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The Likely Effects of the Treaty Establishing a Constitution for Europe (TCE) on the Hungarian Legal Order

Abstract. The study analyses the potential effects of the Treaty on the Hungarian Constitution and its application by the Hungarian Constitutional Court, and the more general–and at the European Law's present stage of the development unavoidable–problem of the theoretical analysis of European Law as a branch of law.

The study points out that the Hungarian Constitution's Accession Clause (Article 2/A) has not solved the problem of the primacy of Community Law, as far as the relationship between EU Law and the Hungarian Constitution is concerned, therefore the Constitutional Court encounters a problem that is increasingly difficult to resolve, when facing issues relating to the incompatibility of Hungarian statutes with EU Law. The study criticises some solutions proposed by the Constitutional Treaty (e.g. the institution of "recommendations"–(the present practice of "guidelines" etc.) which is definitely unconstitutional according to the Hungarian Constitution and its application practice by the Constitutional Court. Finally the study complements the problems thus outlined with the fact that the concept of EU Law and its various parts have not been clarified from a dogmatic perspective–the time has come to systematize this enormous material of law, especially when a Constitutional Treaty makes the attempt to summarize the legal fundaments of the unprecedented effort to develop an economic and political integration in Europe.

Keywords: TCE, EU law, Hungarian Constitutional Court, lawmaking

I. The current problems facing the Constitutional Court with respect to the application of European law**

The application of European law confronts the regular courts the Constitutional Court, as well as the Hungarian lawmakers with *new challenges.* One year after EU accession some focal points are beginning to emerge which will or may become placed in a new context with the adoption of the TCE. We conceive of

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** The study continues the analysis of the constitutional development in Europe dealt with in a previous study: see *Acta Juridica Hungarica* 48 (2007) 5–23.

the application of European law in two ways: for one application by lawmakers and then by law enforcement and the judiciary. In the former case we refer to a very particular instance of legal application, specifically the domestic transposition of current directives or of future European framework law. This, though it completely differs in nature from traditional legal application in this particular European legal context, is undoubtedly (also) legal application in the context of the *sui generis* European legal order. The lawmaker creates domestic law by simultaneously applying European law.

1. The application of European law has reached the *Hungarian Constitutional Court* already. Decisions have been handed down in two cases already, though in both cases the court specifically investigated the compatibility of Hungarian legal acts with the Hungarian constitution, and emphatically did not look at the issue of compatibility with European law–either through reviewing the validity of a directive or the adequacy of implementation 17/2004 (V. 25.) Constitutional Court decision (ABH 2004, 296–297); 744/B/2004 Decision of the Hungarian Constitutional Court, Alkotmánybíróság Határozatai, 2005, No. 2, 81]. The connection with European law stemmed from the fact that in the first case the issue revolved around the implementation of an EU regulation, while in the second case a European directive served as the basis for drafting the Hungarian legal act in question.

Moreover, as a result of two motions the Constitutional Court was recently faced with the task of adjudging the constitutionality of a Hungarian legal act on the basis of European law, to determine the compatibility of the former with the latter (no decision has been rendered as of Spring 2006).

2. In one case the issue is the faulty transposition of a *directive*–a directive on company law. The directive seeks to achieve that member states liberalise the rules and conditions for increasing the capital of public limited-liability companies. The lawmaker–obviously as a result of a translation error–amended Act CXLIV (Companies Act) of 1997 on commercial companies, but due to the presumable misunderstanding of the directive the regulation not only failed to become laxer, but in fact become extremely prohibitive, so that in effect it is more or less impossible to increase capital. The result is thus a transposition that is not compatible with the directive, is in fact contradictory to it. The Hungarian lawmaker therefore not only failed to fulfil its legislative duty, but in fact further restricted the regulation–effectively moving it away from its stated objective.

According to European law a faulty implementation can be corrected if a court requests a preliminary judgment from the ECJ in the context of a legal suit, noting the incompatibility of Hungarian and European law. On the basis of the ECJ's verdict the court may then render the given statute ineffective.

Parties whose interests are violated can of course also turn to the Commission, asking it to take measures to remedy the situation.

In the case at hand the first possibility did not even arise, since due to specifics of the case the commercial parties involved had intensive and good co-operation and therefore a legal dispute did not arise. More importantly, the ECJ's practice does not recognise the direct horizontal effect of a directive. The second venue is more of a theoretical possibility that will yield results only very slowly, if the Commission decides to intervene at all.

Thus the corporation turned to the Constitutional Court with the motion to declare the statute unconstitutional and to thus render it void, on the basis that the Hungarian legal regulation is not compatible with European law (the directive).

Nevertheless, the Accession Clause contained in Article 2/A of the Constitution does not touch upon compatibility with European law, but rather creates the constitutional possibility of transferring the exercise of certain competencies. It does not refer to the issue of supremacy of European law over Hungarian legal order, and most definitely not to the formers' relation to the Constitution and its respective supremacy.

Given that the Companies Act will be repealed by the entering into force of the new company law, the proceedings are likely to be halted.

3. In *another case* members of parliament turned to the Constitutional Court regarding the amendment of Act LVIII of 2001 on the central bank. The amendment changed the rules concerning the nomination of members of the monetary board, dividing the right to nominate between the president of the National Bank and the prime minister. The petitioners do not claim that the amendment conflicts with the Hungarian Constitution's provisions on the central bank in Article 32/D, but they claim that the change is in direct conflict with the TEC's Article 108, which in their interpretation mandates the absolute independence of central banks in member states. Petitioners further request that the Constitutional Court, before rendering a verdict turn, to the ECJ with a preliminary question concerning the issue of compatibility.

Here the Hungarian Constitutional Court must again decide on the *compatibility of Hungarian law with European law,* even though the Constitution *does not proscribe* anything concerning the primacy of European law. As unlike the regular courts the Hungarian Constitutional Court *only and exclusively decides* on the basis of the Constitution, and does not consider the whole of Hungarian law nor the European law that has become part of Hungarian legal order as a consequence of the Accession Treaty's–Act XXX of 2004–Article 2 or the *acquis,* its verdict must be based on the Constitution *alone.* Unconstitutionality can therefore only be determined if a Hungarian legal act is in conflict with the

Hungarian Constitution. In the case of conflict r*egular courts* naturally *have no qualms about applying European law based on the primacy of Community law. But for the Constitutional Court the situation is different.*

4. Though in the professional literature there have been proponents of the view that based on the ECJ's practice European law is even above the member states' constitutions[1]–and this is reinforced by the TCE's Article I-6–the significance of the issues is too great to be decided merely by an interpretation of the TCE Article I-6. In our opinion such a fundamental issue of principle can only be decided by the member states' constitutions themselves, they are the only ones who can decide to raise European law above themselves. It is only the *Constitution itself which can constitute a public power above itself.*[2] This presumes, however, that the public power and its legal order stand even above the Hungarian constitutions, above the member states' constitutions, since European law cannot be measured by the *constitutional standards of the member states.*

Especially not since they were *not created for this policy objective,* thus the comparison with them is a *conceptual non-sequitur.* It is also practically impossible to expect that European law be compatible with national constitutions since–assuming a subordinate position–this would enable Constitutional Courts to "tear apart" European law as they see fit (by declaring it incompatible with their respective constitutions). Though the idea of European law being above the constitutions (its priority over them), is clearly deducible from the ECJ's practice, and the TCE's Article I-6 also contains this point unequivocally now, based on the presentation of the previously analysed Constitutional Court practices and the member states' constitutional courts' reservations about this, a *clear situation* in this regard could only emerge if the Hungarian Constitution were to be *amended* in a way that *unequivocally states that European law is above the Constitution.* Due to the TCE's explicit declaration on the issue settling this matter up cannot be delayed any longer.

5. Given the lack of an explicit regulation in the Constitution the situation is by no means simple.

[1] Horváth, Z.–Ódor, B.: *Az Európai Unió Alkotmánya* [The Constitution of the European Union]. Budapest, 2005. 80; based on the Convention's text the problem was previously brought up by: Czuczai, J.: Utószó. *In: Jogalkotás, jogalkalmazás hazánk EU-csatlakozása küszöbén* [Legislation, application of law before the EU-Accession]. Budapest, 2003. 150.

[2] See Vörös, I.: Az EU-csatlakozás alkotmányjogi: jogdogmatikai és jogpolitikai aspektusai [Constitutional law: legal dogmatic and legal policy aspects of the EU-Accession]. *Jogtudományi Közlöny* 57 (2002) 397.

5.1. One probable scenario in the first of the two cases outlined above is that the Constitutional Court will conclude that the directive's faulty transposition is an unconstitutional failure to act and will thus–in addition to declaring the respective statute unconstitutional and repealed–obligate the lawmaker to fulfil its legislative duties and by a specific deadline create a new regulation that is compatible with European law.

According to the Constitution currently in force, declaring unconstitutionality cannot be based on Article 2/A, but only on the Constitution's Article 7 (1), which prescribes the compatibility of Hungarian law with international law. Referring to this paragraph would be in order in as far as the Accession Treaty in itself is an international legal treaty, and should therefore in principle be compatible with the law that is subject to constitutional review. European law itself, however, which through Article 2 of the Accession Treaty *continuously keeps* seeping into Hungarian law (for instance through the adoption of directives/-framework law by European lawmakers), does not qualify as international law.[3]

The possibility of direct conflict with the Hungarian Constitution does not even arise, as the given Hungarian statute is not in direct conflict with the Accession Treaty (international law), but only indirectly through the European law that flows in as a result of the treaty. Given the lack of a rule concerning primacy, the first example of case law introduced above poses a poses a real theoretical-dogmatic challenge to the Hungarian Constitutional Court.

5.2. But the second case is by no means an easy bit to chew for the Hungarian Constitutional Court, either. For the reasons cited above one cannot refer to an infringement of the Constitution when one has (or should have) to decide on the compatibility with TEC Article 108. In addition, since this is not the misimplementation of a directive, the question of a constitutional infringement caused by a failure to act does not even arise. The legal instruments mentioned in the first case (requesting a preliminary ruling from the ECJ in a regular court procedure or notifying the Commission to request an intervention at the ECJ) are useless in this instance.

5.3. The cornerstone of the Constitutional Court's expected decision will be an interpretation of the Constitution's Article 2/A, which according to the unanimous opinion of academic literature on the subject is equivocal, badly designed and offers a confusing regulation concerning the transfer of competencies.[4] The two cases could have the consequence of almost provoking the creation of rules concerning the issue of primacy between the Constitution

[3] See the analysis of European law as a *sui generis* law distinct from international law in: Vörös: *op. cit.*

[4] See for example Czuczai: Utószó. *op. cit.* 135.

and European law. Such a rule could provide the basis for future decisions of the Constitutional Court in similar cases that are likely to arise. As long as there is no such rule in the Constitution, in my opinion it is impossible for a law to give a mandate to the Constitutional Court to request a preliminary ruling from the European Court of Justice (currently such an authorisation does not exist).

6. Very probably *serious difficulties* can be expected with respect to the *Charter of Fundamental Rights* in the TCE's Part II. Though the Charter of it is compatible with the member states' own constitutional traditions, its significance is so massive that it will impact member states' constitutional court practices.

The problem is that the Hungarian Constitution is well-drafted in the area of formulating the basic constitutional right to social security, for instance, It contains a sufficiently, but not overly detailed regulation (Constitution Article 70/E). In its practice the Constitutional Court applies a rather limited interpretation of this regulation and does not consent to the indeterminate, boundless expansion of this right (for instance the right to housing). According to the Constitutional Court there is no constitutional right for anyone to receive a certain type or amount of social provision, either. The right to a social security consists on the one hand of the state's obligation to secure the citizens' physical existence through social benefits, and on the other hand of organising and operating the social insurance/social security system and associated institutions 42/2000 [(XI. 8.) Decision of the Constitutional Court, ABH 2000. 329]. The lawmaker has significant freedoms in determining the concrete content of these constitutional obligations and in drafting the corresponding laws, a specific vision of these contents is not part of the fundamental right to social security.

The Charter of Fundamental Rights could be likened to a "colourful bouquet" consisting of everything, the contents of which have been collected by its makers on the great "field" of European fundamental rights. It contains all of the imaginable fundamental rights–such as for example the right to "good" (?) administrative processing (Article II-101), or the right to "found a family" (Article II-69), which allows for numerous interpretations. The social (Article II-94) and other rights secured by the Charter of Fundamental Rights go well *beyond* the member states' constitutions' own conception and fundamental rights content.

This is not a problem in itself since the Charter–as pointed out above–can *only* be applied in the context of implementing Union law and in *harmony* with the member states' common constitutional traditions. This limitation only applies, however, if the Charter recognises a fundamental right derived from common traditions [Article II-112 (4)]. In any case, some of the Charter of Fundamental Right's formulations *approximate* political declarations and–no matter how noble they may be–they are often oblivious of the *social and*

economic policy realities. Therefore, as a consequence of the increasing presence and appearance of the European context in the fundamental rights issue, the Charter of Fundamental Rights could have an *undesired compulsory effect* on the member states' constitutional court practice as well.

It is a requirement according to the principles of rule of law and due process that the TCE's text be useful for real application: a formulation that is reminiscent of a political declaration is very difficult to predict in terms of the consequences it engenders.

II. The problems of lawmaking

1. For legislators in the member states future problems may not only stem from the faulty transposition of a *directive* or a future *framework law,* but they may even arise from a faultless transposition.

1.1. The European law's *sui generis* nature manifests itself in the sources of law as well, since the directive–in terms of its content–cannot be considered a "true" source of law from the vantage point of continental European conception of the law, or from the perspective of lawmaking. The European state formation resulting from integration is an institution that is conceptually closely tied to the law–it mirrors the novelty of the *"Staatenverbund",* its incomprehensibility and unfathomable nature in terms of traditional constitutional law and sources of law categories.

1.2. If we talk of a "Staatenverbund" and boldly stop ourselves from demanding traditional criteria of statehood, then of course it will be understandable and easily acceptable that there are institutions among the sources of law that (while prescribing legislative obligations to the member states) are in themselves in legal technical terms nothing more than–severed from the constitutional context above–a guiding working paper or a draft.

But the *directive/framework law* cannot be separated from the process of creating a historically unique state formation. This is exactly what it corresponds to, what it reflects. More specifically its *sui generis* peculiarity, namely that is *mixed:* in part and fundamentally it develops on an intergovernmental basis, but the supranational elements are growing. In other words their *proportion changes* in the course of permanent, continuous evolution.

One of the basic areas of development is *continuous legal harmonisation:* it is no surprise therefore that in the areas characterised by intergovernmental co-operation–if these areas can at all be separated, probably only on a theoretical level, of course–the *indirect European lawmaking,* legal harmonisation through directives/framework laws, plays a fundamentally important role.

The contradiction therefore, between the working paper as a source of law, its legal character, is only apparent: substantively it is a working paper, but legally it is a binding instrument requiring legislation. This is exactly the peculiarity that *adequately portrays,* mirrors this particular European integration attempt; it is a good expression of the legal taxonomy and source of law manifestation of this odd mix of intergovernmental and supranational elements.

1.3. The directive's/framework law's source of law character *remains unchanged* in the TCE [Article I-33 (1)] as compared to TEC Article 249. The framework law is itself a legislative act that sets binding objectives for all member states but leaves the choice of tools and forms of fulfilment up to them.

1.4. The ECJ very rarely requires the verbatim transposition of directives (Case C-339/87. *Commission v. Netherlands* [1990] ECR I-851. Points 26–28).

In practice directives are published with such content that the lawmakers in the member states *hardly have any wiggle room* in freely choosing the tools and forms of complying with them. Legislators are in effect often compelled to just take the text of the directive and use it without the slightest modification, which can have rather adverse effects for the member states' law in terms of *taxonomy.* But of course it is also true that the bureaucracies in the member states' ministries tend towards investing the least amount of work possible in fulfilling the task of drafting legislation.

1.5. The constant modifications resulting from transposition *distort the given member state's* original *legal policy and dogmatic approach* because *elements that are alien to the system* disrupt the thought process underlying the. The transposition lead to such a *confused mass* of legal regulations that are to some degree determined by member states', and in some part by European legal policy considerations.

As these are not even *remotely identical*–in fact the directives become necessary to ensure that the European legal policy ideas are enforced in the member states' legal orders–the law originally based on a coherent, uniform legislative concept *falls apart* into several, often clearly distinct parts. This *increasing internal inconsistency* growing over time makes it harder for the law to be applied by member state courts and other authorities, not to mention the fact that it becomes harder for those addressed by the law–natural and legal persons–to voluntarily shape their behaviour to comply voluntarily with the requirements of the law.

Before our very eyes the insurance act or our act on international private law fall apart, for instance, as a consequence of the Hungarian legislators' compulsory activities.

2. But the *European lawmaker* can also cause numerous problems: I refer to the *guidelines* and *notices* issued by European authorities and agencies. These

notices, etc., naturally lack a legally binding force, they "merely" inform the "subjects" in the name of the agency how *the agency* will proceed in applying the statute.

2.1. The Directorate-General for Competition is especially active in implementing *competition law,* which affects the "heart" of European economic law and its most important issues. It did not only issue a statement on minor cartels, but also provided guidelines concerning block exemptions, which is of fundamental importance with respect to cartel prohibition; the guidelines pertained to EC Regulation 2790/1999 on block exemptions in respect of vertical restrictions of market competition, as well as to EC regulation 1/2003, which is the backbone of community competition law.[5] The bureaucracies' astounding practice then multiplies, the various documents feed on each other: they issue notices on modifying previous notices….

2.2. Two officials argued for instance in the professional literature that the "guideline" issued in connection with EC Regulation 1/2003 is necessary as it takes up certain questions concerning which there had been no consensus at the time the regulation was drafted, and thus they could not be integrated into the legal text[6]…–but the office will nevertheless (!) proceed on the basis of the guideline and apply Community law correspondingly! The extensive guidelines and notices often do not adhere to the requirements applied to the statute, but rather correspond in terms of content to the administrative/public administration law and administrative instructions issued to subordinated bodies.[7]

2.3. The TCE Article I-33 (1), last phrase *integrates this practice into the European constitution* and thus endows it with the rank of a constitutional institution. It states that legislative acts termed "recommendations" and "opinions" by the TCE do *not have binding force.* This naturally fails to resolve the problem what it is that they *exactly "have".* But making these papers part of the TCE also makes it impossible to attack the practices in the ECJ on the grounds of "European unconstitutionality". Theoretically such a complaint would be possible with reference to the rule of law so often and emphatically referred to in the TCE, if the subject of "unconstitutionality" were not enshrined in the European constitution itself.

[5] As a cautionary example we point to a list that includes only a minor part: *Versenyjog* [Competition Law]. Budapest, 2004. 291–292.

[6] Hossenfelder. S.–Lutz, M.: Die neue Durchführungsverordnung zu den Artikeln 81 und 82 EG-Vertrag [The new implementation decree for Articles 81 and 82 of the EC Treaty]. *Wirtschaft und Wettbewerb,* 53 (2003) 125.

[7] Rittner, F.: Die neuen Guidelines für Vertikalvereinbarungen [The new guidelines for vertical agreement]. *Wirtschaft und Wettbewerb,* 50 (2000) 831.

2.4. The publication of such sources of law is in sharp contradiction with the Hungarian constitutional approach. The Hungarian Constitutional Court, in its *60/1992 (XI. 17.) Constitutional Court decision* (ABH, 1992, 275) did not even investigate the constitutionality of the circulars, guidelines, and notices that had become prevalent in Hungarian legal practice–as tools of anti-democratic control–under the party dictatorship between 1947–1989, as those do not qualify as statutes in the Hungarian legal system according to Act XI of 1987 on lawmaking. And the Constitutional Court only reviews the constitutionality of laws. They are simply not suitable for review by the Constitutional Court. In this verdict the Constitutional Court condemned in sharp terms this inherently unconstitutional practice embraced by the authorities–but the practice has no legal effect at all. From this often-cited landmark *decision that is considered a key precedent* it could be concluded that the authorities have no right to inform the addressees about the practices they plan to follow in the future and about the factors that inform their decision-making, since they have to apply the law and not their own notices. By publishing the decision-making criteria the authorities–the executive power–really usurps the competencies of the legislative power–without adequate legal authorisation to do so, of course.

2.5. The situation is the same in European law: issuing notices and guidelines–recommendations and opinions according to the TCE's Article I-33 (1) last phrase and Article I-35 (3)–brings the *danger* that the Union authorities will replace the European legal acts and legal order with their own interpretation–which extends far beyond legal application–and thus with this mere publication influence the behaviour of addresses as if they had issued quasi-legal acts.

Thus *lawmaking and the application of the law become mixed up* and the separation between two distinct branches of power become blurred. This is a serious violation of the democratic principle of separation of powers. (This is exactly how Rittner assesses the practices concerning community competition law.[8])

This European constitutional law phenomenon seriously *undermines* the basic principle and concept of *rule of law* (the rule of law as an "area of freedom, security and justice") as it is currently laid down in TEU Article 6, enshrined as a basic value in the TCE preamble and in Article I-2, and formulated as a key Union objective in Article I-3 (1) of the TCE. This phenomenon violates the constitutional principle of rule of law because it seriously endangers and violates due process in the Union. The reverse side of the coin only serves to

[8] Rittner, F.: Das neue europäische Kartellrecht: bürokratische Netze statt Herrschaft des Gesetzes*?* [The New European Cartel Law: Bureaucratic Webs instead of Rule of Law?] *Orientierungen zur Wirtschafts- und Gesellschaftspolitik.* 2004.

underline our concerns. It was precisely the *ECJ* which quite resolutely espoused the position that the member states' authorities' "circulars"–which in the given case were compatible with the directive, by the way–could not be placed on the same level as the implementation of a directive and that the implementation could not be replaced by or "redeemable" with such a document.[9] In this decision the ECJ pointed out that an authority's practice that was compatible with the directive could be easily modified, while–moreover–such a "circular" lacked the transparency and publicity required by the rule of law.

From the above one could arrive at the *conclusion* that the "recommendations" and "opinions" raised to constitutional level by the TCE are neither compatible with the rule of law, which is considered one of the core values and basic objectives of the EU and the European legal order, nor with the constitutional requirement of due process, as derived from the rule of law. The TCE's inconsistent, internally contradictory regulation in this regard can exert a negative effect on the Hungarian Constitution and constitutional thinking. The Hungarian authorities' aforementioned practice is gravely unconstitutional in itself; but if they themselves were to issue recommendations in reference to community competition law based on EC Regulation 1/2003, for instance, then according to TCE Article I-33 (1) they would proceed lawfully and constitutionally, but at the same time they would violate the TCE's Preamble, its Articles I-2 and I-3, as well as the Hungarian Constitution. Given the TCE's adopted text we cannot offer any solutions to this problem, but we thought it was important to draw attention to it.

III. The legal dogmatic and taxonomic problems of European law as a branch of law

1. A significant portion of the problems outlined above undoubtedly have their origins in broader contexts. The introduction in part I of this study of the need, in fact burning necessity, of creating the TCE–and of the related developments–in some sense "advanced" the notion that the European constitutional legislators not only wanted to quantitatively amass the "Treaties" constituting primary European law into a unitary framework, but that they wanted to created something qualitatively novel. One key goal was to achieve clarity, to get rid of the confusions and overlaps. At the same time the TCE seeks to further develop integration, the Union undoubtedly makes a leap forward towards

[9] Case C-315/98. Commission v. Italian Republic [1999] ECR I-8001.

developing the political union (for example limiting the veto right, dual majority and strengthening the role of the European Parliament).

The need for a quality summation is not formulated with regards to European legal order, though it appears that there would be great need for it. On the remaining pages we will attempt to address the question of what European law is, as the basic law of which the European constitutional legislators have drafted, adopted and recommended to the member states for adoption the TCE? What is European law in terms of taxonomy and the branch of law it belongs to?

What are we talking about when we refer to European or Union law?

2. It is true that the subdivision and classification of this field of law and legislation can still be regarded as an open issue. The problems already begins with the concepts in EU law/EC law, the lack of a basis for distinguishing Union law and Community law.

The professional literature seeks to bridge the problem by assuming that Community law is the sum of first pillar laws, while Union law consists of the laws in the second and third pillars.[10] Correspondingly, one could talk of Union law narrowly understood (as law enshrined in the second and third pillars), or Union law more broadly, which would comprise both Union law narrowly understood and Community law (in this interpretation Union law broadly understood would obviously be a cover concept devoid of real content).

The confusion is increased rather than mitigated by the fact that the TCE itself uses the *terminus technicus* "Union's law" [e.g. Article I-9 (3)].

Considering the fact that next to the unclear terms "European law"/"EU law"/"EC law" other terms have began to spring up, such as for instance "Community/European company law", "Community/European competition law",[11] European economic law,[12] or "European private law"–which even boasts its own journal–we need to ask the following question.

How can the continuously expanding, ever larger and irrepressibly growing legislation be systematised and interpreted as legislation, or maybe even as a separate branch of law? The question is evident: are the criteria and conceptual framework of a traditional branch of law still useful in this case; and if yes, then with what content?

[10] See for example Schweitzer, M.–Hummer, W.: *Europarecht* [European Law]. 5th edition. Berlin, 1996.

[11] e.g. Mestmäcker, E.-J.–Schweitzer, H.: *Europäisches Wettbewerbsrecht* [European Competition Law]. 2nd edition. München, 2004.

[12] Zäch, R.: *Grundzüge des Europäischen Wirtschaftsrechts* [Fundamentals of European Economic Law]. 2nd edition. Zürich, 2005.

What does the concept of "European law" mean today and especially after the drafting and adoption of the TCE (regardless of the ratification process and the results of the referenda)?

Let us consider some examples.

Regulations in the European Community company law aim to secure the legal safeguards for the exercise of the basic freedom to settle and start business anywhere; thereby they protect and maintain the unity of the internal market from this perspective. The primary legal policy purpose of European company law therefore is not the codification of all company types (for example the form of a public limited-liability company).

Community competition law does not move within the traditional framework of competition law/competition law: the objective of its legal policy is not to protect the freedom of competition from attempts to curb it, but primarily to protect, maintain and secure the unity of the internal market. The ECJ's well-known verdict in *Walt Wilhelm v. Bundeskartellamt*[13] addresses this issue specifically.

2.1. Initially the European integration process was geared towards creating a customs union, then an internal market, and then with time it moved further to envision achieving economic union. The continual progress, realisation and deepening of the economic union, especially the creation of the common currency, increasingly shifted the economic/commercial law character of the integration process into the direction of political union. This inevitably brought to the forefront and strengthened the public law and constitutional aspects of integration–which had been present in traces already at the outset.

Though the legislation customarily referred to as EU institutional law was characterised by strong constitutional features from the beginning on, and the concept of "European constitutional law" popped up as well,[14] it was hardly possible to identify a separate constitutional law branch in European law, in the sense the term is traditionally understood in nation-state/member state law**.** At least not if we see the criteria of traditional legal branches in the homogeneity of the subject matter of regulation and the method of regulation.

2.2. The difficulties begin already with the fact the European law is not the legal order of a state, but of–for a lack of a better word–what the German Constitutional Court has termed "*Staatenverbund"*. Even today this is an unprecedented experiment in European history whose objective is to create a *sui generis* European economic and political union. As the polity itself cannot be dogmatically, and from a state theory perspective, be identified with a

[13] Case C-14/68 Walt Wilhelm v. Bundeskartellamt [1969] ECR 1.

[14] *Europäisches Verfassungsrecht. op. cit.*

traditional state in terms of legal dogma or state theory, its legal order cannot be understood in the traditional nation-state/member state categories either. The two types of legal policy approaches and objectives are too different.

The more or less dominant theoretical approach that considers the EU an autonomous legal order[15]–and holds that European law is neither nation-state nor international law but a *sui generis* legal order–makes such an interpretation, categorisation and systematisation impossible in any case.

3. The EU legal order and its further development was first based on the establishment of economic union and was then increasingly driven by the goal of creating political union. This determines the legislation's dual policy objectives and dual nature. Correspondingly–in a somewhat simplified manner–the economic union's legal policy objectives were geared towards the achievement and preservation of a single internal market.

The creation, maintenance and further development of political union, however, was (again somewhat simplified) determined by the legal policy objective that sought to determine at each stage the respective proportions of intergovernmentalism and supranationalism–always with respect to the current social/political possibilities, needs and necessities.

3.1. The difficulty of the problem is exemplified by the structure of the various monographs dealing with European law. The comprehensive treatises simply put the European legislation side-by-side, but quietly acknowledge that this legislation in reality more or less develops based on the possibilities offered by everyday politics, by the perspectives current political considerations bring to the issue. Its formation, development, expansion and content are determined by political will formation, the ability to find consensus. The result is that it develops not with the systematic/dogmatic conceptions of a unified nation-state, but more as a patchwork, thus to a significant degree dependent on chance.

One cannot expect European law to have an immanent system quality–with the taxonomic quality that is present in the national legal orders of nation-states–a real, overarching conception of legal branches that is composed of different legal branches.

Let us consider some other examples!

The "Handbuch des EG-Wirtschaftsrechts"[16] edited by Dauses and Zäch's previously mentioned „Grundzüge des europäischen Wirtschaftsrechts"[17] are

[15] Vörös: *op. cit.* III. 3.3.

[16] Dauses, M. (ed.): *Handbuch des EG-Wirtschaftsrechts* [Manual of EC Economic Law]. München, 2002.

[17] Zäch: *op. cit.*

just as incapable of realising their undertaking without exploring the so-called institutional/organisational law–that is the constitutional aspects *par excellence*– as Nicolaysen's work on the same legislation[18], which carries the subheading "European Integration Constitution" itself. The same constitutional issues (among others) are discussed in the standard work by Craig–de Búrca, which nonetheless bears the title "EU Law". [19]

3.2. Designating the field of law as sui generis may be appropriate, but cannot conceal the fact that the scientists who came up with the term 'sui generis' had no clue themselves as to what is that they are talking about. Developing the contours of political union and stabilising it specifically requires that the concept be endowed with specific meaning.

From the diverse studies, monographs and analyses on the subject it becomes increasingly apparent that a tripartite division is becoming generally accepted.

a) First: the history of integration; the legal dogmatic and legal policy foundations of European law and its characteristic features, as well the concept of European law as unified Union law.

b) Second: the two major part of European law today: the institutional/organisational law (institutions, structure, operation, lawmaking, legislation) and the so-called "substantive" law (e.g. competition law, company law, public procurement law, penal law).

c) Third: the Union policies.

Such a tripartite division illustrates at least that today a monograph on European law can no longer be just a mass of ten chapter on positive laws lined up next to each other. The reasons are threefold.

For one, European law has to reflect the dual legal policy objectives of preserving and further developing economic and political union, which one cannot expect from the legal order of a nation-state, especially since that is not even its legal policy function. This consideration suggests that we ought to use the greatest caution possible when using traditional categories of legal branches, such as for instance European "private law", "competition law", "company law", "penal law" or even "constitutional law". The *sui generis* content of European law and its characteristic features–including its structure and categories–are determined by integration and its specific legal policy objectives. These legal policy objectives–let us reiterate this–cannot be described (without

[18] Nicolaysen, G.: *Europarecht. Die Europäische Integrationsverfassung* [The European Integration Constitution]. 2nd edition, Baden-Baden, 2002.

[19] Craig, P.–de Burca, G. (eds.): *EU Law*. Oxford, 2003.

the danger of causing confusion) with reference to the content of the nation-states'/member states' legal systems.

The distinction drawn between Community law and Union law also increasingly appears artificial, and with the conclusion of the TCE's ratification–that is if it is successfully concluded in every member states–it will become outmoded. Regardless of the TCE's actual fate European law must be presented and systematised in dogmatic unity. The excessive overlaps between TEU and TEC also serve to underline this requirement.

Secondly, the well-known distinction between *"institutional" and "substantive" law* is also becoming increasingly *questionable.*

The institutions constitute the EU's constitutional, more precisely its administrative law foundations and structure, naturally *including the lawmaking and legislative system.*

But the "substantive" law can no longer be simply reduced to the law on the internal market–in other words to the legal guarantees concerning the four fundamental freedoms–either. Obviously the four fundamental freedoms constitute the absolute core of the EC, whose legal regulation and safeguarding–from common trade policy to rights to subsidies–far extends beyond merely maintaining the internal market narrowly understood and the prevention of market distortions. The legislation created in this context–the "law" of the internal market–is not "substantive" law, but *a more or less coherent sui generis field of law, codified around the four fundamental freedoms and following its own particular legal policy objectives.*

"European" competition law, public procurement law, company law or the law concerning state subsidies all give legal form to *different aspects* of maintaining, safeguarding and protecting a single internal market; they formulate the categorical imperative and legal guarantee of the free movement of goods, services and capital, as well as the freedom to settle, countering potential state or corporate efforts to distort or inhibit said freedoms. In terms of their legal policy context and their objectives, the regulations concerning European company law (European Economic Interest Groupings, European Public Limited-Liability Company), can be much better understood as implementing executive regulations of TEC Article 43–that is the free movement of persons and settlement, as well as the safeguarding of the freedom of services–rather than as a form of some "real" nation-state commercial law's codification of company law.

From the above it appears to follow that the use of a "European" private law, economic law or trade law category would be rather *problematic.*

Finally, an open question still remains: what should happen to the various *policies* in terms of legal dogmatic–where should one put the common first pillar trade policy, for example? The strong market protection/administrative

aspects of this policy are obvious. But what about the second and third pillars? A common trade policy, with its legal policy orientation towards protecting the market, its legal/administrative set of tools, as well as its economic diplomacy competencies (WTO, etc.) undoubtedly belong to internal market "law".

The other two pillars belong to traditionally understood public law issues. But in light of the above the division of European law into "private law" and "public law" seems like a rather dubious experiment that I would caution anyone from engaging in. Such a division would be extremely unlikely to have a convincing legal dogmatic basis, as it would say or express nothing regarding the EU's previously often emphasised own and specific legal policy objectives.

4. In my opinion European law could be divided into a *general part* and a *special part.* These categories obviously do not correspond to a nation-state's legal system's traditional conceptual criteria concerning general and special parts.

The *general part* would deal with the historical development of integration, as well as the foundations and objectives of the EU's social, economic and legal policies.

The *special part* can be further broken down into two parts: *First* into the constitutional foundations (institutions and their operation, lawmaking and legislation, the legal nature of European law, the second and third pillar policies) realising the political union. Secondly, it would incorporate the subpart on the legal safeguards for preserving the *single internal market* and the realisation of the *economic* union which, *in a systematic perspective,* would summarise these safeguards' various aspects and legal institutions embedded in a mutually referential *context.*

* * *

In our opinion the presentation of the TCE and the analysis of its effects makes it inevitable to take a look at the fate of European law as well. A dogmatic rethinking of the European legal system is a task, however, that the Hungarian and European legal scholarship and legal practice–including the legislators–will have to face up to as soon as possible, regardless of the TCE's political fate and its substitution with the planned Reform Treaty.