

23 REGULATING LOCAL BORDER TRAFFIC IN THE EUROPEAN UNION

Salient Features of Intersecting Legal Orders (EU Law, International Law, Hungarian Law) in the Shomodi Case (C-254/11)

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23.1 SETTING THE SCENE: AN EXAMPLE FOR THE INTERPLAY BETWEEN LEGAL ORDERS

An eminent Hungarian legal scholar, Professor László Blutman published an article in 2009 on the internationalization of the Hungarian legal order, from the perspective of constitutional law.¹ He submitted that in the current state of the Hungarian legal system, due to constitutional developments since the change of regime (1989), four separate sets of norms could be identified. Below the Constitution (now: Basic Law) one can find domestic legal norms as well as international legal norms and EU law. Quantity-wise, the latter two add up to almost half of all legal norms applicable in Hungary. The author sets up an excellent and thoroughly elaborated theoretical framework to illustrate the interconnection and the possible norm conflicts between these legal orders; constructing the so-called '(double) rhombus model'. In the original concept ('rhombus model'), he conceived of the following possible *norm conflicts in the Hungarian legal order*: a) Basic Law vs. international law; b) Basic Law vs. EU law; c) Basic Law vs. domestic (Hungarian) law; d) international law vs. domestic law; e) EU law vs. domestic law; f) and finally international law vs. EU law.² According to Professor Blutman, a further refinement is necessary in order to fully reflect the legal reality, since conflicts can also occur *within the same set of norms*, i.e. between two rules of international law (e.g. in case of conflicting treaties) or between EU legal norms (e.g. a regulation/directive in its quality as a secondary EU norm violating the founding Treaties in their quality as primary EU law).³ Besides these purely theoretical scenarios, in the practice of courts and administrative authorities applying law these

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1 L. Blutman, 'A jogrendszer nemzetköziesedése alkotmányjogi szempontból (Normák kapcsolódásai, konfliktusai a mai alkotmányos rendszerben)', in: M. Kocsis & J. Zeller (Eds.), *A köztársasági Alkotmány 20 éve. Tanulmánykötet*, PAMA, Pécs, 2009, p. 351-362.

2 Blutman, 2009, p. 352-353.

3 *Ibid.*, p. 355.

possibly conflicting legal norms can interact in *three different ways*: a) clear-cut conflict of norms; b) simultaneous application of two or more norms of different origin; c) a legal norm is used for interpreting another one. In other words, the interacting norms depicted with the 'double rhombus model' might appear in three distinct layers of relationship.⁴

It is now common that a legally relevant situation can not only be covered by one of the above-mentioned set of norms, but in many cases, *all*. Immigration and asylum is typically such a field, where besides domestic legislation, EU law and international law also play a pivotal role.

Against this background, I will present in this short paper a landmark case related to the functioning of the *EU local border traffic regime*, still pending before the Court of Justice of the European Union (CJEU) (*Shomodi* – C-254/11, request for preliminary ruling),⁵ as an example for the *simultaneous applicability* of EU law, international law and domestic (Hungarian) law to a specific situation ('cumulation of norms'⁶). I will examine how the above theoretical framework ('double rhombus model') can help in understanding the relationship and interactions between these different kinds of legal norms in an individual case as well as to identify the applicable law *in situ*. Furthermore, this study tries to show the *complexity and internal diversity* of sources of the EU legal corpus itself as well. This peculiar feature, as we will see below, strongly influences the interpretation and implementation of the EU rules on local border traffic.

As for the scope of this article, I will intentionally *not deal with theoretical, horizontal aspects of relationship between EU law, international law and national law* and the hierarchical rank of the two latter vis-à-vis Union law, since my aim is not to redraw the main lines of this well-established triangular relationship.⁷ Nor will I touch upon the constitutional issue of the place and effects of different sources of public international law (treaties concluded by the EC/EU; mixed agreements, former second and third pillar agreements; customary law; general principles of law etc.) in the EU legal order.⁸

4 *Ibid.*, p. 357.

5 Reference for a preliminary ruling from the Supreme Court of the Republic of Hungary (Hungary) lodged on 25 May 2011 – *Szabolcs-Szatmár-Bereg Megyei Rendőrkapitányság Záhony Határrendészeti Kirendeltsége v. Shomodi Oskar* (Case C-254/11) (2011/C 232/29), OJ C 232, 6.8.2011, p. 17.

6 For this term, see Blutman 2009, p. 360 and Richard Posner (cited by the author).

7 See, in the Hungarian context, e.g. N. Chronowski & T. Drinóczi, 'A Triangular Relationship between Public International Law, EC Law and National Law? The Case of Hungary', in: J. Wouters, A. Nollkaemper & E.de Wet (eds.), *The Europeanisation of International Law. The Status of International Law in the EU and its Member States*, T.M.C. Asser Press, The Hague, 2008, pp. 161-183; N. Chronowski, T. Drinóczi & I. Ernszt, 'Hungary', in: D. Shelton (Ed.), *International and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*, Oxford University Press, Oxford – New York, 2011, pp. 259-287 or generally, e.g., H.G. Schermers & D.Waelbroeck, *Judicial Protection in the European Union*, Kluwer Law International, The Hague, 2001, pp. 151-192; J-V.Louis & Th.Ronse, *Lordre juridique de l'Union européenne*, Helbing&Lichtenhahn, Genève-Bâle-Munich, Bruylant, Bruxelles; L.G.D.J, Paris, 2005, pp. 221-234, 246-289.; T. Kende & T. Szűcs (eds.), *Európai közjog és politika*, CompLex, Budapest, 2007, pp. 836-844, 851-890.

8 For further readings on this issue, in the recent Hungarian legal literature see M.Szabó, 'Az európai jog és a nemzetközi jogrend – hierarchia és összefonódás', *Állam- és Jogtudomány* LIII, 2012, pp. 191-211.

23.2 THE EU RULES ON LOCAL BORDER TRAFFIC

23.2.1 *Legal Basis and Negotiations History*

As for the origins of the EU rules on local border traffic, despite the lack of a clear and precise definition of 'local border traffic', this expression was already used in Article 3(1) of the 1990 *Schengen Implementing Convention* (hereinafter referred to as CISA),⁹ which specified that exceptions to the obligation of crossing the external border at authorised border crossing points and during the fixed opening hours can be envisaged in the framework of arrangements for local border traffic on the basis of rules to be "adopted by the [Schengen] Executive Committee".¹⁰ However, such rules defining "exceptions and arrangements for local border traffic" have never actually been adopted, neither within the intergovernmental framework of the Schengen Implementing Convention, nor after the incorporation of the Schengen *acquis* into the first pillar of the EU following the entry into force of the Treaty of Amsterdam (as of 1 May 1999).¹¹

After years of silence, the new legislative *élan* was due to the *Plan for the management of external borders of the member states of the European Union* endorsed by the Seville European Council of 21-22 June 2002, which highlighted the need to adopt measures to regulate local border traffic, "particularly with a view to enlargement".¹² As explained by the Commission, efficient rules for local border traffic promote economic development of border regions and serve as an instrument to reduce gaps in economic standards. Moreover, transfrontier workers are often sought in the border regions of the member states.¹³ The need to elaborate the rules on local border traffic was also amongst the recommendations for the further development of the Schengen *acquis* made by the EU Council Working Party on Schengen-Evaluation (Sch-Eval), approved by the Justice and Home Affairs Council of 28 February 2002. In order to respond to the Council's request, the Commission tabled two legislative proposals for Council Regulations in August 2003.¹⁴ The two draft

9 Convention implementing the Schengen agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000, p. 19.

10 It is to be noted that since the entry into force of the Treaty of Amsterdam on 1 May 1999, all functions and competencies of the Schengen Executive Committee have been taken over by the Council of the European Union.

11 SEC(2002) 947 – *Commission Staff Working Paper. Developing the Acquis on 'Local Border Traffic'*, p. 2. See also, S. Peers, *EU Justice and Home Affairs Law*, Oxford University Press, Oxford, 2010, p. 210.

12 Council of the European Union: *Plan for the Management of the External Borders of the Member States of the European Union*, 14 June 2002 (doc. 9834/1/02 FRONT 55 COMIX 392 REV 1), p. 26 (para. 112.). See also, D. Mahncke & S. Gstöhl (eds.), *Europe's Near Abroad: Promises and Prospects of the EU's Neighbourhood Policy*, P. I.E. Peter Lang, Brussels, 2008, p. 119.

13 SEC(2002) 947, p. 3.

14 COM(2005) 56 final, Explanatory Memorandum, p. 2. See also, T. Dubowski 'Local Border Traffic – European Union and Member States' Perspective (based on Polish Experience), *European Journal of Migration and Law* 14 2012, pp. 370-371.

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Regulations were based on Article 62(2) of the Treaty establishing the European Community (TEC) (“*measures on the crossing of the external borders of the Member States*”), covering both “*standards and procedures to be followed by Member States in carrying out checks on persons*”¹⁵ and the “*procedures and conditions for issuing visas by Member States*”,¹⁶ including “*rules on a uniform visa*”.¹⁷

The original plan of the Commission was to have the proposals adopted before 1 May 2004, *i.e.* before the accession of ten new member states to the EU. However, discussions on these proposals within the Council have been very difficult and thus no real progress was made.¹⁸

As of 1 May 2004, new rules came into effect under Title IV of the TEC: the measures based on Article 62(2)(b)(ii) and on Article 62(2)(b)(iv) TEC became subject to the co-decision procedure (now: ordinary legislative procedure), meaning that the European Parliament and the Council act as co-legislators. Nevertheless, measures based on Article 62(2)(a) TEC were still to be adopted unanimously by the Council after consulting the European Parliament.¹⁹

Given that in accordance with the well-established case law of the Court of Justice of the European Union,²⁰ it was not possible to include, within the same proposal, provisions related to checks at the external borders and provisions concerning the establishment of a specific visa to be issued to border residents on grounds of local border traffic, the Commission decided to draft *two new proposals, with different legal bases*: 1) a first proposal for a Council Regulation laying down general rules on local border traffic with the exception of the provisions introducing the specific visa (based on Article 62(2)(a) TEC – consultation procedure); 2) a second proposal for a European Parliament and Council Regulation establishing a specific “L” visa to be issued for the purpose of local border traffic (based on Article 62(2)(b), points ii) and iv) TEC – co-decision procedure).²¹

Then another change of legal circumstances came into the picture: as a consequence of the adoption of The Hague Programme (2005-2009), the Council took the decision of *extending the co-decision procedure to certain areas covered by Title IV of the TEC*, including measures related to external borders.²² As a result, since 1 January 2005, both the external borders and its visa-related aspects have been subject to the co-decision procedure; therefore it was no longer necessary to prepare two separate proposals on local border

15 Art. 62(2)(a) TEC.

16 Art. 62(2)(b)(ii) TEC.

17 Art. 62(2)(b)(iv) TEC.

18 S. Peers, E. Guild & J. Tomkin (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, Martinus Nijhoff The Hague 2012, p. 207.

19 COM(2005) 56 final, Explanatory Memorandum, p. 2.

20 See *e.g.*, the CJEU’s Judgment of 11 June 1991 in Case C-300/89, *Commission v. Council*, ECR [1991] I-02867.

21 COM(2005) 56 final, Explanatory Memorandum, p. 3.

22 Council Decision 2004/927/EC of 22 December 2004, providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Art. 251 of that Treaty (OJ L 396, 31.12.2004, p. 45).

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traffic. Thus, in February 2005 the Commission *merged the two legislative proposals into one*, replacing the 2003 proposals (the latter having been withdrawn by the Commission). This single draft Regulation was based on both Article 62(2)(a) TEC (rules on “standards and procedures to be followed by Member States in carrying out checks on persons at [external] borders”) and Article 62(2)(b), points (ii) and (iv) TEC, concerning, respectively, rules on “the procedures and conditions for issuing visas by Member States” and “on a uniform visa”.

The negotiations on this new proposal took just one and a half year; the Local Border Traffic Regulation was adopted in first reading by the European Parliament and the Council in October 2006. The Parliament made quite a few amendments to the original proposal,²³ which affected not only the content but the *legal basis as well*, reducing it only to Article 62(2)(a) TEC [now: Article 77(2)(b) of the Treaty on the Functioning of European Union²⁴]. The *Regulation (EC) No. 1931/2006* of the European Parliament and the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the member states and amending the provisions of the Schengen Convention (hereinafter referred to as LBT Regulation) was published in the Official Journal of the EU on 30 December 2006²⁵ and entered into force on 19 January 2007. Local border traffic is now a specific *sub-field of the Union’s migration policy* and an instrument of European Union law.²⁶

23.2.2 Purpose and Main Provisions of the EU Local Border Traffic Regulation

The *purpose* of the LBT Regulation is summarised in recital (2) of the preamble: “[i]t is in the interest of the enlarged Community to ensure that the borders with its neighbours are not a barrier to trade, social and cultural interchange or regional cooperation. An efficient system for local border traffic should consequently be developed.” This Regulation thus aims at facilitating the crossing of the EU external borders by residents living in the border regions, by establishing a local border traffic regime at the external land borders of the member states and introduces for that purpose a local border traffic permit (hereinafter referred to: LBT permit). It can be described “as a mechanism balancing the need for strict

23 Position of the European Parliament adopted at first reading on 14 February 2006 with a view to the adoption of Regulation (EC) No . . ./2006 of the European Parliament and of the Council laying down rules on local border traffic at the external land borders of the Member States and amending the Schengen Convention (EP-PE_TC1-COD(2005)0006).

24 Regulation (EU) No. 1342/2011 of the European Parliament and of the Council of 13 December 2011 amending Regulation (EC) No. 1931/2006 as regards the inclusion of the Kaliningrad oblast and certain Polish administrative districts in the eligible border area (OJ L 347, 30.12.2011, p. 41-43) was already adopted in accordance with Art. 77(2) b) TFEU.

25 OJ L 405, 30.12.2006, p. 1-22.

26 See Dubowski 2012, p. 368.

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protection of Union's external borders and the necessity of holding the Union open to cooperation with third countries.²⁷

As for the *definition of 'local border traffic'*, it means the regular crossing of an external land border by border residents in order to stay in a border area, for example for social, cultural or substantiated economic reasons, or for family reasons, for a period not exceeding the time limit laid down in this Regulation (the maximum permissible duration of each uninterrupted stay shall not exceed three months).²⁸

The LBT Regulation establishing a general framework authorises member states to conclude *bilateral agreements* with neighbouring third countries for implementing the local border traffic regime and setting up detailed rules in certain areas. These bilateral agreements, governed by international law, are *subordinated to EU law* since if such agreements are incompatible with this Regulation, the member state concerned shall amend the bilateral agreement in such a way as to eliminate the incompatibilities established.²⁹ A similar conflict-of-law rule is enshrined in Article 351 TFEU as well (regarding treaties concluded with third countries prior to the entry into force of the founding Treaties – 1 January 1958/date of accession of the given member state).³⁰ This coincides with the *communis opinio* in legal scholarship on the hierarchical rank of treaties concluded by member states with third countries, placing them below secondary EU law.³¹ As a procedural obligation incumbent upon the member states, before concluding or amending any bilateral agreement on local border traffic with a neighbouring third country, the member state concerned shall *consult the Commission* as to the compatibility of the Agreement with the LBT Regulation.³²

The *main provisions* of the EU local border traffic system are the following:

- The territorial validity of the LBT permit shall be limited to the border area of the issuing member state. The border area is a key element in this special regime, meaning a zone that extends no more than 30 kilometres from the border, but if part of any such district lies between 30 and 50 kilometres from the border line, it shall nevertheless be considered as part of the border area.³³
- As a general rule, in order to prevent abuses, the LBT permit is issued to third country nationals being lawfully resident for at least one year in the border area of a country neighbouring a member state.³⁴ The bilateral agreements may fix a longer period of lawful residence.

27 Dubowski 2012, p. 368.

28 Art. 3(3), in conjunction with Art. 13 of the LBT Regulation.

29 Art. 13(1) of the LBT Regulation.

30 For the operation of Art. 351 TFEU in details, see J. Klabbers, *Treaty Conflict and the European Union*, Cambridge University Press, Cambridge, 2009, p. 113-231.

31 See, recently, e.g. Szabó 2012, p. 207-210.

32 Art. 13(2) of the LBT Regulation.

33 Art. 3(2) of the LBT Regulation.

34 In exceptional and duly justified cases specified in those bilateral agreements, a period of residence of less than one year may also be considered as appropriate (Art. 3(6)).

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- The LBT permit shall be valid for a minimum of one year and a maximum of five years.³⁵ It shall bear a photograph of the holder and shall contain at least certain information (name, date of birth, nationality and place of residence of the holder; the issuing authority; date of issue and period of validity; the border area; the number of the valid travel document or documents entitling its holder to cross the external borders). It shall clearly state as well that its holder is not authorised to move outside the border area and that any abuse shall be subject to penalties as provided for by law.³⁶
- The LBT permit itself authorizes its holder to cross the external border of the EU, *therefore, no visa or travel document is required*. However, the bilateral agreements may require, as an additional condition, the possession of a valid travel document jointly with the LBT permit.³⁷
- The local border traffic permit may be issued by either a consulate or any administrative authority of a member state designated in the bilateral agreements. Moreover, member states shall keep a central register of LBT permits and shall designate a national contact point responsible for providing without delay, upon request from other member states, information on the permits entered in that register.³⁸
- Penalties, as provided for in national law, should be imposed by member states on border residents who abuse the local border traffic regime. Those penalties shall be effective, proportionate and dissuasive and shall include the possibility of cancelling and revoking local border traffic permits. Member states are also obliged to keep a record of all cases of abuse of the local border traffic regime and of penalties imposed, which information shall be forwarded every six months to the other member states and to the Commission.³⁹

It should be noted that LBT permits are issued to border residents irrespective of whether or not they are subject to a visa requirement pursuant to the EU Visa Regulation.⁴⁰ LBT permit holders thus can *not only be nationals of the third country concerned*, neighbouring a member state, but *any other third country nationals* having a lawful residence in the border area as well (e.g. an Uzbek businessman living in the Ukrainian border region for ten years). In consequence, the *EU Visa Regulation* had to be amended so that this legal instrument provides for an exemption from the visa requirement for third country nationals making use of the local border traffic.⁴¹ This explains why the LBT Regulation entered into force in parallel with Regulation (EC) No. 1932/2006 amending the EU Visa Regulation.

35 Art. 10 of the LBT Regulation.

36 Art. 7(3) of the LBT Regulation.

37 Art. 4 (a) of the LBT Regulation.

38 Art. 12 of the LBT Regulation.

39 Art. 17 of the LBT Regulation.

40 Council Regulation (EC) No. 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ L 81, 21.3.2001, p. 1.).

41 For this amendment, see Council Regulation (EC) No. 1932/2006 of 21 December 2006 amending Regulation (EC) No. 539/2001 (OJ L 405, 30.12.2006, p. 23.).

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Furthermore, the LBT Regulation also constitutes a *derogation* from the general rules governing the border control of persons crossing the external borders of the European Union which are set out in Regulation (EC) No. 562/2006 establishing a Schengen Borders Code;⁴² representing another important element concerning the location of LBT rules in the EU legal order.⁴³

23.3 LOCAL BORDER TRAFFIC IMPLEMENTED: THE CASE OF HUNGARY AND UKRAINE

23.3.1 *The Bilateral Treaty Regime between Hungary and Ukraine*

Prior to Hungary's accession to the European Union, in accordance with our commitments made in course of the accession negotiations, we have terminated, by consent, our former bilateral local border traffic agreements with the neighbouring countries.⁴⁴ Hungary has been amongst the initiators of the EU regime on local border traffic, since the bilateral agreements concluded within the framework offered by EU law are important tools for keeping contact with Hungarian minorities living in the neighbouring non EU member countries. As of now, there is *only one neighbouring country* with which LBT regime is of great relevance: *Ukraine*. The other countries around Hungary are now either EU member states (Austria, Slovakia, Romania, Slovenia), or enjoy the visa-free travel regime to the EU (Croatia will soon become member state of the Union;⁴⁵ and Serbian nationals have been exempted from visa requirement as of 19 December 2009).

Based on the provisions of the LBT Regulation (Art. 13), Hungary started negotiations with Ukraine on local border traffic in June 2007. After two rounds of negotiations the *Agreement between the Government of the Republic of Hungary and the Cabinet of Ministers of Ukraine on the rules of local border traffic* (hereinafter referred to: Agreement) was signed on 18 September 2007 in Uzhgorod and has been applied provisionally since 15 December 2007 (it entered into force on 11 January 2008).⁴⁶ As it was the very first agreement negotiated by a member state in accordance with the LBT Regulation (in regular consultation with the Commission), Hungary's efforts and practice with regard to the local border traffic regime have been considered an example for other member states

42 OJ L 105, 13.4.2006, p. 1.

43 On the location of the LBT mechanism in the wider context of policies of the EU (e.g. area of freedom, security and justice; European Neighbourhood Policy, external relations), see Dubowski 2012, pp. 376-380.

44 With Croatia on 28 May 2003; with Slovenia on 31 May 2003; with Ukraine on 31 July 2003; with Romania on 23 October 2003, and with Serbia and Montenegro on 1 November 2003.

45 On 1 July 2013 (Art. 3(3) of the 2011 Accession Treaty (OJ L 112, 24.4. 2012, pp. 10-20.)), since all member states have already deposited their instruments of ratification.

46 Promulgated in Hungary by Act CLIII of 2007 (see: *Magyar Közlöny* of 11 December 2007, p. 12939).

(Slovakia, Poland, Romania, Lithuania), and the respective third countries (Ukraine, Belarus etc.) as well.

Regarding the *content of the Agreement*, its scope *ratione personae* covers persons having permanent residence in the border area for at least three years. Only such individuals can apply for the local border traffic permit.⁴⁷ The LBT permit is valid for at least one year and not more than five years, but it cannot exceed the validity of the travel document. The fee of the LBT permit is 20 Euros, except for disabled persons, pensioners, children under the age of 18 and dependent children under the age of 21.⁴⁸ The LBT permit entitles its holder, together with a valid travel document, *for multiple entries and for a continuous stay of maximum three months within a six months period* in the border area, in particular for social, cultural or family reasons, or substantiated economic reasons that are not to be considered as a gainful activity according to national regulations.⁴⁹ However, this is only possible if the border resident is not considered a threat to public policy, internal security, public health or the international relations of the contracting states, and in particular is not subject to any expulsion or entry ban on the same grounds.⁵⁰ The permit shall be issued within the shortest possible period of time, but not more than 30 days from the date of submitting the application.⁵¹ The Annexes to the Agreement contain the list of settlements in both the Hungarian and Ukrainian border region (244 and 382 settlements respectively, determining its geographical scope⁵²); the lists of documents required for proving permanent residence in the border area; the competent consular authorities who can receive applications and issue LBT permits (the Hungarian Consulate General in Uzhgorod, the Hungarian Consulate in Beregovo, and the Ukrainian Consulate General in Nyíregyháza) as well as the penalties that may be imposed by the contracting states as determined by their national laws.

This bilateral local border traffic regime established tailor made rules with respect to border crossing and staying in the border area suited to the local conditions and expectations of persons lawfully residing in the border region. The authorized Hungarian Consulates in Ukraine have issued more than 127.000 local border traffic permits since the date of application of the Agreement. On the Ukrainian side, the border region covers the entire

47 Exceptions can be made in case of the spouse, minor or dependant major child (including adopted or foster child) and minor or dependant major child (including adopted or foster child) of the spouse of the applicant who has permanent residence in the border area for at least three years; they can apply for the local border traffic permit even if they have had permanent residence for less than three years in the border area. (Art. 1(2) of the Agreement).

48 Art. 2(6) of the Agreement.

49 Art. 1(5) of the Agreement.

50 Art. 1(4) of the Agreement.

51 Art. 2(3) of the Agreement.

52 On the Hungarian side, the border region covers parts of the counties *Szabolcs-Szatmár-Bereg* and *Borsod-Abaúj-Zemplén*, while on the Ukrainian side, it equals with *Zakarpattia Oblast* as administrative entity.

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Zakarpattia Oblast with some 400-450 thousand inhabitants. Compared with this population, the number of applications for LBT permits amounts to approximately 33%. It is an interesting phenomenon that around 80% of the applicants for LBT permit previously possessed a Schengen visa issued by Hungary.⁵³ The Ukrainian nationals living in the border area have become acquainted with the possibilities of the local border traffic permit and they largely use it to ease their everyday life. On the other hand, it must be underlined that the regime established by the Agreement has not caused security risks in the Schengen zone. Neither the Hungarian Police, nor the law enforcement authorities of other Schengen states reported abuses regarding these permits. This situation is in large part due to the security-related provisions of the Agreement.⁵⁴ This regime has thus contributed to the further development of legal migration by creating a new instrument for facilitating the existing visa regime. Summing up the above, the local border traffic regime has been operating smoothly and much to the satisfaction of both Contracting Parties for over five years.

23.3.2 National Legislation

The Agreement between Hungary and Ukraine on the rules of local border traffic did not fill in all regulatory space provided by the LBT Regulation, and left certain issues to be regulated by *the domestic legislations* of both Contracting Parties. By virtue of the Agreement, domestic law is applicable *e.g.* to the security features and technical specifications of the LBT permit, issuance of the permit and the data processing and supply of data, including biometric identifiers.⁵⁵

As far as these more specific domestic rules – mainly procedural in nature – are concerned, *in Hungary* they appear in the Government Decrees implementing Act I of 2007 on the entry and stay of persons enjoying the right of free movement and Act II of 2007 on the entry and stay of third country nationals (in the chapter on short-term stay) as well as Ministerial Decree No. 25/2007. (V.31.) IRM. These pieces of national legislation clarify that the *competent authorities* for issuing LBT permits are the consular officers of the Hungarian Consular Service.⁵⁶ As for the procedure for applying LBT permits, *applications* shall be submitted on a standard form as prescribed in the above-mentioned

53 Estimated data from the Hungarian Consulate General in Uzhgorod.

54 These are the following: at least three years permanent residence in the border area; the list of documents for proving permanent residence is determined; the permit is only valid with passport; the penalties in case of abuses regarding the LBT permits.

55 Arts. 2(1) and 2(7) respectively of the Agreement.

56 Given that the rules on local border traffic are identical in the two Government Decrees implementing Act I of 2007 and Act II of 2007, hereinafter I just refer to the Government Decree No. 114/2007 (V. 24.) implementing Act II of 2007 on the entry and stay of third-country nationals. See Art. 28/A.

Ministerial Decree to the consular officer either at the Hungarian Consulate General in Uzhgorod or the Hungarian Consulate in Beregovo. When lodging it, the applicant shall present his/her valid travel document, the validity period of which cannot be less than one year from the date of submission of the application, plus 30 days, and shall have at least one empty page where the LBT permit can be affixed. The applicant shall also enclose a face photograph and a document for proof of lawful residence in the border area. The *format* of the LBT permit is an ID1 plastic card with biometric identifiers (face photograph and fingerprints, issued in accordance with Regulation No. 1030/2002 as amended by Regulation (EC) No. 380/2008).⁵⁷ As regards the conditions for *refusal* of an application as well as the *withdrawal* of an issued permit, these are the following: a) if the applicant or the holder fails to comply with the requirements for issuing a LBT permit; b) he/she had supplied false or untrue information in the application, c) he/she had made an attempt to mislead the competent authority as far as the purpose of entry and residence is concerned; moreover, d) the LBT permit may be withdrawn if the third country national leaves the border area. The competences in this regard are allocated in a way that the decision for the withdrawal of the local border traffic permit lies with the authority that issued the LBT permit, or if the LBT permit is held by a third country national residing in Hungary, with the competent Regional Directorate of the OIN.⁵⁸ The LBT permit is *void ex lege* if a) it was withdrawn by final decision; b) the data and information that it contains are no longer legible; c) it contains false or untrue information or has been forged; d) its holder has died; or e) its holder has obtained Hungarian nationality. *Legal remedy* (administrative appeal) is provided against the refused applications for LBT permit: the reviewing authority is the minister for foreign affairs.⁵⁹

23.4 HOW TO INTERPRET THE 'DURATION OF STAY' UNDER THE LOCAL BORDER TRAFFIC REGIME: THE SHOMODI CASE (C-254/11)

From the above it is clear that regulating local border traffic implies three different legal layers intersecting each other. The core legislation is EU law (principally the LBT Regulation and, potentially, other EU rules), supplemented by international treaty law in the bilateral relation (the Agreement) as well as national (Hungarian) legislation with more detailed, technical rules. It is therefore a particularly delicate issue to legally qualify a concrete situation since three different sets of legislations (EU law, international law

⁵⁷ Art.s. 28/A(2), 28/B and Annex II, point 2 of Government Decree No. 114/2007 (V. 24.).

⁵⁸ Art. 28/C(1)-(3) of Government Decree No. 114/2007 (V. 24.).

⁵⁹ Art. 28/C(4) of Government Decree No. 114/2007 (V.24.). See also, J. Tóth, 'Hungary', in: D. Vanheule (Ed.), *International Encyclopaedia of Laws: Migration Law*, Alphen aan den Rijn, Kluwer Law International 2012, pp. 79-80.

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and Hungarian law) shall be applied and interpreted in the light of each other. Doing so requires, *inter alia*, using such structural principles of EU law as supremacy and direct applicability and the legal technique enabling the LBT Regulation to prevail over the Agreement due to the specific conflict-of-rule provision in Article 13 of the former.

The *Shomodi* case (C-254/11) pending before the Court of Justice of the European Union (CJEU) is an excellent illustration for this triangular relationship (cumulation of norms) and how these three different sets of norms interact.

23.4.1 *Factual Background*

A Ukrainian national, Mr Oskar Shomodi, possessing a LBT permit wanted to enter Hungary on 2 February 2010 at the Záhony Border Crossing Point. However, the Hungarian Border Police did not let him enter the country, since it established on the basis of the national entry-exit system (*HERR*)⁶⁰ that the person in question had already overstayed the 90 days within the 180 days permitted under the Agreement. Therefore, the Záhony Unit of the Border Police refused his entry based on Article 40 of the Act II of 2007 on the entry and stay of third country nationals.

23.4.2 *Rulings of the National Courts*

The applicant in the main proceedings, Mr Shomodi brought an action against the decision on the refusal of entry before the *Szabolcs-Szatmár-Bereg County Tribunal* arguing that the decision taken by the Police was in a breach of Article 1(5) of the bilateral Agreement. The Szabolcs-Szatmár-Bereg County Tribunal upheld the appeal, considering that Article 1(5) of the Agreement should be understood in the light of EU law, in the sense that the holder of a Hungarian LBT permit is entitled, on the one hand, to an unlimited number of entries into the border area of Hungary, and, secondly, a right of uninterrupted stay not exceeding three months over a six-month period. With regard to the word ‘continuous’ used in the text of the Agreement, in the County Tribunal’s view, the time limit of three months *only concerned the length of uninterrupted stay, not the total amount of time* to be spent in the border zone. The County Tribunal also found that neither the Schengen Borders Code, nor the provisions of Act II of 2007 were applicable in the context of local border traffic.

Following the judgment, further legal actions were lodged. The defendant in the main proceedings (*i.e.* the Szabolcs-Szatmár-Bereg Police Department) brought an appeal before the then Supreme Court (*Legfelsőbb Bíróság*, now: Curia – **Kúria**) against the judgment of the Szabolcs-Szatmár-Bereg County Tribunal. The police argued that the interpretation of

⁶⁰ *Határellenőrzési és Regisztrációs Rendszer.*

Article 1(5) of the Agreement is contrary to Article 20(1) of the Schengen Implementing Convention; recital (3) of the Schengen Borders Code as well as Articles 2 lit. a) and 5 of the LBT Regulation. It also argued that the uninterrupted stay covered by Article 1(5) of the Agreement should be understood as meaning that the LBT permit is valid for a *maximum period of three months*, or, with 31 days each, *a total of 93 days* within a period of six months from the date of first entry.

It is under these circumstances that the then *Supreme Court* decided to suspend the proceedings and ask the CJEU for a *preliminary ruling*, with the following questions:

1. With particular regard to Article 2(a) and Article 3(3) of [. . .] ('Local Border Traffic Regulation'), is the provision in Article 5 of that Regulation, which permits an uninterrupted stay not exceeding three months, to be interpreted in such a way that the Regulation allows multiple exits and entries, and an uninterrupted stay not exceeding three months on the basis of bilateral agreements between Member States and third countries under Article 13 in such a way that a border resident in possession of a local border traffic certificate (sic!) may interrupt the uninterrupted stay prior to the expiry of the three-month period available for the stay, and then be entitled to a further uninterrupted stay of three months once he has crossed the border again?
2. In the event that the answer to the first question is yes, may an exit and entry occurring on the same day or on consecutive days be regarded as an interruption of an uninterrupted stay under Article 5 of the Local Border Traffic Regulation?
3. In the event that the answer to the first question is yes, but the answer to the second question is no, what time interval or other examination criterion needs to be taken into consideration to establish an interruption of an uninterrupted stay, under Article 5 of the Local Border Traffic Regulation?
4. In the event that the answer to the first question is no, might the provision of Article 5 of the Local Border Traffic Regulation [. . .] be interpreted in such a way that the time elapsing over multiple exits and entries must be counted together, and as meaning that, in view of Article 20(1) of the Convention implementing the Schengen Agreement [. . .] or other rules relating to Schengen law, if the total number of days exceeds 93 days (three months), the local border traffic permit does not provide entitlement to any further stay within six months of the date of first entry?
5. In the event that the answer to the fourth question is yes, must multiple exits and entries occurring on the same day, or a single exit and entry on the same day, also be taken into account for the total and, if so, using what counting method?⁶¹

61 Reference for a preliminary ruling from the Supreme Court of the Republic of Hungary (Hungary) lodged on 25 May 2011 – *Szabolcs-Szatmár-Bereg Megyei Rendőrkapitányság Záhony Határrendészeti Kirendeltsége v. Shomodi Oskar* (Case C-254/11) (2011/C 232/29), OJ C 232, 6.8.2011, p. 17.

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23.4.3 Preliminary Procedure Before the ECJ: The Arguments of the Parties

I would like to underline that it is the very first time that the CJEU is invited to interpret the provisions of the LBT Regulation, which attaches even greater importance to the judgment to come. The CJEU's ruling will be a point of reference for all EU member states and Schengen associated states that already established a bilateral local border traffic regime (which are as of now, besides Hungary: Latvia, Lithuania, Norway, Poland, Romania, Slovakia), as well as for those planning to do so.

Besides the applicant and the defendant in the main proceedings as well as the Hungarian Government as directly concerned by this preliminary reference, other member states having a local border traffic regime with neighbouring third countries (Poland, Romania and Slovakia) as well as the European Commission, submitted written observations. I will limit myself to highlighting the main arguments of Hungary (on the defendant's side) and the Commission (on the applicant's side), as diametrically opposing positions, and shall then refer to other intervening member states' views only if they complement either the arguments put forward by Hungary or the Commission.

According to the *Hungarian Government*,⁶² Article 5 of the LBT Regulation shall be interpreted in the light of the Schengen *acquis*, more precisely Article 20(1) of the CISA, applicable to third country nationals exempted from visa requirement. This interpretation is in line with the object and purpose as well as the wording of the LBT Regulation. Several recitals in the preamble confirm that the LBT Regulation “constitutes a development of provisions of the Schengen *acquis*”.⁶³ Furthermore, entry and stay under the LBT regime amounts to a *visa-free regime*, which stems from Article 4 of the LBT Regulation as well as from Regulation No (EC) 1932/2006 establishing an exception from the visa obligation for holders of an LBT permit. As recital 7 of Regulation 1932/2006 foresees: “[the LBT Regulation] makes it necessary to provide for a new exemption from the visa requirement for holders of a local border traffic card”, which principle is reflected in Article 1(1) lit. b) of this amendment to the EU Visa Regulation. In consequence, Article 20(1) CISA is applicable to local border traffic. This provision stipulates that “[a]liens not subject to a visa requirement may move freely within the territories of the Contracting Parties for a maximum period of three months during the six months following the date of first entry, provided that they fulfil the entry conditions” (emphasis added – M.T.). To sum up, the

62 I do not mention the legal position of the *defendant* in the main proceedings, since the Szabolcs-Szatmár-Bereg County Police Department did not prepare written observations before the CJEU, and then in the oral hearing, as a state organ, it has fully aligned with the arguments developed by the representative of the Hungarian Government and made an oral statement merely of practical nature, explaining the everyday situation at the Hungarian-Ukrainian border. This sub-section is prepared on the basis of the written observations of 10 September 2011 and the oral statement of 14 June 2012 of Hungary.

63 Recitals (15)-(20) of this Preamble of the LBT Regulation.

LBT Regulation is part and parcel of the Schengen *acquis* and its provisions, including Article 5 on the duration of stay, which shall be interpreted in the context of the provisions of the CISA.

In the view of the Hungarian Government, Article 5 of the LBT Regulation contains in substance a very similar wording to that of Article 20(1) CISA; the only difference being that the former provides for the ‘maximum permissible duration of each uninterrupted stay’ which cannot exceed three months. There is nothing, on the one hand, in the LBT Regulation indicating that this legal instrument had as its aim to differentiate between border residents spending either the maximum three months as an uninterrupted stay, or with several entries an aggregate of shorter stays. On the other hand, in accordance with Regulation No (EC) 1932/2006, border residents in possession of an LBT Permit should be considered as third country nationals not subject to the visa requirement, therefore Article 20(1)CISA as a general rule applies to them. The latter provision shall be interpreted in accordance with the judgment of the CJEU in the *Bot* case (C-241/05), meaning that 20(1) CISA permits,

in the same way as Article 11(1)(a) of the CISA does expressly as regards nationals of third countries subject to a visa requirement for stays of short duration, both a continuous visit of three months in length and successive visits of shorter length which, taken together, do not exceed three months in all. [. . .] That provision thus allows nationals of a third country not subject to a visa requirement to stay in that area for a maximum period of three months during successive periods of six months, provided that each of those periods commences with [. . .] a first entry (emphasis added – M.T.).⁶⁴

As a result, LBT permit holders are entitled to stay in the Hungarian border area for three months, either for an uninterrupted stay, or an accumulation of successive visits of shorter length, during a period of six months from the first entry, and consequently, when that right to stay has elapsed since the date of the very first entry into the Schengen Area, the third country national concerned must, as a rule, leave it immediately. The duration of stay in the border area in possession of an LBT permit shall be counted together as described above, with a maximum of 93 days within every six-month period starting from the first entry. For the Hungarian Government, this is the only interpretation which complies with the fundamental principle of legal certainty, allowing for a uniform and efficient

⁶⁴ Case C-241/05, *Nicolae Bot v. Préfet du Val-de-Marne*, Judgment of 3 October 2006, ECR [2006] I-9627. (hereinafter referred to as *Bot* Judgment), paras 26 and 29.

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application of the Schengen *acquis*. This is confirmed by the grammatical,⁶⁵ historical⁶⁶ and teleological⁶⁷ interpretation of Article 5 of the LBT Regulation.⁶⁸

Furthermore, Hungary submitted that member states using bilateral agreements only have a ‘one-way’ margin of appreciation in relation to this ‘absolute maximum limit of duration’,⁶⁹ i.e. they may only fix the time frame permitted under Article 20(1) CISA to be shorter. These bilateral agreements may thus prescribe, for instance, that border resident third country nationals are only allowed to stay after the first entry for a maximum uninterrupted period of three days in the border region, and then they can make use of the total permissible stay of three months by successive visits of maximum three days.

In addition to that, Article 2 lit. a) of the LBT Regulation clearly states that it “does not affect provisions of Community and national law [. . .] relating to long-term stays” (emphasis added – M.T.). What does ‘long-term stay’ mean under EU law? By virtue of Article 18 CISA, visas for stays exceeding three months are long-term visas, thus, all stays exceeding three months in every six months period qualify as ‘long-term stays’, which are thus beyond the scope *ratione materiae* of the LBT Regulation. Another connecting argument was put forward by Hungary relating to the consequences of the extensive interpretation of the duration of stay as contained in Article 5 of the LBT Regulation. Provided that the third country national leaves the border region only for one day, in order to comply with the requirement of the maximum three months of uninterrupted stay, re-entering the next day for a new stay of three months and so on, could lead to a long-term stay in the border

65 It is clear from the French and German language versions, argued the Hungarian Government, that the three-month limit refers to the permissible maximum duration of stay, regardless of whether it is continuous or not. This concept follows the logic that bilateral agreements may require a certain maximum of continuous stay (usually a few days or one week duration) or the permissible maximum of total stay that might be made up by shorter continuous stays of few days, but no more than three months counted together.

66 Hungary recalled that in the original proposal of the Commission [COM(2005) 56 final], border residents holding a so-called ‘L visa’ would have stayed up to seven consecutive days in the border area, and the total duration of the successive visits should not exceed three months altogether in any six months period. The final text of this provision of LBT Regulation has been amended by the European Parliament, the aim of which certainly was to leave to the bilateral agreements the determination of the maximum duration of continuous stay, and thus just to fix the absolute maximum limit of duration (three months). Although the reference to any six months period has been dropped out of the text, it can clearly be deduced from the Schengen *acquis*.

67 The purpose of local border traffic regime is to ensure that the borders with neighbouring countries are not a barrier to trade, social and cultural interchange or regional cooperation. This purpose is not compatible with an interpretation that LBT can result in a long-term or permanent residence under EU law in the border region of a member state. A further aim of the Regulation is ensuring a balance between the easing of border crossing for *bona fide* border residents and the need to prevent illegal immigration and potential threats to security. Facilitating border crossings and border controls while maintaining the general Schengen scheme on the maximum duration of stay is the one and only solution in order to uphold this delicate balance.

68 Előterjesztés az Európai Koordinációs Tárcaközi Bizottság részére a Kúria által a kishatárforgalom keretében megvalósuló határ menti tartózkodás tárgyában kezdeményezett C-254/11. számú Shomodi ügyben tartandó tárgyaláson előterjesztendő felszólalás jóváhagyásáról. Budapest, 2012. június, pp. 9-10.

69 For this term, see *Bot* Judgment, para. 38.

region, resulting in an abuse of the LBT regime. Given that a LBT permit may be issued for up to five years, the person concerned could establish long-term residence under EU law⁷⁰ in the border area, while only keeping an eye on exiting for one day right before every three-month period elapses, re-entering again for staying another three months.⁷¹ This practically unlimited stay for LBT permit holders could not have been the purpose of the EU legislature, the Hungarian Government argued, also bearing in mind that in line with the founding Treaties, regulating long-term stays, in principle, lies in the competences of the member states. Such an extensive interpretation would undermine the high level of protection of the EU external land borders as well as go against the equilibrium intended by the LBT Regulation between facilitated border crossing of border residents having legitimate reasons to frequently cross an external land border and preventing security risks, including illegal immigration.⁷²

Finally, as for the technicalities of calculating the days spent in the border region, the Hungarian Government is of the view that multiple exits and entries occurring on the same day, or a single exit and entry on the same day shall be considered *one calendar day*.⁷³

Summing up the above, it may be submitted that 'local border traffic' set up by the EU is a *special regime under the Schengen acquis*, forming part of it with derogations with a view to ensuring a balance between facilitated border crossing of *bona fide* border residents and maintaining the high level of protection of the EU external land borders. In the Hungarian Government's opinion, having regard to the above, the *derogations from* the "general rules governing the border control of persons crossing the external borders"⁷⁴ of the Schengen Borders Code⁷⁵ (hereinafter referred to as SBC) should be interpreted in a way that some requirements set out by the SBC shall not be met in case of local border traffic (entry conditions; stamping of the travel document etc.), but these derogations shall by no means lead to the result that the local border traffic regime as a whole would be placed out of the scope of the Schengen *acquis*, rendering it a self-contained *lex specialis*. The rationale of these derogations is to make the LBT Regulation function efficiently, in line with its object and purpose. Using the *argumentum a contrario*, the Hungarian Government considers that other rules of the Schengen *acquis* still continue to govern, as a general framework, the functioning of the LBT regime (systemic interpretation). Therefore, the

70 As regulated by Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16, 23.1.2004, p. 44-53).

71 This argument has also been advanced by *Poland* in its written observations.

72 See recital (4) of the Preamble of the LBT Regulation.

73 Written observations of Hungary, para. 30.

74 Recital (3) of the Preamble of the LBT Regulation.

75 Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 105, 13.4.2006, p. 1.).

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scope of the exceptions from the SBC is limited to the border crossing or border control related aspects: the rules on calculating the duration of stay, however, do not constitute such aspects, so in this respect these requirements stemming from the Schengen *acquis* (limitations inherent in short-term stays) shall be taken into consideration, in particular, the limitation according to which the LBT Regulation itself expressly excludes from its scope *ratione materiae* the long-term stays.

The arguments of the *applicant in the main proceedings* (Mr Shomodi) as well as the *European Commission* focus on demonstrating the legal soundness of the *extensive interpretation* of the duration of stay as foreseen in Article 5 of the LBT Regulation. Given that the Commission's legal arguments are more sophisticated and better structured, even though in essence those of the applicant in the main proceedings are similar, I will summarize these arguments following the Commission's line of reasoning.

The Commission held that the LBT Regulation *makes an exception*, as a whole, to the Schengen Borders Code. Moreover, since the SBC mirrors the relevant provisions of the Schengen *acquis*, including the CISA, the LBT Regulation constitutes an exception to the CISA as well. As a result, the maximum duration of any uninterrupted stay (three months) contained in Article 5 of the LBT Regulation shall be *interpreted differently* than the rules of the Schengen *acquis* (e.g. Art. 20(1) CISA; Art. 5 SBC). This different legal regime is in particular due to the fact that entry and stay in case of local border traffic is limited to the border region of a single member state (*i.e.* not to the whole territory of that member state or all other member states) as well as that the maximum permissible duration of stay shall be calculated in a different manner than by virtue of the Schengen *acquis*. This means that Article 5 of the LBT Regulation sets up a time frame regarding the length of continuous stay (it cannot exceed three months), but it does not limit the number of entries/exits or the time that must elapse between them. In other words, holders of local border traffic permits are entitled to stay in the border region of a member state; *without any time restrictions, except that each uninterrupted stay may not exceed three months*.⁷⁶ As the Commission argued, this unlimited number of border crossings in possession of an LBT permit is fully compatible with the object and purpose of the Regulation, in particular with stays for social, cultural or substantiated economic reasons, or for family reasons (e.g. the person concerned pays regular visits to a relative; frequently participates in cultural events on the other side of the border etc.).⁷⁷

The Commission also noted that the Hungarian authorities have never claimed that holders of the LBT permit would have used it for purposes other than those reflected in the

⁷⁶ This approach was already followed in the Commission's First report of 24 July 2009 on the implementation and functioning of the local border traffic [COM (2009) 383 final, p. 3].

⁷⁷ Written observations of the European Commission (Brussels, 9 September 2011, SJ.G (2011)1046044 – VBO/GW/gd), paras 17-23.

LBT Regulation; or would have left the border region or abused the system. Furthermore, *Hungary did not make use of the sanctions* established in the bilateral Agreement in accordance with Article 17 of the LBT Regulation.⁷⁸ Instead, the Border Police applied the SBC and its implementing national legislation on refusal of entry.⁷⁹ The latter would only have been lawful if the bilateral Agreement had made it possible by referring to the general Schengen rules governing the movement of persons across borders.⁸⁰

By *conclusion*, the Commission suggested the following interpretation of Article 5 of the LBT Regulation: it allows for multiple entries/exits and an uninterrupted stay not exceeding three months in a way that before the three months period elapses, the LBT permit holder may interrupt his/her stay in the border region, then after re-entering he/she is entitled again to a continuous stay of three months, save for the case of abuses.⁸¹

23.4.4 *Possible Outcome of the Case in the Light of the Opinion of the Advocate General of 6 December 2012*

The Opinion of Advocate General Villalón was finally presented on 6 December 2012 (it was postponed, having originally been scheduled for 17 October). The Opinion is quite *far-reaching* in certain aspects, mainly by enlarging the legal context of the interpretation of Article 5 (duration of stay) of the LBT Regulation as well as by assessing the conformity of the bilateral local border traffic regime established between Hungary and the Ukraine with EU primary law, notably with the EU Charter on Fundamental Rights (and indirectly with the European Convention on Human Rights and the case law developed by the Strasbourg Court).

As a *preliminary issue*, the Advocate General noted at the outset that the *main legal question* at stake was essentially the problem raised by the *fourth question* formulated by the then Supreme Court of Hungary. This question is directly related to the compatibility with Article 5 of the LBT Regulation of the bilateral regime set up by the Agreement between Hungary and the Ukraine. In turn, in the Advocate General's view, the first three questions of the Supreme Court (Curia) are of a purely hypothetical character. These are about a scenario when LBT permit holders somehow legally optimize the use of the given time

78 Art. 17 of the LBT Regulation sets forth the following:

"1. Member States shall ensure that any abuse of the local border traffic regime, as established by this Regulation and as implemented by the bilateral Agreements referred to in Art. 13, is subject to penalties as provided for by national law.

2. Those penalties shall be effective, proportionate and dissuasive and shall include the possibility of cancelling and revoking local border traffic permits."

Under the Hungarian-Ukrainian Agreement, these sanctions determined by Hungary are: obligation to leave the territory of Hungary; aliens policing expulsion and ban on entry and stay; ban on entry and stay (Annex IV).

79 Art. 40(1) of Act II of 2007 on the entry and stay of third country nationals.

80 Written observations of the European Commission, para. 25.

81 Written observations of the European Commission, para. 27.

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frame; including staying continuously during the maximum period of three months, then exiting and re-entering, possibly in the same day, so as to reopen the right of stay of three months, which would lead to distorting the purpose of the local border traffic regime. In addition, he is of the view that the first three questions depart from the hypothesis of the abuse of rights, insofar as the entry and stay in the border region in the framework of the LBT system may give rise to a concealed permanent residence and distort the purpose of this regime. As a result, the Advocate General focused on replying to the fourth question and my analysis also puts emphasis of the arguments related thereto.

Firstly, he found that not only does the Schengen *acquis* constitute the general legal framework of the EU rules on local border traffic, but the LBT regime is also embedded in the EU legal order as such, notably in the *primary law* and, forming part thereof, the *EU Charter on Fundamental Rights*.⁸² This also means that the national authorities and courts are obliged to interpret and apply the rules on LBT not simply in the light of the text and purpose of the LBT Regulation, but in conformity with the whole *corpus* of EU law.⁸³ In consequence, even if the Agreement is grammatically in compliance with the LBT Regulation (Art. 5), this formal conformity is not enough to establish the full compatibility with EU law. The Advocate General identified *further supplementary conditions/standards*, namely the object and purpose of the LBT Regulation as well as the primary EU law, more precisely the EU Charter of Fundamental Rights.⁸⁴

He then added that *neither* Article 5, *nor* any other provision in the LBT Regulation contained a *time limitation of six months* within which the maximum uninterrupted stay of three months should be calculated. He went on by recalling that the LBT regime is characterized by limitations to its scope *ratione personae* and *ratione loci* as well as its purpose permitting frequent and regular crossing of the external land borders. In light of the above, the Advocate General defined the *ratio legis* of the Regulation as to enable border residents to cross the external land borders of the Union easily, without undue administrative burden, as well as frequently, but also regularly, for legitimate economic, social, cultural or family reasons, provided, however, that this freedom must not be distorted or diverted from its purpose, nor abused or fraudulently used.

Reacting to the Hungarian Government's position, the Advocate General *dismissed* that the LBT Regulation should be interpreted in the light of the CISA and the SBC, given that these form two distinct legal regimes, not originating from the same legislative inspiration.⁸⁵ Compared with Article 20 CISA or Article 5 SBC the personal scope of which covers all third country nationals, permitting the short-term stay on the territory of all EU

82 Opinion of Advocate General Villalón of 6 December 2012 in the case C-254/11, para. 4.

83 *Ibid.*, para. 31.

84 *Ibid.*, para. 40.

85 *Ibid.*, para. 54.

member states, the scope *ratione personae* and *loci* of the LBT Regulation, in contrast, is strictly limited. Consequently, the limitations applicable to the short-term stay are not valid for the specific regime established for the purpose of local border traffic,⁸⁶ thus Hungary's argument cannot be upheld. However, he added that although it established a *lex specialis*, the provisions of the LBT Regulation *cannot be exploited* for purposes not intended by it and used in order to circumvent the rules of Union law and applicable national law regarding long-term stay and the access to/the exercise of economic activities.⁸⁷ Finally, and this is the most innovative part of the Opinion, the Advocate General held that the bilateral Agreement shall be assessed, besides the LBT Regulation, against the EU primary law, more precisely the *EU Charter on Fundamental Rights* (in the light of the case law on the European Convention on Human Rights (ECHR)), and the *whole body of EU law* (in accordance with the so-called 'loyalty clause' enshrined in Article 4(3) TEU). In other words, the bilateral agreements under the LBT regime shall be concluded with due consideration to the above-mentioned sources of EU primary law as well. In analysing the possible rights reflected in the EU Charter, he held that given the logic of the regime of local border traffic, *Article 7 of the EU Charter*⁸⁸ guaranteeing the respect for private and family life *is clearly applicable*, interpreted in conformity with the Strasbourg jurisprudence on Article 8 ECHR. He continued by determining that the calculation of *accumulating three months of stay* in every six months period is to be considered as having a *disproportionate effect to the border residents' right to private and family life*, since the jurisprudence of the European Court of Human Rights on the right to private and family life includes the right to *establish and maintain relationships with others and with the outside world* which may include aspects of the social identity of an individual.⁸⁹ As a next step in the test, the refusal of entry as imposed by the Hungarian Border Police, shall be justified by a pressing social need and, in particular, be proportionate to the legitimate aim pursued.⁹⁰ The practice of the Hungarian competent authorities, that is to say systematically refusing the entry of the LBT permit holders to the Hungarian border region for the sole reason of having already stayed more than three months calculated altogether within a period of six months without taking into consideration the legitimate reason justifying such visits, nor the circumstances, without establishing abuse or fraudulent use of these permits, *is not compatible with the LBT Regulation*,⁹¹ since it does not meet

86 *Ibid.*, para. 58-59.

87 *Ibid.*, para. 63.

88 "Everyone has the right to respect for his or her private and family life, home and communications."

89 *Mikulic v. Croatia* (Appl. No. 53176/99), ECtHR, Judgment of 7 February 2002, para. 53. (cited by the Advocate General, *op. cit.* para. 74.).

90 See, in relation to expulsions: *Mehemi v. France* (Appl. No. 25017/94), ECtHR, Judgment of 26 September 1997, para. 34; *Dalia v. France* (Appl. No. 26102/95), ECtHR, Judgment of 19 February 1998, para. 52 (cited by the Advocate General, *op. cit.* paras 74-75).

91 Opinion of Advocate General Villalón of 6 December 2012 in the case C-254/11, para. 77.

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the requirement of proportionality, thus falling short of the legal standard elaborated in relation to the respect for the right to private and family life. The only way to opt for such a restrictive approach is if fraud or abuse is detected, on a case-by-case basis, by the national authorities (subject to judicial review).⁹²

The Advocate General, by conclusion, invited the CJEU to answer to the questions submitted by the then Supreme Court (now Curia) in line with his Opinion.

23.5 CONCLUSIONS: INTEGRAL PART OF THE SCHEGEN ACQUIS WITH EXCEPTIONS OR *LEX SPECIALIS* AS A WHOLE?

As it is clear from the above, three different legal points of view have been developed before the CJEU in relation to the legal regime applicable to the local border traffic and the maximum permissible duration of stay under it. The *Hungarian Government*, supported by Poland, in advancing the *systemic interpretation*, argued for placing it in the framework of the Schengen *acquis*, and consequently, the maximum duration of stay for LBT purposes should be calculated in the same manner as under the CISA (not exceeding three months within every six-month period starting from the date of the first entry). These governments also red flagged the possible abuses and circumvention of other EU harmonised migration statuses in case this interpretation is not followed (*e.g.* long-term residence offered by Directive 2003/109/EC). On the other hand, the *Commission* pleaded that the local border traffic, detached from the Schengen *acquis*, allows for multiple entries/exits and an uninterrupted stay not exceeding three months in a way that before the three month period elapses, the LBT permit holder may interrupt his/her stay in the border region, then, after re-entering he/she is entitled again to a continuous stay of three-months, save for the case of abuse. As for the calculation of the duration of stay, the same approach was taken by the applicant in the main proceedings and other member states submitting written observations (Romania, Slovakia). Finally, the *Advocate General*, building upon the Commission's approach regarding the duration of stay, went even further and brought the context of the EU Charter of Fundamental Rights into the picture, construing the right to stay under the LBT regime different than that afforded under Article 20(1) CISA, practically accepting the Commission's interpretation on the calculation of the duration of stay in the border region (*lex specialis* approach).

2. There are *limited scholarly writings* so far on the EU local border traffic regime, and even those views are *diverging* as for the correct interpretation of the duration of stay in this framework. Steve Peers, one of the best known scholars of EU JHA law, simply states that “[b]order residents may stay up to three months in a border area [. . .] this does not derogate from the normal maximum of permitted short-term stays”.⁹³ This view is not

⁹² *Ibid.*, para. 76.

⁹³ Peers 2010, p. 211.

shared by another leading commentary in the field, echoing the Commission's approach and describing the duration of stay under local border traffic as "not subject to the limit of spending three months in every 180 days period, as set out in the borders code".⁹⁴ The issue of the duration of stay under the LBT is crucial, since once authentically answered (by the CJEU), it will reveal the very legal nature of local border traffic, either putting it within the broader context of the Schengen *acquis*, or excluding it from the regime of short-term stays as well as long-term stays under EU law, thus creating a new, self-standing *lex specialis*.

The reasoning of the Advocate General on the basis of the EU Charter of Fundamental Rights is beyond doubt a highly progressive and innovative legal technique, perceiving it rather a European Neighbourhood Policy instrument than a classic JHA and Schengen legal tool. Nevertheless, if followed by the Court, it can open the Pandora's box. If all EU secondary legislation should be interpreted in the light of the Charter in such a far-reaching way, this might lead to very extensive interpretations; *horribile dictu* contrary to the text/system of the given secondary legislation. It is true that the LBT Regulation refers to the EU Charter,⁹⁵ but this reference is seemingly a weaker authorization to take into account the Charter, than after reviewing the whole EU legal act against the Charter a completely different meaning should be accorded to some of its provisions not flowing from their natural meaning, grammatical or systemic interpretation.

The CJEU has already relied substantially on the Charter in some recent judgments in the field of migration and asylum when interpreting secondary EU law and checking its compatibility with primary EU law.⁹⁶ Therefore, it would not be unprecedented to reach a judgment in migration affairs based largely on the EU Charter of Fundamental Rights. Given that in the overwhelming majority of the cases the CJEU follows the opinion of the Advocate General, there is a significant chance for that in the Shomodi case as well. This line of reasoning would mean that the LBT regime constitutes a *lex specialis* under EU migration law. But it may give rise to even more questions than it answers, and it would require more clarifications on what are the further elements and boundaries of this *lex specialis* LBT regime. Moreover, it is to be noted that the saving clause with regard to fraud and abuses is quite difficult to apply in practice: legally speaking it is hard to prove such misuses on a case-by-case basis.

94 Peers, Guild & Tomkin, 2012, p. 210.

95 Recital (13) of the Preamble of the LBT Regulation.

96 See case C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Judgment of 28 July 2011, not yet reported; joined cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. e.a. v. Refugee Applications Commissioner*, Judgment of 21 December 2011, not yet reported; case C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, Judgment of 22 November 2012, not yet reported. For a synthesis in the legal literature, see e.g., S. Carrerra & M. De Somer & B. Petkova: *The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice*. CEPS Papers in Liberty and Security in Europe, No. 49/August 2012, pp. 1-26.

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If, however, the Luxembourg Court sets aside the innovative reasoning of the Advocate General and accepts Hungary's arguments on the maximum permitted duration of stay, it will mean that local border traffic constitutes an integral part of the Schengen *acquis*, with some derogations under it. In this scenario its contours are more precise, since in the background the relevant rules of the CISA and SBC as well as other Schengen related norms are still applicable. It would better serve legal certainty and a comprehensive, logical legal architecture in the area of freedom, security and justice.

Whatever the judgment of the Court of Justice of the European Union will be, the referring national court, *i.e.* the Curia shall still interpret and apply three distinct sets of legislation. Its task might be even more delicate if the CJEU will have a say regarding the (non) conformity of the Agreement between Hungary and Ukraine with EU law as well. Besides the consequences stemming from Article 13 of the LBT Regulation (*i.e.* eventual obligation to modify the Agreement, a duty of the domestic legislature), it can result in disapplying the provision related to the duration of stay in the Agreement by the Curia; while the LBT Regulation as interpreted by the CJEU and the Government Decree implementing the Aliens Act as well as the Aliens Act itself (with or without the provision on refusal of entry) will govern this legal situation. Hopefully, the Luxembourg Court will give enough guidance so that the Curia will be able to solve this complex issue of three intersecting legal orders. In the time of legal pluralism and the internationalization of legal orders it is of utmost importance that Hungarian courts be familiar with simultaneously interpreting and applying EU law, international law and domestic law, having due regard to supremacy, direct applicability and direct effect of Union law as well as the hierarchical rank, in different constellations, of the norms of these interrelated and intersecting legal orders.