service providers and importers that through their way of operating contribute to a sustainable environment. In order to introduce the flower to a broader audience of European consumers and manufacturers, several campaign activities have

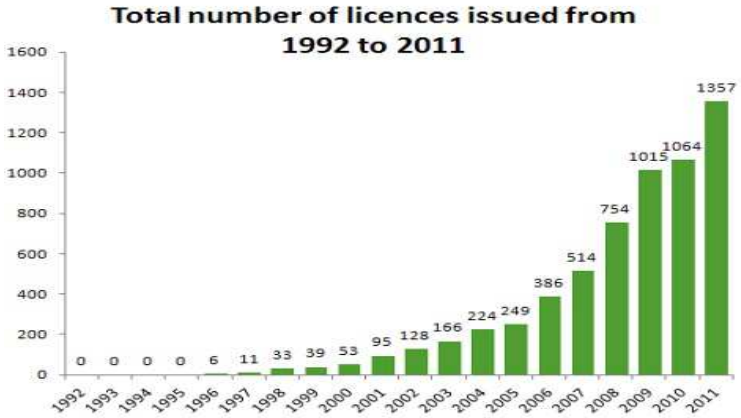
[51] G. Kremlis, *Cohesion Policy and Environment, Challenges and opportunities in 2007-2013*, available at *http://ec.europa.eu/environment/integration/structural_ funds _presentations_en.htm* (03.06.2013).
[52] Rayment, et al., op. cit. n. 2, at p. 129.
[53] Regulation 66/2010 on the EU Eco-label, OJ L 27, 30.1.2010, p. 1.

been organized in different European countries during the *flower week* in the autumn of 2006. In this context, the Directorate-General Environment of the European Commission decided to conduct a survey on Europeans' awareness of the European Eco-label. The EU Eco-label distinguishes products and services that meet high environmental and performance standards. Products and services awarded the EU Eco-label carry the Flower logo, allowing consumers to identify them easily.[54] Every product carrying the Flower must pass rigorous tests, with results verified by an independent body. While other environmental labels cover specific environmental aspects such as recyclability or energy efficiency, the Flower stands for lower environmental impacts throughout a product's life cycle – from the use of materials to final disposal.

2.1. Total number of issued licenses

The EU Eco-label was launched in 1992 when the European Community decided to develop a Europe-wide voluntary environmental scheme that consumers could trust. Since then, the number of products and services awarded the EU Eco-label has increased every year. By the end of 2011, more than 1,300 licenses had been awarded, and today, the EU Eco-label can be found on more than 17,000 products. A license gives a company the right to use the EU Eco-label logo for a specific product group.

Figure 1 Total number of licenses issued from 1992 to 2011[55]

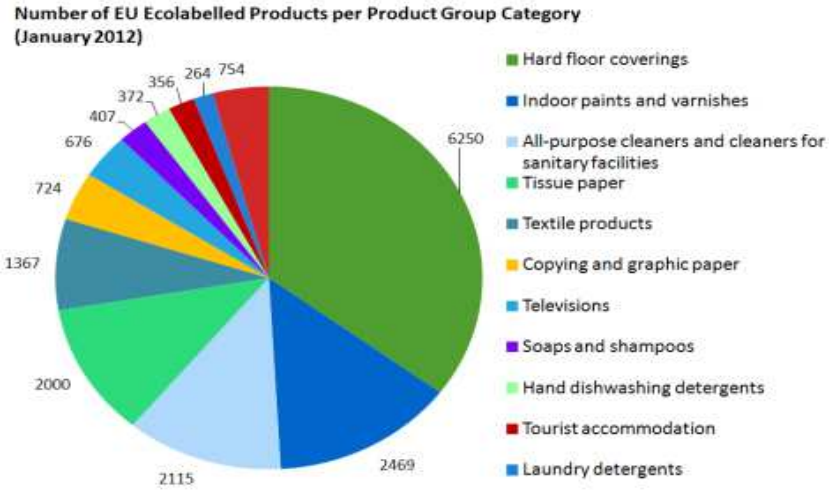


[54] *http://www.euecolabel.eu/display/cid/_11.html* (2.6.2013)
[55] Source: *http://ec.europa.eu/environment/ecolabel/facts-and-figures.html* (25.05.2013).

2.2. Number of EU Ecolabelled products

The EU Eco-label currently covers a huge range of products and services, all non-food and non-medical. Tissue paper and all-purpose cleaners each equate to around 10% of EU Eco-label products, while indoor paints and varnishes make up nearly 14%. The largest product group is hard floor coverings, which total more than 33% of EU Eco-label products. Furthermore, hundreds of TVs, soaps, and shampoos can be found which bear the EU Eco-label.[56]

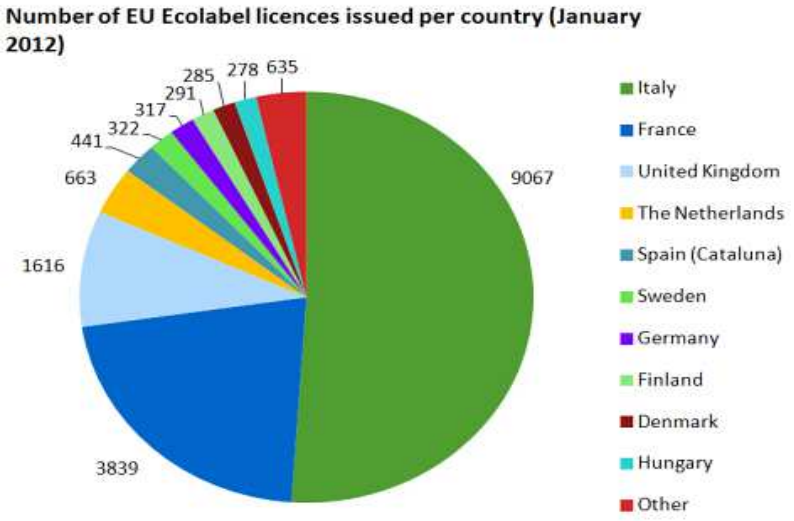
Figure 2 Number of EU Eco-labelled products in January 2012[57]



The EU Eco-label has been awarded to the largest number of products in Italy, France and the UK. Italy has issued more than 50% of the total number of Eco-label awards, while France and UK total 22% and 9% respectively. They are followed by the Netherlands and Spain (Catalonia).[58] While these statistics refer to the awarding countries, EU Eco-labelled products can be sold across the continent.

[56] *http://www.euecolabel.eu/display/cid/_11.html* (2.6.2013)
[57] Source: *http://ec.europa.eu/environment/ecolabel/facts-and-figures.html* (25.05.2013).
[58] *http://www.euecolabel.eu/display/cid/_11.html* (2.6.2013)

Figure 3 Number of EU Eco-labelled licences issued per country, January 2012[59]



3. EMAS in the European Union

The Eco-Management and Audit Scheme (hereinafter: EMAS) is a voluntary environmental management tool for companies and other organizations to evaluate, report and improve their environmental performance. EMAS promotes continuous evaluation and improvements in the environmental performance of participating organizations. The EMAS Regulation 1836/93 was first introduced in July 1993 as an environmental policy tool devised by the European Community, in a step towards the Community's goal of sustainable development. The EMAS scheme was open for voluntary participation by organizations from April 1995, and its scope restricted participation to sites operating industrial activities. In 1996, the international environmental management system standard, EN ISO 14001:1996 was recognized as a step towards achieving EMAS.

In 2009 the EMAS Regulation has been revised and modified for the second time. Regulation (EC) No 1221/2009 ("EMAS III") was published on 22 December 2009. The revised EMAS Regulation came

[59] Source: *http://ec.europa.eu/environment/ecolabel/facts-and-figures.html* (25.05.2013).

into effect on 11 January 2010. [60] The new elements of the scheme lead to the enhanced performance, credibility and transparency of registered organizations and opened the scheme for organizations in non-EU countries. EMAS and additional tools such as the EU Ecolabel or Green Public Procurement (further: GPP) complement a range of EU and national policies that are aimed at improving sustainable consumption and production. However, EMAS neither replaces existing Community or national environmental legislation or technical standards nor does it, in any way, remove a company's responsibility to fulfill all its legal obligations under such legislation or standards.

The European Commission sets an example by reducing the environmental impact of its own activities through EMAS. Key priorities are the efficient use of natural resources (mainly energy, water and paper), the reduction of overall CO2 emissions, waste prevention, recycling and re-use, green public procurement and sustainable mobility. Interest in the environmental performance of organizations is continually increasing. Operating without taking into account the environmental consequences of their actions becomes almost impossible for organizations. Organizations with a proactive approach to environmental challenges look for ways to continually improve their environmental performance. EMAS is the premium environmental management tool to achieve this. It leads to enhanced performance, credibility and transparency of registered organizations.

3.1. Main features and key elements of EMAS

The key features of EMAS are performance, credibility and transparency.[61] By carrying out annual updates of environmental policy targets and actions to implement and evaluate them, registered organizations continually improve their environmental performance and provide evidence that they comply with all environmental legislation

[60] Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC, OJ L 342, 22.12.2009, p. 1.

[61] European Commission, *3x3 Good reasons for EMAS*, Improve your environmental performance with the premium standard in environmental management, Luxembourg: Publications Office of the European Union, 2012, available at *http://ec.europa.eu/environment/emas/pdf/EMAS_3x3_final-Online.pdf* (02.06.2013).

that is applicable to them. Third-party verification from independent environmental verifiers significantly adds credibility to registered organizations by guaranteeing the value of both the actions taken and the disclosed environmental information. Transparency is generated by the environmental statement, which an organization is required to provide as part of EMAS registration.

Performance: EMAS is a voluntary environmental management system based on a harmonized scheme throughout the EU. Its objective is to improve the environmental performance of organizations by having them commit to both evaluating and reducing their environmental impact and continuously improving their environmental performance.

Credibility: The external and independent nature of the EMAS registration process (Competent Bodies, Accreditation/Licensing Bodies and environmental verifiers under the control of the EU Member States) ensures the credibility and reliability of the scheme, including both the actions taken by an organization to continuously improve its environmental performance and the organization's information to the public through the environmental statement.

Transparency: Providing publicly available information on an organization's environmental performance is an important aspect of the scheme's objective. It is achieved externally through the environmental statement and within the organization through the active involvement of employees in the implementation of the scheme. The EMAS logo which can be displayed on (inter alia) letterheads, adverts for products, activities and services is an attractive visual tool to demonstrate an organization's commitment to improving its environmental performance and indicates the reliability of the information provided.[62]

3.2. The main stages and benefits of EMAS

To receive EMAS registration an organization must comply with the following steps:[63]

Conduct an *environmental review* considering all environmental aspects of the organization's activities, products and services, methods to assess these, relevant legal and regulatory framework and existing environmental management practices and procedures.

[62] *http://ec.europa.eu/environment/emas/about/summary_en.htm* (2.6.2013)

[63] *http://ec.europa.eu/environment/emas/local/pdf/la_toolkit_commission_020204_en.pdf* (2.6.2013)

Adopt an environmental policy containing commitment both to comply with all relevant environmental legislation and to achieve continuous improvements in environmental performance.
Develop an environmental program that contains information on specific environmental objectives and targets. The environmental program is a tool to help the organization in its everyday work when planning and implementing the improvements.
Based on the results of the review, establish an effective *environmental management system (EMS)* aimed at achieving the organization's environmental policy and at improving the environmental performance continually. The management system needs to set responsibilities, means to achieve objectives, operational procedures, training needs, monitoring and communication systems.
Carry out an *environmental audit* assessing in particular the management system in place and conformity with the organization's policy and program as well as compliance with relevant environmental regulatory requirements.
Provide an *environmental statement* of its environmental performance which lays down the results achieved against the environmental objectives and the future steps to be undertaken in order to continuously improve the organization's environmental performance.
The environmental review, EMS, audit procedure and the environmental statement must be *approved* by an accredited environmental verifier. The validated statement needs to be sent to the EMAS Competent Body for registration and made publicly available before an organization can use the EMAS logo.

IV. Regional dimensions of the EU green efforts

The aim of the EU regional policy – cohesion policy – is to strengthen the EU's economic, social and territorial cohesion, particularly to reduce disparities between the levels of development of the various regions and the backwardness of the least favored regions (Article 175 TFEU). The EU supports the achievement of these objectives by actions taken through its financial instruments, mostly the so-called Structural Funds.[64] During the present financial period (2007-2013) and in

[64] Cohesion policy is financed by the European Regional Development Fund (ERDF), European Social Fund (ESF), Cohesion Fund (CF), European Agricultural Fund for Rural Development (EAFRD), European Maritime and Fisheries Fund (EMFF), and through other financial instruments, e.g. European Investment Bank.

preparation of the next one (2014-2020) the EU regional/cohesion policy is going through a considerable reorientation in order to enable its contribution to the EU sustainable development goals and to the Europe 2020 strategy for smart, sustainable and inclusive growth, particularly its flagship initiative 'Resource Efficient Europe'.[65] Success in putting the EU economy on the path to sustainable and job creating growth will largely depend on decisions taken at local and regional level. The EU regional policy must serve to mobilize the potential of EU regions and cities to decouple growth from resource overuse, to change current patterns of consumption and production and to lead the way in developing innovation technologies. Thus, the EU regional policy plays an essential role in orientation of investments towards activities to support smart and sustainable growth, to tackle climate change, energy and environmental issues.[66]

In the middle of the present programming period the shift towards "to invest more" and to "invest better" in sustainable growth became the two pillars to increase contribution of regional policy to sustainable growth.[67] Investing more includes, inter alia:

- focus on green investments and transition to a low-carbon economy: focus on investments in energy efficiency, energy investments in buildings, renewable energies and clean transport;
- promotion of ecosystem services: preserving and maximizing the potential of the natural environment; halting the biodiversity decline (the new target is 2020),[68] natural risk prevention, developing 'green infrastructure' (forests, rivers, coastal zones, parks, green bridges and other natural features), proper

[65] Commission, *A resource-efficient Europe – Flagship initiative under the Europe 2020 Strategy*, op. cit. n. 45; Commission, *Roadmap to a Resource Efficient Europe*, COM(2011) 571, Brussels, 20.9.2011.

[66] Commission, DG for Regional Policy, *Regional Policy Contributing to Sustainable Growth in Europe* COM(2011)17, Brussels, 26.1.2011; detailed explanation and examples for projects are available at *http://ec.europa.eu/regional_policy/information/pdf/brochures/rfec/2011_sustainable_growth_en.pdf* (25.05.2013).

[67] Approx. 30% of the total €344 billion regional funding was available for activities with a particular impact on sustainable growth. Commission, COM(2011)17, p. 2.

[68] Commission, *Our life insurance, our natural capital: an EU biodiversity strategy to 2020* COM(2011)244, Brussels, 3.5.2011.

management of ecological networks and Natura 2000 sites, adaptation to climate change;

- supporting eco-innovation, innovation partnership and information technology: development and take up of environmental technologies, through e.g. the sustainable consumption and production action plan, strategic energy technology plan to improve resource efficiency and promote a green economy;
- increased use of 'green public procurement' to stimulate green growth: it can improve the competitiveness of regional suppliers of goods and services; environment management companies, regional action plans and initiatives taken at regional and local level should be established (e.g. the use of eco-labels and EMAS registration at local administration);
- check investments against climate resilience: regional policy investments have an impact on local and regional development for long periods, thus, projects should be assessed for their climate resilience.

Investing better means: integrating sustainability throughout the project life-cycle; checking investments against climate resilience and resource efficiency; and better governance.[69] Sustainable development has not been sufficiently channeled into the conception, implementation and evaluation of projects and actions. An increase in the effectiveness of regional funds would require more attention to these aspects of projects financed by them. Public administrations and policy-makers need to incorporate objectives of sustainable growth into the general framework of policy-making. Structural funds should be used within a broader policy framework providing legal (regulatory) measures and incentives. This would mean that regional policy programs and projects should be accompanied by changes in relevant regulations and administration (standards, market-based instruments, taxation, subsidies, public procurement, etc. should be set).[70]

Environmental impact assessment should play an important role here by checking impacts of projects eligible for ERDF support on climate

[69] Commission, DG for Regional Policy, *Regional Policy Contributing to Sustainable Growth in Europe*, op. cit. n. 66, at p. 8.

[70] Commission, DG for Regional Policy, *Regional Policy Contributing to Sustainable Growth in Europe*, op. cit. n. 66, at p. 21.

change, emissions, production and consumption, natural and built environment, people, traffic, research and training.[71]

In addition, full advantage of the opportunities offered by cross border, interregional and transnational cooperation should be taken, in line with the new territorial cohesion objective of the TFEU.

The European funds financing cohesion policy pursue complementary objectives to restore and increase growth and jobs while ensuring sustainable development. In the future much closer cooperation of regional funds and their closer alignment with the Europe 2020 strategy is required, entailing a reconsideration of goals and priorities within the new operational programs. Therefore a regulation of common provisions and a common framework are envisaged for the next programming period of regional policy (2014 – 2020). As a novelty, 'Partnership Contracts' between the Commission and Member States will be instituted, which will set out the commitments of the partners at national and regional level. These contracts will be in line with the Europe 2020 strategy objectives and with the national reform programs, addressing the territorial challenges of smart, sustainable and inclusive growth.[72]

From among the horizontal principles which apply to the implementation of the new Common Strategy Framework Funds (further: CSF), two are emphasized during the preparation: the promotion of equality between men and women and non-discrimination; and the principle of sustainable development. The latter requires compliance with the EU environmental *acquis*; at least 20% of the EU budget should be allocated to environmental enhancement in the next period.[73] More systematic application of the polluter pays principle across programs and projects is also emphasized, especially in the financing of infrastructure projects. The Commission sets priorities for territorial cooperation programs; macro regional and sea basin strategies will be eligible for funding from all CSF funds.

Among the thematic objectives of the new CSF the following are of importance for the development of a green economy: strengthening

[71] For an example see the checklist for EIA of project proposals in Finland. Commission, DG for Regional Policy, *Regional Policy Contributing to Sustainable Growth in Europe*, op. cit. n. 66, at pp. 17, 26.

[72] Commission, *Elements for a Common Strategic Framework 2014 to 2020* SWD(2012)61, Part I, Brussels, 14.3.2012, pp. 3-4.

[73] Commission, *Elements for a Common Strategic Framework 2014 to 2020*, op. cit. n. 72, at p. 11.

research, technological development and innovation; enhancing information and communication technologies; supporting the shift towards a low-carbon economy; promoting climate change adaptation; environment protection and promotion of resource efficiency; promoting sustainable transport.[74]

Under the thematic objective on environmental protection and resource efficiency, the main aims are to protect water resources and the aquatic environment, to reach targets for waste prevention and treatment, to halt the loss of biodiversity and the degradation of ecosystem services, to protect nature (habitats), to improve the implementation of the EU soil protection and maritime policy strategies and to improve the ambient air quality. The CSF defines key actions for all funds and sets out general principles for their implementation (e.g. water and waste hierarchy, provision of 'environmental public goods' through agriculture and forestry, encouraging private investments, application of principles of producer responsibility and polluter pays, use of green public procurement, etc.).

Under the cross-border, transnational and interregional cooperation thematic objective, the support for joint management of natural resources of regions sharing major geographical features and facing similar challenges should be further strengthened. Cooperation in various areas is envisaged, preference will be given to research and innovation, connections between the business sector and the research and higher education centers. Investments to the shared use of common public services, such as waste and water treatment, green infrastructure, emergency services, as well as health and social infrastructure and education facilities will be prioritized. Cross border networks and transnational cooperation programs should focus on support for environmentally friendly planning transport infrastructures, establishing missing cross-border links and strengthening cross-border labor market. Interregional cooperation should focus on design and implementation of joint operational programs contributing to the EU programs for research, growth and jobs. The regional policy will further implement and strengthen the cooperation within the already established macro regional strategies, such as the Danube Strategy and the Black Sea Strategy. In

[74] Commission, *Elements for a Common Strategic Framework 2014 to 2020,* Part II, Annexes SWD (2012)61, Brussels, 14.3.2012.

the future, transnational cooperation between partners at national and regional level will also be supported by the EU funds.[75]

[75] Commission, *Elements for a Common Strategic Framework 2014 to 2020,* Part II, op. cit. n. 74, at pp. 19-22, 41-43.

The project is co-financed by the European Union through the Hungary-Croatia IPA Cross-border Co-operation Programme