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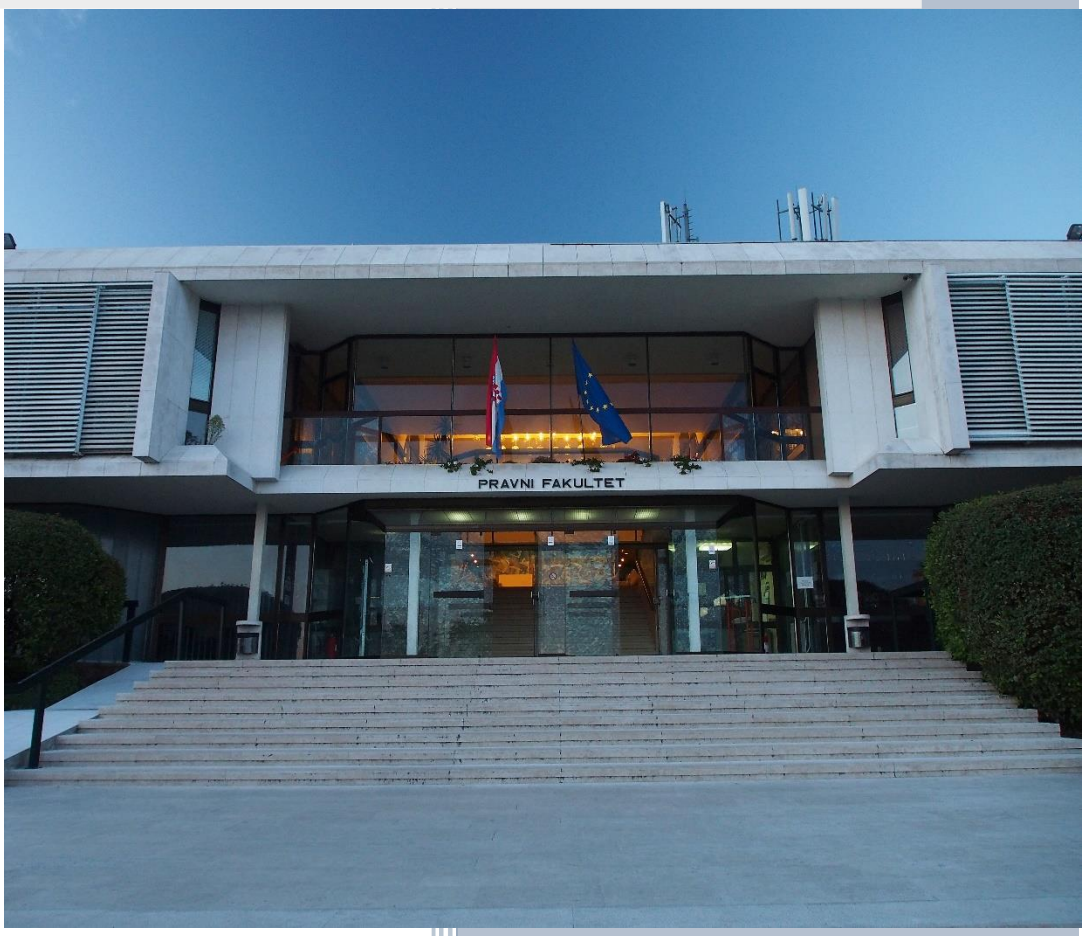

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Ivana Kunda

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COMPLIANCE OF FINANCIAL INTERMEDIARIES IN THE NEW ERA OF EXCHANGE OF INFORMATION BETWEEN TAX AUTHORITIES

This presentation deals with the compliance of financial intermediaries with their new duties regarding the exchange of information between tax authorities. The said duties continue to grow on both the international level and European level, which sometimes overlap. On the one hand, there are international instruments developed especially by the OECD, such as Tax Information Exchange Agreements (hereinafter: TIEAs), the Convention on Mutual Administrative Cooperation (hereinafter: MAAT Convention) and – the milestone – Art. 26 of the OECD Model Convention. These instruments represent different working schemes aimed at improving transparency and efficiency between fiscal authorities of different States. They all rely on financial intermediaries who are expected to give an important contribution to the development of the system of exchange of information. For instance, Art. 26(5) of the OECD Model Convention has recently been modified to introduce a specific regime for the category of economic operators. On the other hand, the European Union has introduced a new transparency policy, not only to implement international standards, but also to achieve harmonization with regard to this important issue. The first directive – the Directive 779/77/EEC – concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (and taxation of insurance premiums) has been replaced by the Directive 2011/16/EU, known as the DAC Directive, on administrative cooperation in the field of taxation, providing a new and more efficient mechanism to grant a correct exchange of information between the Member States and tax authorities.

As of 2014 the role of financial intermediaries has assumed an increased importance, so that EU institutions decided to take legislative actions. Firstly, by enacting the Savings Directive 2014/48/EU whose objectives were to ensure effective taxation of savings income in the form of cross-border interest payments which were generally included in all Member States in the taxable income of resident individuals. Subsequently, by introducing the Directive 2014/107/EU, known as the DAC 2 Directive, which amended the Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation. The latter instrument focuses on the role of financial intermediaries laying down a series of their duties which must be strictly followed and carried out correctly to grant the transmission of taxpayers' data to the competent authorities. And finally, by adopting the Directive 2015/2376/EU whose goal is to assure mandatory automatic exchange of advance cross-border rulings and advance pricing arrangements. Moreover, the focus is put on the role of financial intermediaries, analysing their duties

and, overall, the way in which they face the balance needed between the taxpayers' privacy right and the taxing power of States.

This presentation forms part of a broader research aimed at studying the development and trends in the field of legal regulation of the exchange of information within EU and the international framework. By comparing different schemes, shared traits are identified as well as areas with potential for convergence. Joined in a single mechanism these parallel schemes would be more efficient. At the same time, there is a need to carefully balance the opposing interests of taxpayers to protect their privacy right and the States to strengthen their taxing powers of States.

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OPEN ISSUES OF THE PRIVATE EQUITY AND VENTURE CAPITAL FUNDS IN THE LIGHT OF THE LEGAL REGULATION OF ALTERNATIVE INVESTMENT FUNDS

Since 2013 alternative investment funds (hereinafter: AIFs) have been regulated by the Alternative Investment Funds Act (hereinafter: ZAIF) in the Croatian law. The latter Act has redefined the legal forms of AIFs and its bylaws detail their sub-types. As regards AIFs with a legal personality, except AIFs in the form of a joint stock company, ZAIF introduced a fund in the form of a limited liability company (LLC). While AIFs in the form of legal persons can be self-managed funds, open-ended AIFs should appoint an external manager. Shares/units in AIFs can be offered through private or public offering, whereas shares in LLCs are not suitable for public offering. Private offerings are mainly targeted to professional investors, whose investing capacity exceeds a certain threshold. On the other hand, only in a limited number of cases may a small investor also require the "professional investor status". Such a variety of criteria requires a closer look when it comes to particular types of AIF.

In the category of funds with private offering, which appear relatively unfamiliar and unknown to the public, one may distinguish between "a basic AIF with private offering" and "a special type of AIF-s with private offering", the latter being AIF-private equity (hereinafter: PE), AIF-venture capital (hereinafter: VC), AIF-with private offering for investing in the real-estate, fund of funds, hedge fund, specialized AIF, European venture capital fund (hereinafter: EuVECA) and European social entrepreneurship fund (hereinafter: EuSEF). Apart from the type of assets such special funds with private offering invest in, they differ according to the time horizon of the investment, level of risk and investment techniques they employ, as well as in shaping their "enter" and "exit" techniques.

PE and VC funds deserve special attention since they invest in the companies generating economic growth. While these funds fulfil a very important role in providing alternative sources of financing, their investment techniques are becoming increasingly questionable – especially as to whether they invest in a socially responsible manner. In addition, AIFs exert influence over the financial market in which they operate. They often use the instrument of leverage, i.e. borrowing which is not secured. The higher the leverage, the higher the exposure. Consequently, AIFs with a higher value of assets pose a threat to the financial system in general. These were some of the reasons for adopting the EU AIFM Directive, which tends to put AIFs managers under the regulatory umbrella.

This presentation focuses on the new regulation of PE and VC funds as generators of the social and economic development. Special reference attention is dedicated to the relationship between AIFs (PEs and VCs) and the portfolio company – focusing on the pre-

investment and investment stages, as well as the exit techniques. Entering a portfolio company by VC and PE is generally preceded by due diligence and, if positive, structuring legal terms of investments. Foreign AIF managers have already developed legal models which they adjust to the local market needs in order to comply with the existing company, tax, competition and other applicable laws. However, there is plenty of room for negotiation in view of the fact that legal relations between the portfolio company and the PE and VC funds falls under the category of non-mandatory law. Having a stronger bargaining position, AIF managers not only impose the contents of the investment, but also dictate the rhythm and outcome of negotiations. Once the PE and VC funds enter the portfolio company, the AIF managers motivated by their incentive-based remuneration model, exert considerable influence in the operation of the portfolio business. As a result, AIF becomes a very important stakeholder in corporate governance. Because of this, AIFs should act socially responsible and moreover encourage other decision-makers to do so too. Even so, international investment practice shows that the activism of AIFs as shareholders in the portfolio company often goes beyond the level of legally acceptable conduct, especially if the AIF itself is focused on short-term results, which is visible from the hedge funds operations.

Therefore, the author intends to identify techniques of "entering" the portfolio companies and analyse AIFs conduct in the course of investment, including the exit techniques. There is a demand for the AIFs socially acceptable conduct by pursuing the goals of maximizing their profits, albeit in a socially responsible way. PE and VC funds should pay attention to the interests of all stakeholders in the process, such as other shareholders and employees, as well as the interest of integrity of the market as a whole.

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RETHINKING PART-TIME EMPLOYMENT IN THE MIDST OF DEMOGRAPHICAL CHALLENGES AND THE ECONOMIC CRISIS

This presentation addresses the potential of part-time work combined with social safety nets as an alternative tool to be used in Italy in order to sidestep the employment crisis plaguing the younger generation and as a "decompression chamber" of the pension reform of 2012. It considers not only "pro labour" aspects, but also the direct and indirect costs and benefits which characterise part-time employment. Methodology-wise, this presentation relies on the traditional legal research of Italian or supranational sources in the broad sense (statutory provisions, union collective agreements and case-law), as well as on comparative empirical evidence (analysing case studies) from interdisciplinary, economic and financial sustainability viewpoints.

Why rethink part-time employment now? Part-time employment has lately become the fulcrum of the transformation and the test-bed of labour law. In fact, it represents one of the most amended types of contracts because it adapts better to the changes of our economic and social system. One of the purposes of Europe 2020 recommended in the Treaty of Lisbon is the increase in part-time jobs, assuming it will generate a growth in the employment rate, even for vulnerable subjects on the labour market, such as women, young people and seniors.

One way to approach the issue is to further close the doorway to retirement, however, this severely affects the chances for the younger generations to find employment. Another solution is offered in the form of the so-called generational relay, which has been in the spotlight for some time. While some countries have experimented with it, Italy never took that path. The purpose of the generational relay is to divide employment among generations, thus guaranteeing senior workers the transition from full-time to part-time employment and, at the same time, employing young people on part-time basis. This is a valid solution for workers, for it permits a gradual conversion from working life to retirement and opens new ways for the younger generations to enter the labour market. It may also be seen as advantageous for the employers, as a means of supporting the generational transfer of knowledge. Yet, many employers might see its advantage in reducing the costs related to human resources. Whatever the case, this is an expensive measure.

Part-time employment reveals its ductility in particular when combined with social safety nets. The most fitting instruments to this effect are the so-called "expansive" job-security agreement and collective agreements at the company level which have the specific objective to defend employment levels and simultaneously hire other workers.

Operationally, this leads to a reduction of working hours for all or for the most of workers, depending on employees' skills, as well as to a compensation of the lost pay in the form of wage coverage of national contributions. As a "lesser evil", part-time employment may also be used as an atypical social safety net. Whereas during periods of reduced employment conversion of full-time into part-time relationship is used to mitigate more severe consequences, during recovery, the situation should be reversed to full-time employment. For many reasons in the past, job-security agreements were not successful, but now that the Italian government has modified the passed legislation the situation might change for the better. The new Jobs Act brings about a revisited scope and operation of the rules on job-security agreements assuring greater flexibility.

This is very important particularly in relation to the most recent records on the reduction in the use of ordinary *Cassa integrazione* – the Italian social security net, a strong increase in the use of non-ordinary *Cassa integrazione* and notwithstanding *Cassa integrazione*, despite the lack of approval of the agreements that are awaiting funding. If both job-security agreement and part-time employment could be used, companies, which did not have the right to take advantage of the non-ordinary *Cassa integrazione*, could benefit from it. In fact, those are usually small and medium-sized enterprises, that make up the social fabric in the northeast of Italy. Possibly, part-time employment could be a helpful instrument in suppressing high unemployment rates.

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ADEQUATE DISCLOSURE AND EFFICIENT ANTI-OPPORTUNISM MECHANISMS IN CROWDINVESTING

Not so long ago innovation as the "mantra" of competitive economy stepped into the financial sector and the capital-raising process utilizing the benefits of the digital era. Innovative young companies traditionally approached high net-worth individuals with entrepreneurial experience and venture capital industry as the main sources of early stage financing. Following the credit crunch, the potential investor base for high-risk investments has been expanded to retail investors. A recently emerged business practice of raising venture capital from a general public using specialised online portals – crowdinvesting – has the potential to grow into a viable financial alternative for start-ups. Whether and to what extent this potential can be realised depends *inter alia* on the interest of general public to engage in this type of high-risk investments and its confidence in the crowdinvesting market.

Having in mind the distinctive features of crowdinvesting, this presentation explores possible investor-protection mechanisms used to mitigate the risks associated with the issuer and the offer of financial instruments in crowdinvesting context. Both the pre-investment phase and the post-investment phase in crowdinvesting are marked by a significant information asymmetry between entrepreneurs and investors as well as by risks of opportunistic behaviour. Taking into consideration what is possible to disclose and that what is necessary to disclose, adequate disclosure enables an informed investment decision. Although different anti-opportunism mechanisms may be used, evaluating possible alternatives is instrumental to identify the most efficient ones. Likewise, when selecting the investor-protection mechanisms, it is important to study not only those seen as typical features of crowdinvesting, but also other relying on strategies applied by professional investors (such as anti-dilution provisions, tag-along provisions, liquidation preferences etc). Some of these mechanisms could be employed as optional, i.e. as a part of crowdinvestor-friendly business model, while others should be imposed by the legislator.

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NON-LETHAL WEAPONS IN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW

Although weapons in international law are usually associated with lethal weapons, the reality paints a different picture. Both in armed conflict and law enforcement scenarios non-lethal weapons are also deployed aimed primarily at temporarily incapacitating people and/or objects. Within the past years, many incidents occurred where non-lethal weapons were used against people causing death or permanent injury. Especially the high fatality rates resulting from the use of conducted electrical weapons, commonly referred to as "Tasers", led to much criticism raising in turn strong human rights concerns. Within this research, different legal regimes, most notably International Humanitarian Law (hereinafter: IHL) and International Human Rights Law (hereinafter: IHRL) will be analysed with a view to developing common standards and criteria for the use of non-lethal weapons both within and outside the ambit of armed conflict.

Non-lethal weapons may be broadly classified into many different categories such as acoustic, biological, chemical, electric and kinetic weapons. While arms control treaties only prohibit the use of biological and chemical weapons, IHL takes a broader approach. Despite that, IHL restrains the use of non-lethal weapons only to a limited extent. While the principle of distinction prohibits indiscriminate attacks, the principle of proportionality leads to the circumvention of the former principle. Insofar, the legal regime established within the IHL does not suffice in restraining the use of non-lethal weapons. Therefore, IHRL may be more suitable for this purpose. The right to life prohibits the use of non-lethal weapons which may cause death but the provision does not prohibit "unnecessary suffering". Only the prohibition of torture, applicable within and outside the ambit of armed conflict, includes the deployment of non-lethal weapons causing severe suffering. Yet, this prohibition can be applied only in case a weapon is intentionally inflicted on a person with a view to obtaining information or a confession. The right to health with regard to non-lethal weapons has not been addressed extensively so far.

The research conducted thus far has resulted in the following preliminary findings. First, the only solution currently available is to foster the right to health as enshrined in several human rights treaties. Both practice and literature are rather reserved when it comes to the principle of the right to health used in the context of non-lethal weapons. The right to health needs to be interpreted in a much broader understanding. Second, when interpreting human rights obligations, the particular circumstances in which non-lethal weapons are being used need to be taken into consideration adequately (by means of a

case-by-case assessment). Especially in custodial centres and riot control scenarios where people are unable to hide or protect themselves must the use of non-lethal weapons be restricted to very exceptional circumstances. Third, when it comes to armed conflict, Additional Protocol I may be considered as a more special provision than the right to health. Nevertheless, IHL and the right to health can be seen as complementing each other. Therefore, the term "unnecessary suffering" has to be interpreted in a human-rights sensitive manner. Finally, the principle of proportionality must not lead to the circumvention of the principle of distinction.

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FAIRNESS OF CURRENCY CLAUSE IN CONSUMER CREDIT AGREEMENTS: A CASE STUDY OF CROATIA

In the period from 2005 to 2007 the Republic of Croatia witnessed an expansion of credit consumers agreements with currency clauses based on the Swiss franc exchange rate (hereinafter: CHF credit agreements). More than 90.000 CHF credit agreements were concluded in Croatia, of which over 90% were intended for housing loans. In 2008 the value of the Swiss franc soared. The increase was so high that the monthly credit agreement annuity nearly doubled. Because of this, a huge number of Croatian borrowers (and their families) were put in a difficult financial position, wherefore non-governmental organisations started pressuring the Government to deal with this issue. It should be noted that the Croatian experience is not an isolated one, and similar scenarios occurred in many South and Eastern European countries, including Hungary and Poland. To help their citizens rectify the damages, some of these Member States enacted new laws or helped establish non-profit organizations for consumer protection and initiate proceedings before domestic courts. Since then, Croatia has witnessed legislative interventions as well as court cases raising numerous controversies, but the story is long from over. Various allegations have been made in the course of these court proceedings, among others that the banks had been able to predict the substantial increase in the value of the Swiss franc, but intended this situation to happen in order to make an extra profit. Whatever the case, from the perspective of the consumers, the credit agreements seemed favourable, because the monthly annuities were lower in comparison to credit agreements linked to other currencies, especially Euro as the most commonly used currency in credit clauses in Croatia.

The purpose of this research is to examine the legal notion of the currency clause and its function in the CHF credit agreements, as well as to assess the currency clauses, in particular using the clauses from the CHF credit arrangements through the lenses of the unfair contract terms. It is well known that the purpose of the currency clause in general is to prevent the loss of the money value owing to currency fluctuations, thereby protecting the lender (in this case the banks) from currency devaluation and shielding the borrower (in this case the consumers) from currency revaluation. Naturally, the lenders wish to protect themselves from currency fluctuation risks, in view of the fact that the common period for credit arrangements related to residential immoveable property is 20 years or more. However, in B2C credit agreements the consumer as the weaker party does not have the opportunity to negotiate the terms of the agreement. Is this fact alone relevant to the question whether in B2C situations the other party to the contract (in this case the bank) should also be subject to certain equivalent obligations? Is it fair that the banks, as the professionals, may always rely on the instruments such as currency clause, when they are involved in B2C agreements? Are there alternative instruments that can

serve similar purpose of protection against money fluctuation risks, without the potential to affect consumers in such a way as in the case with the CHF credit agreements? With this in mind the author intends to suggest different ways in which a currency clause may be used in the consumer credit arrangements and to offer alternative protective clauses, which may alleviate the lenders' risks without having an adverse effect on the consumers' position.

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HOW TO RECONCILE THE EU NOTION OF SGEI AS A UNIVERSAL NOTION WITH THE NATIONAL CONCEPT OF PUBLIC SERVICES?

Due to EU Member States' individual legal cultures, traditions, as well as their specific social and historic contexts, the difference in their approach to public services and in particular to services of general economic interest (hereinafter: SGEI) comes as no surprise. The notion of SGEI was introduced by the Treaty of Rome in 1957, and today it is referred to in Articles 14 and 106(2) of the Treaty on the Functioning of the European Union (TFEU), in Protocol No 26 annexed to the TFEU and in Article 36 of the Charter of Fundamental Rights of the European Union. However, none of these documents explains the meaning of SGEI or enumerates services that are to be considered SGEIs. This is so because the European legislator intended to give Member States the freedom to define specific missions of general economic interest and to establish the organisational principles of the services intended to accomplish them. However, there are certain common denominators applicable to SGEIs in all Member States: a) they must be considered of particular importance for the citizens; b) be identified as such by the public authorities and; c) must not be supplied by market forces alone (or at least not to the extent and under the conditions required by society in terms of quality, safety, affordability, equal treatment or universal access). Some examples thereof are transport networks, postal services and social services.

Having in mind the importance of such services and the implications of the differing legal regulation across the Member States, this presentation introduces and analyses the regulatory framework of the SGEI in Croatia and addresses the Croatian regulatory and policy choices relating to a number of SGEIs from the perspective of State aid law.

The research conducted thus far reveals a fragmented legal approach to public services and their financing in Croatia. There is no general law on public services and no comprehensive view on SGEIs in particular. In addition, there is a lack of clear legal terminology. The latter is the result of the decision-making bodies' practice of using non-synonyms interchangeably. Such a practice may be understood as a manifestation of conceptual inconsistencies in the legal vocabulary, or even a corollary of misunderstanding the concepts in question. For this reason, reconciling the EU notion of SGEI as a universal notion with the national concept of public services in Croatia which is mostly formed by the socialist past of the country on the one hand, and specific legal tradition regarding matters of public administration on the other, is a formidable task indeed.

The most coherent approach to defining the notion of public services is from the perspective of the State aid law. Namely, in case the provision of a SGEI does not produce enough profit for the undertaking providing it, a public service compensation is needed to offset the additional

costs stemming from the obligation to provide these services. Nonetheless, any State intervention in the market can be a source of distortion. Therefore, State aid control is needed to ensure that public service compensation is necessary and proportionate to the objective pursued, so as to avoid distortion of competition and trade contrary to the interests of the EU. From that perspective, the key question is whether to use the notion of SGEI only when referring to the State aid aspects in relation to public services or to extend this notion beyond these rules so as to encompass other relevant normative acts as well.

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ARE SPECIAL PRIVACY RULES NECESSARY FOR THE ELECTRONIC COMMUNICATIONS SECTOR? A LEGAL-BASES PERSPECTIVE

The personal data protection system in the European Union consists of general and special legislation. In light of the intensified use of the Internet in personal and business spheres, and increasing fears of persons about misuse of their personal data, the new European Union data protection legislation was deemed necessary. With a two-year vacation period, in May 2018 the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation – hereinafter: GDPR) will become applicable. The GDPR was enacted after an almost four-year long legislative process. With over 4000 amendments it is the most lobbied EU legislation ever. Following this new EU general data protection legislation, the revision of the only EU special data protection legislation is under way. Currently in force is the Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (the so-called ePrivacy Directive), last updated in 2009. It is focused on ensuring data protection and free movement of such data in the electronic communication sector. As in the case of the GDPR, the revision of ePrivacy Directive was deemed necessary in order to address the challenges of the digital era and to align it with the Digital Single Market Strategy and the new GDPR. The European Commission closed the public consultation on the Evaluation and Review of the ePrivacy Directive in July 2016 and is currently conducting its in-depth analysis.

The main question in the context of the consultation is whether there is (still) a need for EU special data protection legislation at all. According to the preliminary findings from the consultation, 83% of the surveyed citizens and civil society organizations is in favour of special data protection legislation, whereas industry respondents are sceptical declaring only selective support for rules on confidentiality (31%) and rules on traffic data (26%). A strong divide between the two poles indicates that a long and exhausting legislative process is again a likely scenario, for it is unrealistic that the Commission will give up this Directive. Nevertheless, this presentation intends to examine the question of the need for the special legislation in the electronic communications sector from a particular perspective – that of the legal bases for processing of personal data. The basic assumption is that clearly defined and legally certain legislative bases for personal data processing are essential for assuring the right to protection of personal data as an EU fundamental right. Therefore, the following questions arise: Are legal bases established in the new GDPR

sufficient guarantees in the electronic communications sector? Should stricter rules for personal data processing be preserved in the electronic communications services? Is the consent-based approach, which is characteristic of processing of personal data according to the current ePrivacy Directive, (still) appropriate? Could legal bases in the ePrivacy Directive generate negative consequences upon individual or collective interests because they are more limited than in the GDPR? What impact can the existence of the special regime have on the development of innovative services and products? Results of this analysis will lay the groundwork for providing *de lege ferenda* proposals with respect to legal bases for personal data processing in the electronic communications sector.

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TRADEMARK EXHAUSTION AND THE INTERNAL MARKET

As an intellectual property right trademark does not confer upon its holder the right to control the distribution up to the final consumer. This general principle is also present in the doctrine of exhaustion of rights. After having put a good bearing a trademark on the market for the first time, or having authorized it the trademark holder essentially cannot oppose further commercialization of that good nor condition its lawfulness on the territory where it has been first put on the market by subjecting it to price conditions, distribution conditions or the like. The territorial reach of this doctrine depends on the types of exhaustion adopted in a particular country and can in turn be of national, regional or international reach. The European Union opted for the regional exhaustion, thus, once the goods bearing a trademark are put on sale in any country within the European Economic Area, they can freely circulate within that region without violating anyone's trademark rights. The key element in opting for the regional exhaustion, as stressed by the Court of Justice of the European Union (hereinafter: CJEU), is that the parallel importation within the European Economic Area does not undermine the essential function of the trademark (function of guaranteeing the origin and the quality of the product) or its specific subject matter (the functions of guarantee-investment, advertising or communication). However, the flipside of the coin of the doctrine of exhaustion is that trademark owner is allowed to oppose parallel importation from a country outside that Area. Even if the international exhaustion doctrine were applied within the European Economic Area, the functions of the trademark would have to remain unimpeded.

Ideally, the mechanism of exhaustion should achieve a balance between the interests of the holder of the trademark, on the one hand, against the individual interests of the acquirer of the product covered by the trademark, as well as the collective interests of consumers, on the other. The author argues that the applicable EU rule is inadequate from the point of view of balancing these interests. Although the main goal of the exclusive rights conferred by the trademark for the trademark holder is to benefit financially from their own activity, this presentation attempts to set a more adequate limits to this benefit. It is argued that trademark holders enjoy excessive legal protection to the detriment of the interests of other participants in legal transactions. The latter argument is supported by an analysis of the CJEU case law, which demonstrates that the trademark holder may rely on the doctrine of exhaustion, provided the first sale of the product conformed with certain cumulative conditions. Four issues arise in this context: the notion of putting on the market, the quality of consent, the territory of commercialization and legitimate reasons for the prohibition of further commercialization of the trademark owner. In particular, the meaning of “consent" is far more complex than might be conceivable, especially in regard to the question of quality of consent and how to prove its existence.

Arguably, the interpretation given by the CJEU is overly strict, making it well-nigh impossible for the parallel importer to submit proof of the existence of consent. Additional issue in focus of this presentation concerns legitimate reasons for prohibiting the further use of a trademark. It is argued here that the interpretation given by the CJEU is too wide and fails to take the principle of proportionality sufficiently into consideration. Needless to say, too wide a right given to the trademark owner may jeopardise the functioning of the EU internal market – the very goal that the CJEU had in mind when establishing the (trademark) exhaustion model for the EU.

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PACTUM ANTICHRETICUM IN ROMAN AND MODERN CIVIL LAW

The word *antichresis* originates from a combination of the Greek words *anti* ('against') and *chresis* ('use'). Despite the fact that this legal institution was named by the Ancient Greeks and moreover remains to be known by this name to date, the practice of *antichresis* was also common to the cultures preceding the ancient Greece, such as the Sumerian, Akkadian and Mesopotamian. While *antichresis* was introduced into the Roman law towards the end of the classical period, sources reveal that ancient Romans knew not only of the *antichresis*, but also of the *pactum antichreticum*.

Regardless of important differences between the two, *pactum antichreticum* and *antichresis* are often used interchangeably, thus causing misunderstanding, confusion and even inadequate decision-making. The relevant sources indicate that the Romans considered *pactum antichreticum* as a type of *pactum adiectum*. Although the *antichresis* pact could be added to any type of contract, most frequently it had been added to the contract of pledge. Following the quote from Gaius, *si pignore creditor utuatur, furti tenetur,* the holder of the pledge may not use it. Adding the *pactum antichreticum* to the contract of pledge constituted an exception to the prohibition of *ius fruendi*, because the pledgee would have obtained the right to possess and use the object of the contract in order to retain the fruits of the pledged thing in lieu of the interest. On the other hand, Marcian's passage D.20,1,11,1 teaches that ancient Romans knew of the legal institution of *antichresis* as well. They considered it to be an innominate contract *do ut facias* that incorporates the *contrarium muutum* of the things, i.e. the use of someone else's capital in exchange for the use of someone else's property.

During the Middle Ages, the *antichresis* was abandoned under the Canon law and prohibited by Pope Alexander III in 1163. These were times when receiving interest on loans was condemned, whereas the *antichresis* contract was considered as an institution disguising the practice of usury. In modern law, the *antichresis* contract reappears in the Napoleonic Code to legislate the practice of the customary law that was popular in southern France at the time the Code was drafted in the early 1800s. Nowadays, *antichresis* is present in most countries in which the Napoleonic Code have had considerable influence, such as France, Spain, Italy and in the majority of the Latin American countries. A comparative analysis of *pactum antichreticum* and *antichresis* in the above mentioned legal orders aims to single out the main issues pertaining to the two legal institutions.

Considering that these two legal notions were distinguished back in the Roman law, the functions and legal nature of the Roman concepts of *pactum antichreticum* and *antichresis* are here thoroughly analysed in order to provide a better understanding of the genesis of

the corresponding legal notions in the modern legislations based on Roman law tradition. The gained insights will prove equally valuable for an effective differentiation between these legal institutions in the modern civil law.

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PUBLIC-PRIVATE DIVIDE IN ORGANIZATION THEORY

An organization theory approach to the public sector assumes that it is impossible to understand the content of the public policy and public decision-making without analysing the organization of political-administrative systems (Christensen et al., 2007). Modern public administration systems include different organizations. Three categories of the latter organizations are distinguished: first, public organizations such as government ministries and agencies; second, private organizations such as private companies that deliver various public services or public goods to citizens (e.g. water companies, transport companies); and third, nongovernmental organizations that can and often are involved in service delivery, especially those of the welfare kind (e.g. charities).

This presentation focuses on the difference between public and private organizations, more specifically, on publicness as a characteristic of an organization. The issue whether the public context of an organisation influences its conduct is a topic known in the literature as the "publicness puzzle" (Bozeman, 1987) and it has been extensively discussed due to its important practical implications. Both scholars and practitioners of public administration are interested in questions such as: Does ownership of an organization matter? Are there any intrinsic properties of public organizations that make it impossible to treat them as private ones? And if so, what are these properties? A practical reason prompting the search for answers to these and similar questions is the assessment of possibility to successfully transfer the managerial practice from one sector to another, namely from private to public; for example, by introducing a more flexible regulation of public servants employment or remuneration. Equally important is, exploring the implications of imposing public interest goals to private companies. Finally, answers to these questions are crucial for understanding the roles of private and public sector in modern societies.

The traditional approach to organizational publicness assumes that organizations are different because of their ownership: public organizations are owned by government, while private by private actors. Thus, organizations are differentiated based on the formal legal element of their status. In contrast, the contemporary approach is more complex insofar as it argues that every organization is public to a certain degree. With the aim to debunk the common myth that ownership matters when it comes to organizational performance, this presentation addresses the difference in the treatment of publicness in organizational theory and examines, empirical findings to date on the differences between public and private organizations.

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MANDATUM POST MORTEM: A DIACHRONIC CONNECTION BETWEEN ROMAN LAW AND EUROPEAN PRIVATE LAW

With respect to inheritance law, the legal systems of the Member States are commonly divided into two groups: on the one hand those that permit contracts as a means of devolution of inheritance, and on the other those that prohibit successions agreements. After the recent entry into force of the Regulation 659/2012, an amendment of the applicable national rules appears necessary especially for countries such as Italy, whose laws do not allow succession agreements. The current European trend shows that where future succession pacts are prohibited, Member States should consider allowing such covenants, as their prohibition makes proper estate planning unnecessarily cumbersome. Departing from this background, this presentation focuses on the Italian prohibition of succession agreements from a historical-comparative perspective.

In view of the harmonisation of the European private law, both a historical and comparative point of view merit equal importance. The conducted analysis demonstrates that the archetype of the admissibility of succession agreements is found in the ancient Roman law. Notwithstanding the general understanding that the prohibition of succession pacts may be traced back to the ancient Romans, this research aims at pointing out that a clear position against *mortis causa* attributions resulting from bilateral agreements cannot be found in the classical legal thought. With this in mind special attention is devoted to the so-called *mandatum post mortem*, a contract accepted in the case law of the Italian *Corte di Cassazione* and legal scholarship. As the line between a valid *mandatum post mortem* and a void succession agreement (so-called *mandatum mortis causa*) is very fine, it is argued that the recent introduction of the "reverse mortgage" within the Italian legal system can be considered as a step towards overcoming the prohibition of succession agreements.

In light of the above reasons, this research is concerned with the mandate *post mortem mandatoris* in ancient Roman legal sources, focusing in particular on the problems connected with the validity of a contract having effects after the death of one of the parties. In this respect, I believe that a fundamental misunderstanding concerning the difference between the *mandatum post mortem* and testamentary dispositions needs to be corrected. These two instruments are sometimes confused with one another, due to the ambiguous terminology used in classical sources. Adopting a procedural perspective, one may find that in the sources mentioning both the "will" and the "*mandatum*", the latter term was not used to designate a consensual contract, but to generically define the concept of "authorization". This is consistently demonstrated by the fact that in such cases there is

no reference to *agere mandati*, to *iudicium mandati* or to the *actio mandati*. However, in other – contractual – cases, jurists granted *actio mandati* for the enforcement of a *mandatum post mortem*. In this context, special attention is paid to D.17.1.13, where the validity of a *post mortem* mandate agreement is indeed accepted. Observing that D.17.1.13 provides an example of what today would be considered a void succession agreement, the conclusions offered in this presentation shift to the contemporary law, thereby seeking to establish that the new European trend (allowing more broadly the conclusion of future succession pacts) is not contrary to our common legal culture rooted in the ancient Roman law.

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ANTITRUST LITIGATION AND GROUPS OF COMPANIES AFTER THE CJEU JUDGMENT IN *CDC HYDROGEN PEROXIDE*

Private international law (hereinafter: PIL) has played a vital role in the enforcement of competition law over the last years, due to the increasing number of cases involving cross-border situations. The recently adopted EU Damages Directive is an evident sign of the EU legislator's will to enhance private actions and to engage individuals as relevant actors for the enforcement of competition law. However, whether national courts have jurisdiction to deal with actions under Arts. 101 and 102 of the Treaty on the Functioning of the European Union is a matter of the relevant jurisdictional rules applicable in the EU Member States, which, regarding EU-domiciled defendants are provided by the well-known Brussels I Regime.

The importance of economic affiliations was soon acknowledged by the CJEU, which – albeit not in a coherent way – developed the concept of the so-called "single economic entity". The CJEU's interpretation of the notion of undertaking represents a clear exception to the principles applied to groups at the national level, foremost the principle of corporate legal personality, and has been the subject of harsh criticism by practitioners, in particular for the alleged oversight of fundamental rights protection. However, a question arises concerning the consequences of such a far-reaching approach within the context of private actions, and especially concerning the court jurisdiction for damages actions relating to infringements committed by companies belonging to a group.

The aim of this presentation is to verify whether EU PIL provides sufficient procedural tools allowing a unitary apprehension of corporate groups, i.e. consolidation of claims against different companies belonging to the same group before a single venue. The CJEU has recently for the first time had the opportunity to give a preliminary ruling on the application of Arts. 5(3) and 6(1) of the Brussels I Regulation (now Arts. 7(2) and 8(1) of the Brussels I bis Regulation) in follow-on competition cases. The CJEU's plaintiff-friendly interpretation in *Cartel Damage Claims (CDC) Hydrogen Peroxide SA* does not seem to be consistent with its previous case law and raises a number of issues as to how this judgment will be followed by national courts in the future. Moreover, there are many other aspects that remain unanswered. For instance, it would be interesting to examine whether and how this CJEU's judgment will affect the possibility that defendants, not addressed by the infringement decision, are used as anchor defendants to attract litigation before one court, which is not necessarily closely connected with the dispute overall considered. As is known, English courts developed rather liberal case law on this point, which warrants a critical analysis in light of the "foreseeability" criterion relied on by the CJEU.

Accordingly, this presentation proposes the introduction of certain limits that are necessary in order to avoid jeopardizing the underlying principles of judicial cooperation in civil matters.

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WHEN DIFFICULTY BECOMES DIFFICULT: A RECENT CASE OF FOOTBALL AID RECOVERED

This presentation examines the issue of rescue and restructuring aid to companies in difficulties. A recent case in which the European Commission issued a decision on illegal aid was initiated under the Community guidelines on State aid for rescuing and restructuring firms in difficulty against several professional football clubs from the Netherlands and Spain. The decisions in these cases (SA.41617 Netherlands, Aid to Dutch Football Club NEC (Decision); SA.41614 Netherlands, Aid to Dutch Football Club Den Bosch (Decision); SA.41613 Netherlands, Aid to Dutch Football Club PSV (Decision); SA.41612 Netherlands, Aid to Dutch Football Club MVV (Decision); SA.40168 Netherlands, The Netherlands – State aid for the professional football club Willem II in Tilburg (Decision); SA.36387 Spain, Aid to Valencia football clubs (Decision); SA.33754 Spain, Aid to Real Madrid (Decision); SA.29769 Spain, Aid to certain Spanish football clubs (Decision)) were issued in July 2016, hence 3 years after the cases were initiated. The Commission decided that no State aid was received by PSV Eindhoven and that compatible aid was awarded to the Dutch clubs FC Den Bosch, MVV Maastricht, NEC Nijmegen and Willem II. It further decided that public support measures to the Spanish football clubs Real Madrid, FC Barcelona, Valencia CF, Athletic Bilbao, Atlético Osasuna, Elche and Hércules constitute incompatible State aid.

Whereas the suspicions about the illegality of the awarded State aids to the football clubs from the Netherlands were cleared off, the Commission established that considerable illegal aid was awarded to seven Spanish football clubs. Specifically, the corporate taxation privileges of Real Madrid, FC Barcelona, Athletic Bilbao and Atlético Osasuna were found to represent measures in breach of EU State aid rules. To eliminate the undue advantage received for two decades, each of the said clubs will have to repay up to €5 million (subject to the Spanish authorities recovery process). Furthermore, the Commission determined uneven advantage for Real Madrid gained in the process of real property swap with the City of Madrid. As a consequence, the City of Madrid needs to recover € 18.4 million from Real Madrid. In its last decision, the Commission determined that Valencia, Hércules and Elche will need to repay €20.4, €6.1 and €3.7 million respectively because the clubs were in difficulty when they received public guarantee on bank loans, yet all stakeholders failed to notify the Commission of the State aid compatible with the internal market or develop an appropriate restructuring plan.

This presentation examines the background to the Commission's decisions in these Dutch and Spanish cases, while providing an insight into the history of considering sport activities as economic activity in the market (transfer, media, commercials etc.) and by extension subject to the EU competition rules. Awaiting for the texts of the decisions to be published by the Commission, the presentation puts forward possible justifications of the individual decisions and explains the reasons for the negative outcome for the Spanish

clubs. In doing so, both practical and theoretical approaches are employed to compare professional football as a sport activity to real-sectors where State aid for rescue and restructuring of firms in difficulty is predominantly in use.

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DAMAGE FROM GENETIC CONTAMINATION: EVOLUTION AND NEW PERSPECTIVES IN THE AFTERMATH OF DIRECTIVE 2015/412/EU

Among new kinds of damages that have occurred in the last half of the 20th century due to the scientific evolution, as well as the technological development (e.g. damage caused by the use of mobile phones), the so-called "damage from genetic contamination" takes a special place. The latter damage is inflicted upon conventional and organic agricultural production by genetic pollution. This presentation offers a reflection on damage from genetic contamination first by analysing its legal regime and then by focusing both on the nature of this type of damage – in particular in light of the recent modifications brought by the Directive 2015/412/EU, and the liability rules applicable to the issue of repairing damage.

From a legal point of view, and specifically from the European law perspective, the Directive 2001/18/EC – which is the key legislation on GMOs – does not provide for any specific rules relating to the damage resulting from genetic contamination, the only pertinent provision being in Article 26 *bis* thereof. Further guidelines for the development of national coexistence measures to avoid the unintended presence of GMOs in conventional and organic crops are to be found in the Recommendation 2003/556/EC, subsequently replaced by the following Recommendation of 3 July 2010. However, recent amendment to the Directive 2001/18/EC, by virtue of the Directive 2015/412/EU, opens new horizons in the configuration of damage caused by genetic contamination. This remarkable modification entered into force in 2015, with the introduction of Article 26 *bis*, paragraph 1 *bis* which lays down the obligation to the Member States effective as of 3 April 2017. According to the new provision in paragraph 1 *bis*, Member States in which GMOs are cultivated shall take appropriate measures in border areas of their territory with the aim of avoiding possible cross-border contamination into neighbouring Member States in which the cultivation of those GMOs is prohibited.

Therefore, on the EU level the structure of damage sustained as a result of genetic contamination has been modified from being merely an internal matter of every Member State in the relations between growers of GM products and those of biological or conventional products, into being a cross-border matter where damage in the border areas is considered caused by a Member State in which GMOs are cultivated to a neighbour-Member State, in which GMOs are not cultivated. Thus, it is essentially a transboundary damage. In the light of the above, the presentation will single out the rules applicable to the liability of a certain Member State for cross-border contamination spread

in another Member State, while noticing the differential treatment of cases depending on whether the contamination takes place between two states which are both EU Member States or not.

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BARGAINING FOR ATROCITY CRIMES IN A CONTINENTAL LEGAL SETTING: THE CASE OF BOSNIA AND HERZEGOVINA

Does wartime rape have a price? Should an accused be allowed to bargain away a genocide charge? These and many more principled questions arise as a result of studying the current system for negotiating the outcome of criminal proceedings in Bosnia and Herzegovina (hereinafter: BiH). Following extensive legal reforms since 2003 parties in BiH may bargain away criminal charges. However, unlike in the majority of continental legal systems, the possibility of such bargaining in BiH is not subject to limitations such as the nature of the offense or personal circumstances of the accused. This presentation therefore examines the role of the rules of criminal procedure in striking a balance between justice for victims and fairness to the accused in the BiH post-conflict society, focusing in particular on the suitability and modalities of bargaining for atrocity crimes (genocide, crimes against humanity and war crimes).

The presentation aims to examine the vaguely-defined bargaining regime under the current BiH criminal law and questioning whether such procedures are desirable from the truth-seeking perspective in a country in transition marked by the heavy burden from its recent history. The presentation is structured in three parts. The first part discusses the emergence of consensual practices in continental legal settings and their acceptance in comparative law. Based on the theoretical, normative and case law analysis, this section attempts to prove that the procedural forms for bargaining were introduced as a result of various tendencies and with the aim of rationalization of criminal justice systems. The second part is meant to outline the BiH criminal procedure framework and analyse the relevant war crimes case law in BiH, in order to demonstrate that the manifested inconsistent bargaining practices call into question the modality and scope of bargaining envisioned by law. The third part includes *de lege ferenda* proposals for BiH bargaining procedure in the context of criminal proceedings that would take into account fair trial standards and recent human rights case law, while advancing justice for victims of atrocities at the same time.

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PACTUM DISPLICENTIAE AND *EMPTIO AD GUSTUM* AS THE PREDECESSORS OF THE CONTEMPORARY TRIAL SALE

This presentation highlights the connection between two Roman law concepts: *pactum displicentiae* and *emptio ad gustum* and the contemporary trial sale (also termed sale on approval). *Pactum displicentiae* in Roman law and trial sale in contemporary laws are similar variations of the contract of sale, wherefore it is assumed that the modern version has Roman roots. With this in mind studying its Roman law origins should enable a better understanding of corresponding concepts in the contemporary law.

The *pactum displicentiae* is an additional clause in a Roman contract of sale entitling the buyer to return the thing to the seller and to annul the sale within a certain period of time, if the thing does not suit the buyer. This type of sale is conditional and its validity depends upon the approval of the buyer. The condition can be either suspensive or resolutive. The question of interim deterioration will not arise in case of resolutive condition, since the buyer can reject the thing. Alternatively, if the condition is suspensive, the risk of deterioration remains with the seller, because the *emptio* is (still) *imperfecta*. Resolutive condition was more common in ancient Roman times when the buyer could not have used the *actio in rem*. On the other hand, the buyer could use *actio in personam, actio empti* or *actio in factum*, the latter one being the *actio prescriptis verbis*. Regarding the time limit, the buyer had a certain period of time namely six *dies utiles* unless stated otherwise. Furthermore, according to *Domitii Ulpiani fragmenta*, this period of time could be *in perpetuum*, if it was expressly agreed (D. 21, 1, 31, 22). It should be noted that Roman *emptio ad gustum* only pertained to the sale of wine, in which case the clause that the buyer had the option to taste the wine was so common that Ulpian stated it was tacitly implied, if not excluded.

Contemporary trial sale which is still often named *emptio ad gustum* ('purchase to taste') is a sale in which the buyer takes the goods under the condition that he or she had tested it and confirmed that it suits his or her wishes. In Croatia it is regulated by Articles 456, 457, 458 and 459 of the Civil Obligations Act. The seller's obligation arises once they agree on the goods and the price, while the buyer's obligation arises only after the fulfilment of the condition, or when he or she expressly conveys his or her approval of the goods. Contemporary *emptio ad gustum* has two variations: with the delivery of goods and without it. There is also a possibility of objective *emptio ad gustum*, where the buyer's obligation arises depending on the results of the independent expert's examination. Unlike in the ancient Roman law where it was limited to wine, today *emptio ad gustum* is of practically unlimited scope.

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HOW DOES THE REQUIRED STANDARD OF PROOF AFFECT THE EFFICIENCY OF CIVIL PROCEDURE?

One of the main obstacles to effective access to justice in Hungary is noncompliance with the requirement of resolving civil lawsuits within a reasonable time. This is most likely owed to the fact that judges are struggling with establishing when the burden of proof is discharged pursuant to the high standard of full conviction proclaimed by the Hungarian Code of Civil Procedure. This issue merits special attention in light of the fact that the codification of the new Hungarian Code of Civil Procedure is under way. In addition to this practical aspect of the research, there is also a theoretical component to it.

The methodology employed involves comparative analysis which comprises two dimensions. The first dimension includes a comparison of standards of proof in different national civil procedures. The selected jurisdictions include Hungary, Germany, Switzerland, France, England and Wales and the US. Research conducted thus far has demonstrated that differences in approaching the standard of proof exist between the continental European civil law systems and the common law systems. A hypothesis to be tested in the course of this research is that the difference between the two systems is normative, rather than practical. This is believed to be the case because the standard of proof applied by the continental European judges is much lower than the standard prescribed in their statutes and as such comes close to the standard of proof in the common law systems. The aim of the first comparative dimension is not only to detect differences between the selected legal systems, but also to look for the core principles which cause these differences. This overview should provide a catalogue of options from which the Hungarian legislator may choose desirable elements to create its own model. For the above reasons, it is submitted that the efficiency of civil procedures in Hungary could be increased by introducing a lower standard of proof in civil cases – the standard of the preponderance of evidence.

The second dimension of the comparative analysis focuses on the differences between the required standards of proof in civil procedure, criminal procedure and administrative procedure. Variations in legal policies underlying the standard of proof in different types of procedures are scrutinised. In order to compare one aspect – the proof standard – of the civil, criminal and administrative procedures, it is essential to study the differences in the structures of and objectives pursued by these procedures. Within the second dimension dissimilarities between certain subtypes of civil procedures are examined, with the intention of determining whether introducing varied standards of proof for these subtypes of civil procedures is indeed necessary.

The main focus is put on establishing a balanced standard of proof for the Hungarian civil procedure based on the comparison of several viable options. Furthermore, the links between the standard of proof applied and the efficiency of civil procedure as an essential factor in assuring access to justice in civil cases are thoroughly examined.

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APPLYLING THE FREE MOVEMENT OF CAPITAL AND FREEDOM OF INCORPORATION AND ACTIVITIES UNDER THE EAEU TREATY TO THE TAXATION OF DIVIDEND: HARMONIZATION BASED ON THE LESSONS LEARNED FROM THE EU

Five countries of the Eurasian region: Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia have recently joined under the Treaty on Eurasian Economic Union (hereinafter: EAEU Treaty), which has been in force since 1 January 2015. The above Member States aim to strengthen their respective economies and increase competitiveness by means of internal market economy and the fundamental freedoms envisaged in the EAEU Treaty – free movement of goods, labour, services and capital. Considering that the EU experience has inspired this endeavour, the objective of this research is to compare the fundamental freedoms as envisaged in the EAEU Treaty with those under the Treaty on the Functioning of the European Union (hereinafter: TFEU). Special attention is given to the CJEU's interpretation of the TFEU provisions in the area of direct tax harmonization, which may be a valuable tool for the EAEU Member States in developing their common scheme. Therefore, the presentation will offer draft recommendations on enhancement of fundamental freedoms under the EAEU Treaty.

The presentation commences with a review of all EAEU Treaty provisions pertaining to taxation and taxing powers within the EAEU, including general provisions and provisions on indirect taxes. It continues with an in-depth analysis of the fundamental freedoms as worded in the EAEU Treaty. The focus is put on exploring the fundamental principles of the free movement of capital and incorporation and activities, as well as their relation to the taxation of dividend. It is posited that the current wording of the fundamental freedoms for the movement of capital and incorporation and activities in the EAEU Treaty is limited in its scope, wherefore it cannot guarantee the realization of an absolute non-discrimination principle required for the functioning of the internal market. To verify this hypothesis, the research involves an analysis of the national legislations in the EAEU Member States with respect to taxation of dividends. Based on the latter analysis, the potential for discriminatory tax treatment is identified from the point of view of the principles developed in the EU. Moreover, model cases are created to demonstrate the application and interpretation in a comparative perspective of the fundamental principles of the EAEU and the EU on the free movement of capital and establishment. It is expected that the conducted analysis will confirm the opinion that "what is perceived as discrimination at the EU level, would not be perceived so at the level of the EAEU".

Accordingly, the experience of the EU and in particular its approach to taxation of dividends is rendered partially irrelevant for the EAEU region to the extent that the wording of the basic Treaty provisions remains the same. Given that the current wording of the EAEU Treaty cannot ensure the functioning of the internal market, it is argued that it should be amended. At the same time it is argued that a simple translation of the provision of the TFEU into the EAEU Treaty constitutes an equally unsuitable approach. On the other hand, analysing CJEU's case law from the position of a developing country may be helpful in identifying the areas in which the approach developed in the EU with respect to taxation may not be of benefit to a less developed EU Member State. In fact, in both the EU and the EAEU Member States are at different levels of economic development. This research is thus aimed at finding an appropriate wording of the provisions concerning the free movement of capital and freedom of incorporation and activities, which would at the same time, ensure a more genuine internal market and avoid problems the EU is facing due to the different levels of economic development. Among other issues, the institutional framework and competences of both the EAEU and the EU are discussed, as well as their legislative and judicial systems, issues of multilateralism and the role of tax conventions.

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BETWEEN ROMAN LAW AND EUROPEAN PRIVATE LAW: PRE-CONTRACTUAL LIABILITY IN THE LIGHT OF THE CASSAZIONE JUDGEMENT NO. 14188 OF 12 JULY 2016

This presentation analyses the nature of the pre-contractual liability in the Italian legal system. The research has been prompted by the Italian *Corte di Cassazione* judgement No. 14188 of 12 July 2016. Not only the explicit statement of the contractual nature of the so-called *culpa in contrahendo*, but also the relevant regulation concerning prescription, burden of proof, damages and subjective elements render this decision innovative. Similarly to the *Cassazione* judgement No. 27648 of 20 December 2011, the *Cassazione* judgment of 2016 departs from the traditional doctrinal and jurisprudential approaches, which connect this type of liability to the tortious model (recently, *Cassazione* judgement No. 477 of 10 January 2013). Furthermore, for the first time the so-called *contatto sociale qualificato* is considered as belonging to the third category of the sources of obligations, according to Art. 1173 of the Italian Civil Code. At the end, the 2016 judgment states that, rather than consisting of a duty to perform, the obligation under Art. 1337 of the Italian Civil Code involves the duties of good faith, information and care, in accordance with Arts. 1175 and 1375 of the Italian Civil Code. The *Cassazione*'s reasoning demonstrates that modern jurists should emerge into "dialogue" with the doctrinal and jurisprudential elaborations in a transnational context, in order to solve the problems in their national legal system. Since we are indeed witnessing an "eclipse of the Private Law", as Castronovo put it, it is necessary to think about a new, logical and coherent legal order within national borders.

It is interesting to follow the historical development of the approaches to characterise *culpa in contrahendo*. The ancient Roman law archetypes of the modern third category of the sources of obligations in Art. 1173 of the Italian Civil Code are *variae causarum figurae* in D. 44.7.1 pr. (Gai) and *quasi contractus* in I. 3.13.2. Conceptually, the duty to perform is not an essential structural feature of the obligations, either in Roman or in modern law. Conversely, according to the most recent studies, the fundamental element is the pandectistic *Haftung*, deriving from the ancient Roman concept of *praestare*. Further analysis concentrates on the German legal theory of *sozialer Kontakt*, which in the 1930s linked the *culpa in contrahendo* to the contractual model because of the lack of a specific discipline in terms of the pre-contractual liability. Even though this theory is rendered outdated by § 311 BGB due to *Schuldrechtsmodernisierung* which connects this kind of liability to the category of *Vertrauenshaftung*, it nevertheless served as basis for the subsequent Italian doctrine opting for the contractual nature of the *culpa in contrahendo*.

In the context of modern developments, this presentation deals with the consequences over the structure of obligations, in particular the theory of *obbligazione complessa*, consisting of the unity *debitum-utilitas*, exceeded by the theory of "duty of care" and "obligation without performance". The Italian doctrine and jurisprudence do not attribute tortious character to the "obligation without performance"; instead, the latter is deemed closer to the contractual liability as it derives from the third category of sources of obligations in Art. 1173 of the Italian Civil Code and the *Cassazione* judgment of 2016 confirms this legal characterisation. Indeed, it states that by the words "contractual liability" Art. 1218 of the Italian Civil Code is in fact – a synecdoche, to the effect of including the particular variants "between contract and tort". The last part of this presentation considers the implications of the European Union case law on the subject, in particular the judgement in case C-26/91 *Handte*, involving the concept of "matters relating to a contract".

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