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CONTENT

The Independence of the Data Protection Authority in Electronic Commerce in the EU: Relevances to Indonesian DPA Legislation?

ARIFIN, SARU

ABSTRACT *This essay critically analyzes the EU and Indonesia's existing regulation on personal data protection, especially on the role of data protection authorities. The points of analysis in focus are how the EU Data Protection Authority (DPA) regulatory system protects the personal data stored on the electronic commerce platform; and what its relevances are to Indonesia's DPA regulation. It is undeniable that the advancement of information technology has brought about a significant change in contemporary business. Not every businessman needs to rent a space in the shopping areas. They need to register their products for sale on the business platform by storing sufficient data, and pieces of information are requested. For buyers, this new way to purchase the item they want to have is more convenient and efficient in terms of time and cost. By clicking on any platform of the online market, the item needed is ready to purchase. How to implement processes for requesting buyers to store their data, such as their name, birth date, phone number, e-mail, and credit or debit account number? At this point, the European Union has enacted the General Data Protection Regulation (GDPR). This Act gives protection to every personal data, mainly in electronic commerce. Moreover, EU DPAs have fully independent powers in assessing and implementing the GDPR. The independence of DPAs is a core element of the whole data protection regime in the EU. Unlike the EU, Indonesia has not yet decided on a similar regulation as the EU did, especially like the one on DPAs. Consequently, the development of electronic commerce is in slow motion. Shoppers are concerned that their data is being misused by merchants for their benefit or distributed to irresponsible third parties. This paper suggests that features of the EU DPA system are feasible in Indonesia's DPA legislation plan with the necessary adjustments.*

KEYWORDS *personal data protection, e-commerce, GDPR, DPAs, EU, Indonesia*

1. Introduction

The significant change in business practices from the traditional pattern, where buyers and sellers meet physically, to the virtual pattern using information technology[1] has a strong effect on customer behavior changes.[2] Today's buyers do not need to come to a shop or supermarket to get the goods they want to buy. However, by merely opening their smartphone and finding a Marketplace they like, they can then choose and compare the sellers' prices who are members of the company that is affiliated to the Marketplace.

In this virtual trading practice, generally, a marketplace requires customers to fill in detailed personal data on the Marketplace's website. In its development, Marketplace companies use personal data from their customers to personalize their shopping preferences. If they buy one product, the Marketplace will offer many other products of interest to that customer even though he does not ask for it.[3] How can the Marketplace customize these products? The answer is: from the personal data submitted to the Marketplace during initial registration before shopping at the marketplace stalls. All these personalized services for customers are based on cookies, the tracking of browsing, and[4] unscrupulous individuals carry out today's misuse of personal data mostly for the economic interests they are targeting. The personal data of a customer or client stored with a particular Marketplace or service provider is a serious concern for the public. On May 12, 2020, Indonesia-based CNBC News reported that nearly 91 million personal data of Tokopedia, one of the big Marketplaces, were stolen by a hacker, who sold them. About 15 million customers' data are being shared for free on the Dark Web.[5] Gomez *at al.*[6] in their study state that even large and global firms like Google, Yahoo, and Facebook use their client's data without authorization. In the US, Sarah

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[1] Georgious Doukidis, Angeliki Poulymenakou, I. Terpsidis, Marinos Themistocleous, P. Miliotis, *The Impact of the Development of Electronic Commerce on the Employment Situation in European Commerce* (Athens: Athens University of Economics and Business, 1998).

[2] Chen Li and Hong-wei Liu, "A Review of Privacy Protection in E-Commerce," *Journal of Advanced Management Science* 3, no. 1 (2015): 50–53.

[3] Ibid.

[4] Ibid.

[5] Tim Redaksi, "Buka-Bukaan Bos Tokopedia Soal Bocornya 91 Juta Data Pengguna" accessed 2020, https://www.cnbcindonesia.com/tech/20200512133506-37-157889/buka-bukaan-bos-tokopedia-soal-bocornya-91-juta-data-pengguna.

[6] Joshua Gomez, Travis Pinnick, and Ashkan Soltani, *"Know Privacy,"* UC Berkeley: School of Information, 2009, available at https://escholarship.org/uc/item/9ss1m46b.

Ludington[7] indicates in her study that more than 1,000 data brokers claim to have detailed data profiles of "nearly every American consumer and household," and their profits exceed US$1 billion annually.

The case mentioned above shows that personal data information stored on the e-commerce platform and social media or in an e-mail is risky for the data owners.[8] Why has the international community voiced the opinion that rights of privacy must be protected as human rights? Even long before today's legal system all countries had concerns about privacy: the debate emerged as early as the late nineteenth century. Samuel Warren and Louis Brandeis[9] were the ones who initiated the debate on the right to be alone.[10] The concern for data privacy protection reoccurred in the mid-twentieth century, where Alan Westin[11] insisted that an individual has personal data to share with or keep from others, which is then regarded as a moral value by William Parent.[12] A Philosopher, Adam Moore[13] introduced the concept of access control. Under this concept, personal data are to be independently secured in public life. Therefore, he proposed finding a solution to detecting loss of privacy in information society activities and to protecting personal data.

In this era of information technology, most democratic states in the world have enshrined personal data protection in law. In every state that uses the internet for daily business, the government has made privacy a concern to be protected by any form of law. The European Union adopted a regional legal act, known as the General Data Protection Regulation (GDPR), as a strategic regulation to protect society's data privacy for those living in the EU's

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[7] Sarah Ludington, "Reining in the Data Traders: A Tort for the Misuse of Personal Information," *Maryland Law Review* 66, no. 1 (2006): 140. See also Milena Head and Yuan Yufei, "Privacy Protection in Electronic Commerce-A Theoretical Framework," (Ontario, 2000): 445.

[8] Dhirendra Pandey and Vishal Agarwal, "E-Commerce Transactions : An Empirical Study International Journal of Advanced Research in E-Commerce Transactions : An Empirical Study," *International Journal of Advanced Research in Computer Science and Software Engineering* 4, no. 3 (2014): 669–71.

[9] Samuel D Warren and Louis D. Brandeis, *The Right to Privacy Today*, Harv. Law Rev. 297 (1929): 43.

[10] Herman T. Tavani & James H. Moor, *Privacy protection, control of information, privacy-enhancing technologies*, and 31 ACM SIGCAS Comput. Soc. (2001): 6–11; Herman Tavani, *Philosophical Theories of Privacy*, 38 Metaphilosophy (2007): 1–22.

[11] Tom C. Clark and Alan F. Westin, "Privacy and Freedom," *California Law Review* 56, no. 3 (1968): 911.

[12] Yuliia Schastlivtseva, "Informational Self-Determination of Europe and Its Importance," *Lega-Dialogue.Org*, (2018), available at https://legal-dialogue.org/informational-self-determination-of-europe-and-its-importance.

[13] Ibid.

territory.[14] Meanwhile, the ASEAN countries regulate privacy protection domestically and Indonesia does so in the form of government[15] and ministerial regulation.[16]

Theoretically, according to Tavani,[17] concerning the protection of data privacy at the present time, it is adequate to use the Restricted Access/Limited Control Theory.[18] The RALC framework has three components: an account of the concept of privacy, an account of the justification of privacy, and an account of the management of privacy. The RALC theory distinguishes between a natural situation of privacy and privacy rights. In a naturally private situation, where one has a right to be protected, privacy can be lost but not violated or invaded due to any norms or conventions, either legal or ethical. This is in contrast with normative private situations. One's privacy can be violated or invaded, in addition to being lost, therefore laws and norms exist to provide protection in those situations.

One of the strategic issues in data privacy protection is the competent authority to oversee and enforce the regulatory norms. According to Husein,[19] a Journalist of Tirto. id, this data protection authority requires independent and robust supervision. Therefore, the persons working in this institution must have the competence and adequate skills relating to computers and the internet to handle the personal data and a deep understanding of the data protection regulations. Besides, the present situation poses challenges to regulation due to the international data flow. The European Union has responded to these challenges by enacting a data protection law that puts DPAs in charge of personal data protection issues across Europe.[20]

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[14] W. Scott Blackmer, "EU General Data Protection Regulation," *American Fuel and Petrochemical Manufacturers, AFPM - Labor Relations/Human Resources Conference 2018* 2014, no. March 2014 (2018): 45–62.

[15] Sekretariat Negara Republik Indonesia, "Peraturan Pemerintah Tentang Penyelenggaraan Sistem Dan Transaksi Elektronik," Pub. L. No. 02 (2012).

[16] Kementerian Komunikasi dan Informasi, "Peraturan Menteri Komunikasi Dan Informasi Tentang Perlindungan Data Pribadi Dalam Sistem Elektronik," Pub. L. No. 20 (2016).

[17] Tavani and Moor, "Privacy Protection, Control of Information, and Privacy-Enhancing Technologies"; Tavani, "Philosophical Theories of Privacy."

[18] According to Sarah, there is a clear distinction between privacy rights and the right to control. See Ludington, "Reining in the Data Traders: A Tort for the Misuse of Personal Information."

[19] Husein Abdulsalam, "Sulitnya Melindungi Data Pribadi Di Indonesia," *Tirto.Id*, (2019).

[20] Paul M Schwartz, "European Data Protection Law and Restrictions on International Data Flows," *Iowa Law Review* 80, no. 1992 (1995): 471–96.

Meanwhile, in the ASEAN countries,[21] the data protection authority's existence is stipulated by data privacy protection regulations. Some of the states established their supervisory data protection body as a part of the government office, and others created their supervisory data protection body as an independent commission. For instance, in Malaysia, the Personal Data Protection Office (JPDP) was created to implement the provisions of the Malaysian Personal Data Protection Act. This institution is under the Malaysian Ministry of Communication and Multimedia.

The Philippine Personal Data Protection Act mandates the formation of the Komisyon *para sa Proteksiyon ng Personal na Impormasyon* (KPPI) aka the National Privacy Commission. According to the law, this Commission is an independent institution. However, it is attached to the Philippine Department of Information and Communication Technology for policy coordination.[22] This form of supervisory data protection is semi-independent, because the commission is subordinated to the ministerial office. It is likewise in Singapore and Thailand.

In Singapore, such an institution is called the Personal Data Protection Commission (PDPC). According to the Singapore Personal Data Protection Act, the Communications Media Development Authority of Singapore, an agency under the Ministry of Communications and Information, is designated as PDPC. Meanwhile, in Thailand, personal data protection is managed by the Minister of Economy and Digital Society.[23]

Unfortunately, in its Draft Bill on Data Privacy Protection, Indonesia does not recognize the DPA's existence. The existing supervision mechanism uses the traditional institution to handle it. Husein[24] doubts that such an institution would have a thorough understanding of the provisions of personal data protection. Consequently, its implementation can deviate from the regulation.

This essay will describe the Data Protection Authority's role in implementing data privacy protection in the EU, the GDPR and its relevance and the need for it to be adopted by the Indonesian Draft Bill on Data Privacy Protection. The analysis focuses on what its independent position means and its strategic role to ensure well-implemented personal data protection. It is intended to construct the academic argumentation on the importance of forming an independent institution such as DPAs to implement the Act on Data Privacy Protection in Indonesia.

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[21] Abdulsalam, "Sulitnya Melindungi Data Pribadi Di Indonesia."
[22] Ibid.
[23] Ibid.
[24] Ibid.

2. The EU's GDPR Supervision System

2.1 The Definition of Personal Data and the Scope of Their Protection

Data protection regulation on the European continent has a long history both from a political and cultural perspective, such as the notion of non-individual interference.[25] However, a modern data protection law was adopted in the early 1970s in Germany and in 1973 in Sweden. Unlike the US philosophical view that personal data processing is lawful unless it is forbidden by law, the EU system insists that personal data processing is prohibited unless there is a law that permits it.[26] In 1995, the EU established the Data Protection Directive (DPD) to regulate digital personal data processing and regulate how data are moved around within the EU. Over the next years, it became clear that as technology developed, not only were further protections needed, but they needed to be implemented regularly. To that end, what would ultimately develop into the GDPR was proposed in January 2012.[27] The proposal was then adopted on March 11, 2014, the European Parliament, sitting in a plenary session, voting with an overwhelming majority

[25] See Francesca Bignami, "Privacy and Law Enforcement in the European Union: The Data Retention Directive," *Chicago Journal of International Law* 8, no. 1 (2007): 233–55.

[26] Edward S. Dove, "The EU General Data Protection Regulation: Implications for International Scientific Research in the Digital Era," *Journal of Law, Medicine and Ethics* 46, no. 4 (2018): 1013–30. According to Article 1 Regulation of EU 2016/679, "The protection of natural persons in relation to the processing of personal data is a fundamental right as it is said in Article 8(1) of the Charter of Fundamental Rights of the European Union (the 'Charter'). In addition, Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) provides that everyone has the right to the protection of personal data concerning him or her". See European Parliament and of the Council, "Regulation (EU) 2016/679 of April 27 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)," *Official Journal of the European Communities* OJ L 119/1 (2016).

[27] Elisabeth Meddin, "The Cost of Ensuring Privacy: How the General Data Protection Regulation Acts As a Barrier to Trade in Violation of Articles XVI and XVII of the General Agreement on Trade Servives," *American University International Law Review* 35, no. 4 (2020): 997–1037.

(621 to 10 and 22 abstentions) in favor of the proposed Data Protection Regulation.[28]

On May 25, 2018, the General Data Protection Regulation (GDPR) introduced a new data protection system in the EU that assures personal and institutional data privacy. This internet regulation protects EU nationalities' interest in being protected from the misuse of their data by perpetrators territorially based in the EU and foreigners.[29] The most crucial provision in this GDPR is related to a very high fine for violating data privacy. The GDPR, which replaces the Directive of 1995, will allow European Data Protection Authorities (DPAs) to fine companies up to the higher of €20,000,000 or 4 percent of their global turnover for the most severe category of data protection violations. This may potentially increase maximum fines to over $1 billion for a company such as Facebook and over $3 billion for one such as Google.[30]

Therefore, Gregory[31] states that this GDPR has a global impact, it saves and strengthens EU economy. However, in terms of personal data protection, the GDPR's scope of protection is limited in some clearly stated situations. Personal data is defined under the GDPR[32] as "any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier, or one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of that natural person".

The EU's GDPR applies when personal data is processed, and the event of data processing falls within the material and territorial scope of the GDPR. The processing of personal data is included in the material scope of the Regulation provided it takes place by automated means or forms part of a

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[28] Françoise Gilbert, "Proposed EU Data Protection Regulation - Issues to Consider When Planning for the Future Regime," *Internet Law 17,* no. 12 (2014): 1, 13–24.

[29] Dove, "The EU General Data Protection Regulation: Implications for International Scientific Research in the Digital Era."

[30] Kimberly A. Houser and W. Gregory Voss, "GDPR: The End of Google and Facebook or a New Paradigm in Data Privacy?," *Richmond Journal of Law & Technology XXV,* no. 1 (2018): 1–109.

[31] Voss W. Gregory, "Cross-Border Data Flows, the GDPR, and Data Governance," *Washington International Law Journal (Formerly Pacific Rim Law & Policy Journal)* 29, no. 3 (2020): 485–531.

[32] Regulation (EU) 2016/679 of April 27 2016 of the European Parliament and of the Council 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), Article 26.

filing system. However, the GDPR excludes some activities from the range of processing categories, such as the following:

1) activities concerning the National Security[33]
2) activities concerning the common foreign and security policy of the European Union[34]
3) a purely personal or household activity[35]
4) processing by the competent authorities for the prevention, investigation, detection, or prosecution of criminal offenses or the execution of criminal penalties, including the safeguarding against and prevention of threats to public security[36]
5) personal data processing by EU institutions, which is covered by a different legislative act.[37]

These provisions relating to personal data protection enumerating exceptions aim to create a balance between fundamental personal rights and other fundamental rights.[38] Therefore, the GDPR concept of personal data protection is not absolute.[39] However, to ensure that provisions are well implemented, the GDPR establishes an independent supervisory authority.

2.2 Independent Supervisory Authorities

The EU's General Data Protection Regulation is the uniform standard rule covering its members. The GDPR requests legal entities to follow the standard in the processing of personal data. A considerable fine for violations may total up to €20 million or 4 percent of revenues, whichever is greater.[40] This regulation contains further provisions compared to the other legal acts relating to human rights law. Article 8(1) of the Charter of Fundamental Rights of the European Union (the 'Charter') and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) state that everyone has the right to the protection of personal data concerning him or her. It is clearly stated

[33] General Data Protection Regulation, Article 16.
[34] Ibid. Article 17.
[35] Ibid. Article 18.
[36] Ibid. Article 19.
[37] Ibid. Article 20.
[38] See Warren et al., "The Right to Privacy Today"; Clark and Westin, "Privacy and Freedom."
[39] General Data Protection Regulation, Article 4.
[40] Schastlivtseva, "Informational Self-Determination of Europe and Its Importance."

that the protection of natural persons concerning personal data processing is a fundamental right.[41]

To ensure the implementation of Personal Data Protection under the GDPR system, the third party must establish an independent supervisory body and provide mechanisms for cooperation with the Member States' data protection authorities. Data subjects should be guaranteed sufficient and enforceable rights and effective administrative and judicial redress.[42] This provision is also clearly laid down in Article 286 EC as follows, addressed to the Member States and the Community Institutions and Bodies:[43]

1) From January 1, 1999, Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data shall apply to the institutions and bodies set up by, or on the basis of, this Treaty.
2) Before the date referred to in paragraph 1, the Council, acting in accordance with the procedure referred to in Article 251, shall establish an independent supervisory body responsible for monitoring the application of such Community acts to Community institutions and bodies and shall adopt any other relevant provisions as appropriate.

The independence of the Supervisory Body to safeguard data protection is non-negotiable. Hielke Hijmans,[44] in his study, gives an example of the German case of the dependent body, which was then questioned by the Commission. The German Länder, responsible for the supervision of personal data processing by non-public bodies, were subject to State scrutiny. For instance, in many Länder, the data protection authorities were incorporated into ministries.

"The Commission argued that complete independence was a wide notion requiring that authority must be free from any influence. Whereas Germany defended a far more limited concept of independence, independence had mainly a functional meaning: an authority must be independent of its supervised body. The European Data Protection Supervisor intervened in this case on the Commission's side because he attached great value to

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[41] W. Scott Blackmer, EU General Data Protection Regulation, 2014 Am. Fuel Petrochemical Manuf. AFPM - Labor Relations/Human Resour. Conf. 2018 45–62 (2018).

[42] Ibid.

[43] Hielke Hijmans, "The European Data Protection Supervisor: The Institutions of the EC Controlled By An Independent Authority," *Common Market Law Review* 43 (2006): 1313–42.

[44] Hielke Hijmans, "Recent Developments in Data Protection at European Union Level," *ERA Forum 11,* no. 2 (2010).

independence as an essential element of effective data protection, which is, for instance, illustrated by Article 8 of the Charter of Fundamental Rights of the European Union".

This case indicates that the DPA authority's independence is essential for protecting private data under the EU GDPR system. The supervisory body can assess any misuse of personal data in e-commerce and other internet activities by having independent authorities. Meanwhile, the violation of privacy refers to the acquisition, storage, selling, and use of private information without the data subject's awareness and/or consent. These actions can result in personal or monetary harm or damage. Businesses are economically motivated to collect and use significant amounts of personal information because personal details are acquiring enormous financial value. They are the new currency of the digital economy.[45] With regard to these unlawful activities, DPAs have the authority to provide 'oversight, auditing, monitoring, evaluation, expert knowledge, mediation, dispute resolution, and the balancing of competing interests'.[46]

3. Indonesian Policy on E-Commerce and the DPA System

3.1 Indonesian Policy on E-commerce

In 1994 IndoNet emerged as the first commercial Internet Service Provider (ISP) in Indonesia. IndoNet's presence opens up opportunities for the most effective possible use of telecommunications and information technology in all fields, including trade.[47] Since that time, the volume of e-commerce in

[45] Milena M. Head, and Yufei Yuan. "Privacy Protection in Electronic Commerce - A Theoretical Framework." *Human Systems Management* 20. (2001): 149–60."

[46] Charles Raab and Ivan Szekely, "Data Protection Authorities and Information Technology," *Computer Law and Security Review* 33, no. 4 (2017), 421–33. Meanwhile, Sahara Williams classified the tasks of data protection into three categories: Comprehensive data protection is composed of three categories: (1) information or data privacy, (2) cybersecurity or data security, and (3) response to breach. See Sahara Williams, "CCPA Tipping the Scales: Balancing Individual Privacy with Corporate Innovator for a Comprehensive Federal Data Protection Law," *Indiana Law Review* 53, no. 217 (2007): 217–43.

[47] Departemen Komunikasi dan Informatika RI, *Cetak Biru (Blueptint) Sistem Aplikasi E-Government Bagi Lembaga Pemerintah Daerah*, *Depkominfo* (Jakarta: depkominfo, 2016).

Indonesia has multiplied and ranks as the highest one across the ASEAN e-commerce.[48]

Advances in information technology have positively impacted the growth of new jobs, easy access to various online services, and their connection with the global community.[49] In 2019, Indonesia held eleventh place outdoing Russia and Australia as an e-commerce market with revenues reaching US$ 20 billion. With a growth of 49%, e-commerce in Indonesia contributed to world economic growth by an average of 16% in 2019. This data provides an optimistic projection for e-commerce growth in Indonesia in the future and places Indonesia as the most attractive country in East Asia and Southeast Asia, which is supported by a significant increase in the middle class, as well as an increasingly advanced online shopping infrastructure.[50]

Recognizing the rapid development of e-commerce, the Indonesian government issued a policy[51] called the Roadmap to an Electronically-Based National Trade System (E-Commerce Roadmap). This policy was made considering that an electronically-based economy has high economic potential for Indonesia and is one of the backbones of the national economy. Therefore, the government needs to encourage the acceleration and development of an electronically-based national trading system, start-up businesses, business development, and logistics by establishing an e-Commerce Road Map.[52]

The e-commerce roadmap[53] serves as a reference for both the central and regional governments to establish sectoral policies and action plans in order to accelerate the implementation of the Electronically-Based National Trading System. Besides, the roadmap can also be a reference for stakeholders in carrying out e-Commerce activities with the following principles:

1) openness to all parties;
2) legal certainty and protection;

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[48] Statista Research Departement, "Indonesia: Social Network Penetration Q3 2019," *Statista.Com*, 2019.

[49] Kaushik Das, Toshan Tamhane, Ben Vatterott, Phillia Wibowo, and Simon Wintels, *The Digital Archipelago: How Online Commerce Is Driving Indonesia's Economic Development*, (McKinsey&Company, 2018).

[50] EcommerceDB, "The ECommerce Market in Indonesia," *Ecommercedb.Com*, (2019).

[51] Sekretariat Negara Republik Indonesia, "Peraturan Presiden," Pub. L. No. 74 (2017).

[52] Ainurrofiq, "Pengaruh Dimensi Kepercayaan (Trust) Terhadap Partisipasi Pelanggan E-Commerce (Studi Pada Pelanggan E-Commerce Di Indonesia)," *Jurnal Sistem Informasi (JSI)* (2010).

[53] Sekretariat Negara Republik Indonesia, Peraturan Presiden. Article 3(3).

3) strengthening and protection of national interests and micro, small and medium enterprises as well as start-ups; and
4) increasing the expertise of human resources for players of the Electronically-Based National Trade System (e-Commerce).

Besides, behind the convenience offered by e-commerce, there are some security concerns for the government — namely, some business practices that tend to harm certain parties, especially buyers. The trust factor in electronic transaction relationships becomes an important issue. As a developing country, Indonesia has adopted e-commerce only in the past five years. Of course, it has some differences compared to developed countries that have long-standing e-commerce practices. These differences mainly concern regulatory issues, legal instruments, and consumer behavior. The Ainurrofiq[54] study shows that trust directly affects e-commerce customers' participation in Indonesia, and this influence is significant.

In this regard, if this trust is not legally protected, it will violate consumer rights. Consumer protection against business actors' defaults in e-commerce transactions still needs to be addressed. The Law on Consumer Protection[55] has not been able to protect consumers in e-commerce transactions because the provisions have not accommodated consumer rights in such transactions. The absence of protection is a serious issue, because e-commerce has its particular characteristics compared to conventional transactions, namely, there is no meeting of sellers and buyers.[56] In this regard, Nindyo Pramono[57] suggested a legal solution for e-commerce by optimizing conventional law or making new laws specifically related to e-commerce, which have regard to these special characteristics.

3.2 Surveillance of the Data Privacy Protection System

Since 2016, Indonesia has been preparing a special law on personal data protection. Other countries in the ASEAN have enacted data privacy in a single regulation. Meanwhile, the Institute of Study and Society Advocacy (ELSAM) noted that in Indonesia more than 30 laws separately regulate data

[54] Ainurrofiq, "Pengaruh Dimensi Kepercayaan (Trust) Terhadap Partisipasi Pelanggan E-Commerce (Studi Pada Pelanggan E-Commerce Di Indonesia)" (Universitas Brawijaya, 2007).
[55] DPR RI, "Undang-Undang Perlindungan Konsumen" (1999).
[56] Heldia Natalia, *Perlindungan Hukum terhadap Konsumen dalam Transaksi E-Commerce*, 1 Melayunesia Law 111 (2017); Wibowo, *supra* note 31.
[57] Nindyo Pramono, "Revolusi Dunia Bisnis Indonesia Melalui E-Commerce Dan E-Bisnis: Bagaimana Solusi Hukumnya," *Ius Quia Iustum Law Journal* 8, no. 16 (2001): 1-9.

privacy based on their interest.[58] Regarding the Data Protection Authority (DPA) to protect personal data, it is handled by the sectoral office under the Ministerial Office of Communication and Information. The Ministry of Telecommunication and Information acts as a single institution in the capacity of an official DPA. This is stipulated in Article 35 of Regulation No 20 of 2016 of the Ministry of Telecommunication and Information. Due to its status as an institution subordinated to the Ministry Office, Husein[59] doubts the subordinate office's ability to work independently, and its competence to carry out its job is questionable.

Husein's doubts concerning surveillance by the Ministerial Office are reasonable due to the complexity of the scope of personal data protection. In Al-Jum'ah's view,[60] Digital Surveillance is needed to monitor the activities, behavior, or the process of exchanging information carried out by the public with the aim to influence, regulate, direct, or protect them. In the digital context, surveillance, such as wiretapping, is carried out by utilizing digital technology and its networks.

Based on the concept of the above-mentioned surveillance, Al-Jum'ah further explains that surveillance can be conducted to serve both private and state interests.[61] Private surveillance is carried out with the aim to understand the preferences of a private company's clients. The result of such surveillance is utilized to create the company's strategy to offer their products to their customers. Meanwhile, state surveillance aims to avert security threats, such as cybercrime, terrorism, and serves other state intelligence purposes. In some cases, the state, in the interests of state security, breaks citizens' privacy by surveillance. Practically, the supervision activities are carried out by each of the ministerial offices based on their scope of authority. There is no standard of supervision applicable to the system to protect data privacy or the

[58] Abdulsalam, "Sulitnya Melindungi Data Pribadi Di Indonesia." See DPR RI, "UU Tentang Penanggulangan Bencana," Pub. L. No. 4723 (2007); DPR RI, "Undang-Undang Tentang Perubahan Atas Undang-Undang Nomor 7 Tahun 1992 Tentang Perbankan," Pub. L. No. 10 (1998); DPR RI, "Undang-Undang Tentang Data Perusahaan," Pub. L. No. 8 (1997); DPR RI, "Undang-Undang Tentang Telekomunikasi," Pub. L. No. 36 (1999); DPR RI, "Undang-Undang Tentang Administrasi Kependudukan," Pub. L. No. 24 (2013); DPR RI, "Undang-Undang Tentang Informasi Dan Transaksi Elektronik," Pub. L. No. 19 (2016); DPR RI, "Undang-Undang Tentang Kesehatan," Pub. L. No. 36 (2009); DPR RI, "Undang-Undang Tentang Kearsipan," Pub. L. No. 43 (2009).

[59] Abdulsalam, "Sulitnya Melindungi Data Pribadi Di Indonesia."

[60] Muhammad Na'im Al Jum'ah, "Analisa Keamanan Dan Hukum Untuk Pelindungan Data Privasi," *CyberSecurity Dan Forensik Digital* 1, no. 2 (2018): 39–44.

[61] Ibid.

institution. Consequently, personal data in e-commerce and other internet-based activities are not secure.

3.3 Lesson Learned from the EU DPA System

There are some interesting provisions relevant to Indonesian data protection legislation, especially regarding the Data Protection Authority's independence and its authority to impose fines for the misuse of data protection. The independence of EU DPAs is the core provision of the data protection regime in the EU. This is explained by the fact that the responsibility to guard personal data is very tough and increasingly challenging. As for human resources, talented people with high integrity deserve a position in the DPAs. The organizational structure of DPAs under the EU's GDPR incorporates both persons and a system. However, the DPAs' work system demands the integration of legal and technical knowledge among its personnel, as illustrated by Mario and Alberto[62] in the following Table 1.

Table 1: Stakeholders Identified by GDPR

Name	Description	Type
Data Subject	An identifiable natural person who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier, or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity.	Person
Controller	A natural or legal person, public authority, agency, or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data	Team

[62] Màrio Fernandes, Alberto Rodrigues Da Silva, and António Gonçalves, "Specification of Personal Data Protection Requirements: Analysis of Legal Requirements from the GDPR Regulation," in *ICEIS 2018 - Proceedings of the 20th International Conference on Enterprise Information Systems*, vol. 2, (2018): 398–405. *See* also in Edward R Alo, "EU Privacy Protection: A Step Towards Global Privacy," *Michigan State International Law Review* 22, no. (2014): 1095-1148.

Processor	A natural or legal person, public authority, agency, or other body that processes personal data on behalf of the controller	Team
Supervisory Authority	An independent public authority which is established by an EU Member State	Organization
Data Protection Officer (DPO)	A security leadership role in entreprises involving responsibility for overseeing data protection strategy and implementation to ensure compliance with GDPR requirements.	Person

Based on the EU DPAs mentioned above, if Indonesia wants to adopt the DPA system in the draft legislation on data protection, two essential provisions must be considered carefully: the independence of DPAs and the personnel involved. This fact, of course, requires a particular body or Commission that is separate from the government ministerial office. Still, both of them cooperate in order to carry out their respective duties and obligations without interference.

The other provision that is essential to be adopted by the Indonesian Data Protection Legislation is the fine imposed on the perpetrator for the misuse of data. The experience of the EU Directive indicates that, if the Court penalizes some big business enterprises who violated the Act with a light fine, they will not be deterred and keep repeating data privacy breaches. The fine imposed under the GDPR reaches as much as 4% of the company's revenue. The first case of imposing a fine was that of the violation of personal data by Google in France in 2018. Two defenders of privacy rights initiated the investigation concerning Google upon the complaints made on 25-28 May 2018. Both organizations claimed that Google did not have a valid legal basis for the processing of personal data, which was done mainly to personalize advertising. The top data protection authority of France, CNIL (*Commission Nationale de l'Informatique et des Libertés*), commenced an investigation upon the complaints. Based on the evidence collected during the investigation, Google was condemned and ordered to pay a fine of €50,000,000.[63] This

[63] Murat Volkan Dülger, "First Major Breach of the GDPR: France Fined Google €50.000.000," *SSRN Electronic Journal*, (2019). It was not the only case of violation of data privacy experienced by Google. Previously, in 2013, Germany issued a fine against Google for $189,000 due to their data privacy violation. The capturing of data

amount of fine was five times bigger than the fine imposed by CNIL on Google for a similar case on March 17, 2011. Based on some violations of data privacy by Google, France ordered Google to make a clear statement on collecting personal data by defining the purposes of processing users' data, and retention periods for personal data cannot exceed the period necessary for the purposes of collection. Last, France, also called on Google to inform users and obtain their consent before storing cookies on their devices.[64]

The independence of EU DPAs and the strong data privacy protection accompanied by high and firm sanctions are the key to the success of the legal system for personal data protection in the EU. Both these provisions, the independence of DPAs and the fine deserve to be adopted by Indonesian DPA legislation considering that lately there have been many cases of misuse of data privacy by several Marketplaces and companies in Indonesia.[65]

4. Conclusion

The personal data protection system for the people of the European Union under the GDPR is powerful. The protection of personal data in the GDPR is based on protecting privacy as a fundamental right for everyone. As well as philosophically, the robust protection of data privacy for EU citizens is also supported by the existence of provisions on independence for DPA institutions in exercising their authority so that no party can interfere with it. The GDPR system also emphasizes the high fines as sanctions for corporations carrying out business activities that violate citizens' privacy. The fine, which amounts to four percent of the company's total assets, makes the GDPR a powerful legal instrument for protecting citizens' privacy rights. The legal system for personal data protection contained in the GDPR constitutes the regulatory standard for all EU members.

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by Google Street View resulted in similar enforcement actions by EU member state DPAs in Europe and various other nations worldwide. Belgium settled with Google for €150,000 in April 2011, to get rid of charges on the company's unauthorized collection of private data from unencrypted wi-fi networks. The French Commission called Nationale de l'Informatique et des Libertés (CNIL), the DPA in France, sanctioned Google Street View's collection of personal data on March 17, 2011, with what then was a record fine of €100,000. *See* Voss W. Gregory, "Cross-Border Data Flows, the GDPR, and Data Governance." at 27.

[64] Voss W. Gregory, "Cross-Border Data Flows, the GDPR, and Data Governance."

[65] See study conducted by Ririn Aswandi, P.R.N. Muchsin, and Muhammad Sultan, "Perlindungan Data Dan Informasi Pribadi Melalui Indonesian Data Protection System (IDPS)," *Legislatif 3*, no. 2 (2020): 167–90.

Indonesia, which is currently drafting a Privacy Protection Act, deserves to adopt a privacy protection legal system like the one in the GDPR, especially regarding the underlying philosophy, the independence of data privacy monitoring institutions, and the imposition of high sanctions for violators of citizens' data privacy. Regarding the independence of data privacy protection agencies, the EU's DPA model should be adopted to draw up plans for personnel, institutional authority, and institutions. Because the institution for the protection of data privacy is not independent, it will be difficult for the public to trust its credibility and integrity. It will have an impact on decreasing public trust in electronically-based transactions and communications. Indonesia needs to redesign e-government and e-commerce systems and related regulations and technical measures in the future.

Problems of Evidence in the Cases of Domestic Violence[1]

BLAŽEK, RADOVAN

ABSTRACT *The article focuses on cases of domestic violence where the testimony of the victim or a key witness changes after the accusation is made as a result of changes in the victim's perception of the accused with the passage of time. The article analyses the resulting procedural situation and the problems of criminal proceedings that may lead to the acquittal of the accused.*

KEYWORDS *domestic violence, testimony, interrogation, witness, victim, criminal proceedings, evidence procedure*

1. Introduction

Conflicts between couples are a daily problem in many families. The assessment of the extent to which these disputes and quarrels can be considered "normal" and "acceptable" depends on the specific circumstances and intensity of the escalation of the conflict. In various social circles it is common for partners to shout, throw objects at each other, use abusive language or even physically attack each other; slaps, kicks and punches are not rare. For some couples, this is common behaviour, and to a certain extent they consider it "normal". They are accustomed to the fact that such situations occur and do not solve them by filing criminal complaints. However, when long-term violence gradually intensifies and leads to physical injuries or threats that go beyond the legal limits, the offender could be exposed to a penalty for a crime or misdemeanour.

This article examines conduct that remains mainly on the verbal level and is accompanied by minor bodily harm, which, however, does not reach the intensity of bodily harm (in Slovak Criminal Code[2] crimes under Art. 155 or 156 CC). This behaviour is difficult to prove because its consequences are

[1] "This article was supported by the scientific project APVV 16-0471 of the Slovak Research and Development Agency."

[2] Act No. 300/2005 Coll., the Criminal Code as amended (hereinafter also "CC").

usually not clearly visible. In practice, we are mainly referring to the crime of "dangerous threat" under Art 360 CC,[3] however, even verbal threats, when committed on a regular basis over a long period of time can fulfil the criteria of the crime of abuse of a close and entrusted person under Art. 208 CC.[4]

2. Domestic violence

A person who feels harassed by his/her partner over a long period of time often considers filing a criminal complaint the only way to prevent further abuse.

To begin with, it should be emphasized that in practice we often encounter criminal complaints which are either exaggerated or untrue, because the victim could not find a solution to his/her "household issues". It should be stressed that law enforcement authorities are neither social workers nor marriage counsellors, nor are they authorized to *punish* an intolerant or unfaithful spouse. Such complaints are often encountered in the event of impending divorce proceedings or after divorces, where the spouses are trying to gain an advantage in the upcoming *battles* for child custody rights or property. By filing a criminal complaint they may be in a better position to acquire a greater proportion of property or child custody.

Obviously, law enforcement authorities must thoroughly investigate all available information in order to understand the criminal complaint and not to be "dragged" into partner quarrels over children and property.

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[3] Art. 360 sec. 1 of the Criminal Code: "Anyone who threatens another with death, serious physical injury or other serious harm to an extent which may give rise to justifiable fear shall be punished by imprisonment of up to one year."

[4] Art. 208 sec. 1 of the Criminal Code: "Any person who mistreats a close person or a person entrusted into his care or charge, causing him physical or mental suffering by
a) repeated beating, kicking, hitting, inflicting various types of wounds and burn wounds, humiliating, disregarding, continuous stalking, threatening, evoking fear or stress, by forced isolation, emotional extortion or by other improper conduct endangering his physical or psychical health, or putting his safety at risk,
b) repeated and unjustified denial of food, rest or sleep, or denial of necessary personal care, basic clothing, elementary hygiene, health care, housing, upbringing or education,
c) forcing them to beg or to a repeated performance of activities causing excessive physical strain or psychological stress for the person subject to ill-treatment considering his age or health condition, or damaging his health,
d) repeated exposure to the effects of substances that are detrimental to his health, or
e) unjustified restriction of his right of access to the assets that he is entitled to use and enjoy,
shall be liable to a term of imprisonment of three to eight years."

A number of criminal complaints also result in convictions. Clear procedural situations arise when sufficient evidence supporting the criminal complaint is provided, the victim cooperates, or the accused admits to committing the offense.

However, the situation becomes complicated when the victim later realizes that he or she is somehow emotionally or economically dependent on the accused and tries to reverse the consequences of the original criminal complaint and recants previous testimony. This makes it very difficult to achieve a conviction of a perpetrator of domestic violence.

3. Procedural aspects of investigation of domestic violence

3.1 Commencing criminal proceedings and accusation

If the injured person provides a sufficient amount of credible evidence when filing a criminal complaint, it is possible to initiate criminal proceedings for the offense.

However, the mere assertion that the suspect made threats without causing any bodily harm is not sufficient for the accusation, because if the suspect denies the accusation, it is impossible to prove who is telling the truth. In such cases the rule *"in dubio pro reo"* would apply and the suspect will not be accused.

However, proceedings may be commenced if the injured party's testimony is accompanied by other supporting evidence, e.g. a video recorded by the injured person, a sound recording recorded by the injured person, or a video recording if the act took place in an area monitored by a camera, the testimony of witnesses present at the crime scene, the testimony of persons who talked to the injured person immediately after the act, people who know about the cohabitation of the suspect and injured person in the past, or medical reports confirming minor injuries of the victim that may have been suffered in the conflict.

If the injured person cannot obtain all of the necessary documents when filing a criminal complaint, it is necessary to request them after questioning, thus it is not possible to make a decision about the initiation of a criminal proceedings immediately. Following the completion of the documents it is possible to initiate criminal proceedings without an accusation, pursuant to Article 199 of the Code of Criminal Procedure,[5] or if, on the basis of information and evidence gathered, there is a reasonable suspicion that the act

[5] Act No. 301/2005 Coll. The Criminal Procedure Code as amended (hereinafter also the "CPC").

occurred and the identity of the offender is verified. In that case the person can be directly accused under of Art. 206 sec. 2 CPC.

In cases of domestic violence, the identity of the offender is always known, so there is no need to prove his/her identity. In these cases, there is usually a relatively short period between the initiation of the proceedings and the accusation, or the initiation of the proceedings and the accusation are made with one decision, as mentioned above.

3.2 Pre-trial proceedings

If an accusation is made against a specific person, the accused must first be questioned and their position regarding the accusation must be ascertained. In many cases, the accused does not deny that the act occurred, they merely interpret it in a way more favourable to themselves. For example, they deny all of the "circumstances" of the act which constitute the criminality of the conduct and only admit that a conflict between the accused and the victim took place but without threats or physical assault.

If the accused admits to committing the offense, this is a procedurally simple situation, since a confession is a strong argument for bringing an accusation in the subsequent proceedings.

After interrogating the accused, the injured person and witnesses who were previously interrogated are questioned again and the accused is permitted to question the victim and witnesses. This requirement follows from the opinion of the Supreme Court of the Slovak Republic, file No. Tpj 63/2009, of 7/12/2009:

"I. The prosecution in a criminal case may be based on the testimony of witnesses and other evidence made prior to the issuing of a decision on a criminal accusation or, where appropriate, prior to the announcement of the decision on the accusation (Art. 206 sec. 1 of the Code of Criminal Procedure), if this evidence was produced after the beginning of the criminal proceedings under Art. 199 sec. 1 of the Code of Criminal Procedure.

II. However, if the testimony of the witness is the only incriminating evidence or to a significant extent, on which the prosecutor wishes to base the indictment, it is necessary to hear such witness after the indictment, thus preserving the defendant's rights of defence (right to an adversarial procedure). An exception to adversarial procedure is the testimony of witnesses who, within the meaning of Art. 263 sec. 3 b) of the Code of Criminal Procedure, was an act of urgency or irrevocability; this is also the case of witnesses under 15 years of age (Art. 135 sec. 2, second sentence of the Code of Criminal Procedure).

III. If the accused directly or through defence counsel asks to repeat the interrogation of other witnesses, it is up to the law enforcement authorities to decide on the need to conduct an adversarial hearing of the witness after assessing the evidence. It is sufficient for a fair trial and a critical examination of a witness's testimony if the witness is questioned in the presence of the accused or their lawyer in the court proceedings." [6]

On the basis of that opinion, persons who have been heard before the accusation must be heard in such a way as to enable the defence counsel or the accused to ask questions and therefore to be heard in an adversarial procedure, since otherwise, the defendant's right to defence is not ensured. The indictment may only be based on statements which were made after the accusation.

This is particularly important in cases where the interrogations of those persons constitute the sole basis for a decision on the guilt of the accused (mainly in an "expedited court procedure", e.g. the issuing of a criminal order,[7] a plea bargaining procedure a plea bargaining[8] declaring the "guilty testimony" at the beginning of the trial[9]).

3.3 Alteration to the testimony of the victim

A problematic situation arises especially in cases where the interrogation of the victim provides the only or decisive evidence of the guilt of the accused party. This is also usually the case for offenses based on threats or minor injuries.

Indeed, if the victim or witness changes their testimony after the accusation, it will become subject to substantial cracks and may lead to the cessation of criminal prosecution in pre-trial proceedings, or acquittal in the court proceedings.

There could be various reasons behind a person's decision to change their testimony and suddenly help the accused avoid criminal prosecution, despite the fact that they filed charges in the previous phase of the proceedings. This may be due to:

a) the victim's emotional dependence on the accused;
b) the victim's economic dependence on the accused; or
c) the psychological and personal aspects of the victim that cause him/her to reckon the accused differently, downplay his/her actions,

[6] Decision No. 30/2010 of the Supreme Court of the Slovak Republic, dated 7.12.2009, (Tpj 63/2009), published in the Collection of Decisions of the Supreme Court of the Slovak Republic and the Decisions of Slovak court No. 4/2010, p. 9.
[7] See CPC Art. 353 to 357.
[8] See CPC Art. 232, 233 of CPC and Art. 331 to 335.
[9] See CPC Art. 257.

depict him/her in a better light, or keep positive events at the forefront of their memory while pushing the negative events into the background. Finally, the victim could additionally deny the unlawful conduct of the accused and convince himself/herself that the circumstances of the criminal act were different or that it never took place.

The first group of reasons in which the victim consciously adjusts their testimony with the deliberate and rational intention of helping the accused pertains to points a) and b) above. This is because the victim usually wishes only to punish the accused by taking him/her to court, or they wish to solve the conflict at home without any criminal consequences. In such cases, the victim does not really want to initiate the criminal proceedings or see the accused imprisoned. In this case, this is due to their "misunderstanding" of the consequences of filing a complaint.

The second group of reasons pertains to point c) above, where the victims unknowingly modifies their testimony, and really believes that the event transpired differently from how they originally described it, or that some things did not "happen" and they are convinced of the truth of their latter testimony.

In both groups of cases, however, the same procedural situation occurs, namely the contradiction between the victim's former and latter statements. How can the prosecution deal with this situation?

In the case of the offense of dangerous threat according to Art. 360 CC, or the abuse of a close and entrusted person according to Art. 208 CC, it is not possible to apply the rule of "the injured party's consent" for criminal prosecution pursuant to Art. 211 of the CPC; therefore, even the victim's subsequent recantation will not prevent the criminal prosecution of the accused. It should be pointed out that Slovak criminal proceedings do not recognize the 'withdrawal' of a criminal complaint. Therefore, following the filing of a criminal complaint, the law enforcement authorities are obliged to prosecute the accused, even if this is contrary to the wishes of the victim (if not stated in the Art. 211 of the CPC otherwise).

Therefore, if such situation occurs, it is up to the law enforcement authorities to determine which testimony seems more probable and in which direction they will continue the proceedings.

According to the basic rules of Slovak criminal proceedings, *"the law enforcement authorities and the court assess the evidence obtained lawfully according to their internal convictions based on a careful consideration of all of the circumstances of the case, individually or in aggregate, regardless of*

whether it was procured by the court, law enforcement authorities or any of the parties".[10]

If the law enforcement authorities believe that the accused is guilty, they need to continue to prosecute him/her and gather evidence proving his/her guilt. However, how should they proceed, when they have lost the main piece of evidence - the victim's testimony? Here are some suggestions for gathering missing evidence:

1. One of the first acts in this case is the possibility of *confronting the person* to be heard *with his/her previous version of the testimony* and asking him/her additional questions about the inconsistencies of the latter testimony with his/her previous statements. Very often, the person is unable to explain his/her former testimony or states that he/she does not know why he/she previously said something else while insisting that the new testimony is true. The new testimony usually shows some illogical features, minor errors, inconsistencies in the series of events related to the act or its partial features. The outcome of the deliberation about the truthfulness or untruthfulness of these testimonies is thus based on their comparison. If the interrogation of the victim is conducted by a skilled investigator, the former testimony will seem to be more likely than the latter one, and according to the rule of "free evaluation of evidence"[11] the remaining evidence can lead to the final evaluation that the latter testimony is not true and as a consequence the truth is just the opposite.

The "untruthfulness" of the more recent testimony and the "truthfulness" of an earlier testimony can be inferred, in particular, when both versions are identical regarding key facts to the deed, its time, duration and character, but the victim changes the "circumstances" which he/she considers most "harmful" in relation to the prosecution of the accused and explains them in a more favourable way. However, if the victim does not describe the act in the new statement altogether differently but merely "alters" some elements of the event to depict the accused in a better light, such fact may be considered sufficient to confirm the truth of the previous testimony, especially if the latter testimony is not entirely consistent, logical and seems unlikely.

Thus, the more recent testimony confirms that the act has been committed, that it has been committed by the accused and that there is a high probability that the act has the characteristics of a criminal offense provided that this suspicion is supported by other indirect evidence.

2. The situation is less complicated when there is *sufficient supporting evidence,* such as medical reports, camera or other records, or the testimonies

[10] CPC Art. 2 sec. 12.
[11] CPC Art. 2 sec. 12.

of other witnesses. These witnesses can also be individuals who speak about other events that they have seen. Although they do not speak directly about the criminal act, their testimony can prove the behaviour of the victim after the alleged crime, about the situation in the house (broken objects, moved furniture, mess in the rooms, and minor injuries of the victim, etc.). The witnesses can be even friends or family members who can testify on the long-term relationship of the parties (if they had fights in the past, if they argue a lot, if similar situations have occurred, etc.). Such testimony gives credence to the possibility that the alleged crime actually took place. The prosecution would then have reason to believe that the act had happened as it was described in the victim's first testimony.

For example, a witness may have seen the victim after the deed and is unable to describe all of the specific injuries, but notices some minor injuries that the victim subsequently interprets in the newer testimony as having originated as a result of other events not related to the conduct of the accused. Alternatively, the witness could notice scattered or displaced furniture, which indicates that the act could have happened, but the victim subsequently denies that the moving of things or the displacement of furniture was due to the accused. In this case, however, the admission of these 'consequences' of the offense as actually existing, but ultimately attributed to the victim by other 'accidental' circumstances, is sufficient evidence to justify the authenticity of the victim's previous testimony. Although the previous testimony did not have to be made in an adversarial manner, it does not contradict the principle of adversariality if the court does not believe the latter testimony because it is different, and will base the decision about the guilt of the accused on other indirect evidence.

3. Often, the existence of a criminal offense can be inferred from the *testimony of the accused,* if he/she basically agrees with the victim in the course of the act and its key features, but conceals the essential facts relevant to the criminality of the act, or denies some fact by stating that "only this" particular part of the act did not happen or happened otherwise. At the same time, in some small details, the testimony of the accused, who denies his/her guilt, does not fully correspond with the new testimony of the victim. This is mainly because if the accused and the victim admit the events that have occurred, but each of them in a different way, their statements cannot correspond. Consequently, this inconsistency of their testimonies suggests that one or both testimonies, are not truthful; if the accused and the victim have not agreed in advance on how to "omit" and "replace" the criminal part of the conduct of the accused, events diverge, which in itself proves that these testimonies are not truthful in these parts, but are sufficiently true in the other parts. Thus, it is possible to conclude that the event indeed took place and the

accused is guilty. In such a case, any circumstantial evidence can clearly be used as decisive evidence for a conviction and to prove that the act was a criminal offense as well.

4. In some cases, it is subsequently possible to obtain *expert evidence by conducting a psychological assessment of the victim,* in which the following facts can be clarified:

- how the victim evaluates and perceives his/her relationship with the accused, how he/she evaluates their cohabitation;
- whether subconscious or deliberate changes in his/her attitude towards the accused can be observed within a specific time period from the criminal act;
- if he/she tends to see the accused in a better light;
- whether he/she retains the surviving events in memory and whether he/she can correctly interpret the events after a certain period of time;
- whether there were any tendencies to lie, fabricate, imagine or subconsciously distort the events of memory, and if so, for what reason;
- a description of the perception of the victim in relation to the conduct of the accused with regard to the course, intensity and duration of the harm;
- how the victim behaved in conflict situations, if he/she did not agree with the accused, whether and how he/she expressed resistance; and
- what was the motivation of the victim for filing a criminal complaint.

Such expert opinion may serve as accompanying evidence to evaluate whether the relationship between the victim and the accused was hostile, or whether the victim tended to distort events and see the accused more positively after the negative emotions subsided. Such a testimony is a natural consequence of the personality of the victim and his/her inner perception and handling of the events. An expert is often able to conclude, according to the victim's examination that he/she naturally distorts events with the passage of time and adjusts the facts which results in the perception of the accused in a better light.

5. It is also possible to induce a criminal offense if the accused has been punished in the past for a similar offense or misdemeanour, especially, if the offenses were committed against the same person. Therefore, it is necessary to secure the *criminal records of the accused.* Apparently, the rule of "the presumption of innocence"[12] prohibits a prosecutor from basing the guilt of the accused on previous criminal offenses and misdemeanours; however, they can shed light on his/her conduct, and ability to act in a criminal way and

[12] CPC Art. 2 sec. 4.

whether it is therefore likely that he/she may have committed the crime as described in the current case. This can be described as supporting evidence, which will enhance the decision-making body's faith in the truthfulness of one or the other version of the criminal act.

It can also support the accuracy of the accusation if the accused has been prosecuted *for several acts,* or several partial attacks of a *continuing crime*, as these indicate that such events between the accused and the victim are recurring and not isolated.

3.4 Finalization of the pre-trail proceedings

After the investigation, the prosecutor examines the evidence and decides whether to bring an indictment before the court or refrain from further prosecution of the accused, pointing out that the act is not criminal offense according to Art 215 sec. 1, b) CPC. In each individual case the prosecutor, as well as the court, evaluate all of the evidence produced according to the internal conviction in accordance with the principle of "the free evaluation of evidence" and according to his/her conscience. It is not contrary to the principle of "establishing facts without a reasonable doubt" [13] if the indictment shows a clear and constant line of evidence which led to the accusation. In accordance with their beliefs, the prosecutor, and ultimately the court, may evaluate the adversarial testimony of the victim as false and unlikely, and base their decision on such considerations and thus change their thoughts and beliefs on the grounds of a decision under § 168 sec. 1 CRC: *"If the judgment contains a statement of reasons, the court shall briefly state which facts it has proved, on which evidence the decision is based and what considerations have been taken in assessing the evidence produced, in particular if they contradict each other. It must be clear from the statement of reasons how the court dealt with the defence, why it did not comply with the motion to produce further evidence and what legal considerations it handled when assessing proven facts under the relevant provisions of the law on guilt and punishment."*

4. Conclusion

Cases of domestic violence occur quite often in all countries. It is not easy to prove them because often the victim's testimony is the only or decisive evidence for the conviction of the accused, on which the entire "guilty" verdict stands or falls. If this testimony is changed after the accusation in favour of the accused, the task for law enforcement authorities becomes more difficult,

[13] CPC Art. 2 sec. 10.

since this does not relieve them of the obligation to investigate the act, if on the basis of prima facie evidence, there exists a reasonable suspicion that it is a criminal offense.

The law enforcement authorities are thus forced to clarify, prosecute and punish crimes in situations where both the accused and the victim stand against them, and they must bring evidence supporting their belief that the accused committed a crime, although the accused and the victim do not wish it.

The prosecution of the accused is often waived because the victim covers him/her, despite the fact that the deed actually occurred and it has the features of a crime. The question remains if it makes sense to protect the rights of victims who ultimately do not want to pursue the perpetrator's criminal prosecution.

If the crime had no real negative consequences to the individual's health, practical experience should dictate the possibility of including such crimes in Art 211 CPC among crimes that require the consent of the injured party to prosecute the accused. In this way, law enforcement authorities would be relieved of the task of investigating crimes that the victim does not wish to pursue and for which today prosecution needs to be pursued in Slovakia. In the circumstances set out above where the attitude of the victim changes, the continuation of such proceeding seems to be counterproductive.

Sport Broadcasting Rights and the Geo-Blocking Revolution

CZERMANN, JÁNOS

ABSTRACT *The sale of sport broadcasting rights as copyrights generate the most significant financial transactions of the European services market. It is a global phenomenon that in case of spectator sports an increasing part of the sport associations' revenues; today generally more than half of them, is accounted for by the royalties collected for the broadcasts on different platforms.*

The economic importance of sport has been provided for by several European Union documents since the seventies, and this emphasis also appears in the practice of the European Court of Justice. While the mature case-law in sport cases is well-known in terms of freedom to work, in the scope of freedom of services, with regard to its potential restrictability, some significant decisions transforming the market were made in the subject of broadcasts, and more specifically in sport broadcasting rights. This issue which founded the subsequent EU-level regulation of the prohibition of restriction on a territorial basis, is discussed in more detail below.

KEYWORDS *sport brosdcasting rights, geo-blocking, Murphy-case, freedom of services, communication to the public, FANG, competition law related issues, post-murphy process, Pay Tv case*

1. The Appreciation of (Sport) Broadcasting Rights

The sale of sport broadcasting rights as copyrights generate the most significant financial transactions of the European services market. It is a global phenomenon that in case of spectator sports an increasing part of the sport associations' revenues; today generally more than half of them, is accounted for by the royalties collected for the broadcasts on different platforms. The tendencies are demonstrated by the fact that in 1966 ARD-ZDF paid 0.64 million DEM for the broadcasting of the German football Bundesliga, in 1998 it already paid 180 million DEM; in 1960 the IOC sold the exclusive broadcasting right of the Rome Olympic Games for 1 million USD, this

amount was already 1 billion USD in the 1996 Atlanta Olympic Games,[1] and exceeded 2.5 billion USD in the 2012 Summer Olympic Games.[2] The broadcasting revenues of the NFL increase by an average of five percent each year, while this value has reached twenty-eight (!) percent – on an annual basis – in the UEFA Champion's League over the last years. When it comes to football championships, the English Premier League leads by far the value list with permanent annual revenues of over two billion, which undoubtedly dwarfs the broadcasting value of the Hungarian NBI (National Championship I), which is, however, increasing continuously: the MTVA (Media Services and Support Trust Fund) Contract, effective since 2016, grants an annual amount of four billion Hungarian forint (12 million €) to the Hungarian Football Federation (HFF). Besides traditional sports, electronic sports also claim their share of the broadcasting 'pie' as viewership of e-sports is also increasing drastically – by an annual fifteen percent; the annual viewership of some online games on online streams even exceeds 250 million hours.[3]

Interweaving of sport and economy dates back to the period after the Second World War. The main drivers of this phenomenon included professionalisation, internationalisation and commercialisation, among others. The phenomenon emerged in the 1960's and football gradually intertwined with advertisements next to the pitch, sponsorship, television commercials and trading the clubs' own range of products. A new kind of endeavour became visible in case of the English clubs: the increase of their share of revenues from their commercial activity outside the pitch was significant, and its rate even exceeded the amount of their revenues gained from ticket sales.[4] In the Hungarian football sector, kept artificially alive from the end of the eighties, these economic aspects inevitably appeared later, in the middle of the nineties, while, it is only since the 2000's that the relevant regulation and transparency relating to the broadcasts have become the features of domestic football.

The economic importance of sport has been provided for by several European Union documents since the seventies, and this emphasis also appears in the practice of the European Court of Justice (hereinafter: ECJ). While the mature case-law in sport cases is well-known in terms of freedom to work (Doná vs. Montéro, Bosman, Kolpak, Simutankov etc. cases), in the

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[1] Tóth Nikolett Ágnes, „*Sport as Special Law*" (PhD Dissertation, PhD School of the Faculty of Law of the University of Miskolc, 2014), 56.

[2] Olympic Marketing Fact File 2012. http://engagingideas.info/wp-content/uploads/2012/07/OLYMPIC-MARKETING-FACT-FILE-2012.pdf

[3] Járnos Czermann*, „Legal Questions in E-Sport"* (working paper, 2019).

[4] Anna Burján, „*Sport Broadcasting Rights in the European Union and Hungarian Competition Law*" (TDK paper, Budapest, 2016), 127.

scope of freedom of services, with regard to its potential restrictability, some significant decisions transforming the market were made in the subject of broadcasts, and more specifically in sport broadcasting rights. This issue which founded the subsequent EU-level regulation of the prohibition of restriction on a territorial basis, is discussed in more detail below.

Within the framework of this paper, I will primarily discuss sport broadcasting rights in the context of the questions of interpretation relating to the freedom of services, the territorial restrictability thereof, exemption from the restriction, and the aspects of competition law and copyright, which are inevitable in the subject.

2. Generally on the Sale of Broadcasting Rights

According to Sárközy[5] the right to license broadcasting is a non-transferable personal property right which is unsalable and cannot be the subject-matter of a sale and purchase agreement. Similarly to a license agreement, the right holder can grant right of use to the broadcaster for the broadcasting by contract, which thereby utilises the intangible right. The trend of the right's value is primarily influenced by the popularity and media ability of the given sport. The financial value of sport broadcasting rights is provided by the brand image of the series of sport competitions as commercial total product, which consists of the totality of the elements mentioned above, and as such, it cannot be separated from the series of sports competitions.

The royalties from the sale of sport broadcasting rights – especially in football – constitute the largest part of the revenue of the right holders. For the appropriate optimisation of royalties, right holders have developed different sales techniques. Based on the experiences, the collective selling of the broadcasting rights by the sport federation or sport federation type organisation (e.g. league) considered as the (co-) organiser of the given series of competitions on a territorial basis proved to be the most efficient method in terms of the maximisation and distribution of the revenues as well as the sustainability of the series of competitions. Collective selling means in practice that it is not the teams participating in the given competition scheme (championship) that conclude license agreements with the broadcasting organisations or agencies for the broadcasting of the games, but the organiser of the series of competitions sells the broadcasting right of all the games of the given series of competitions in 'one piece', based on the agreement of the participants. The sale to the broadcasting organisation is carried out on a

[5] Tamás Sárközy: Sport Law – The explanation of the Sport Act of 2004 (Budapest: Hvg-Orac Lap- és Könyvkiadó Kft., 2004) 23.

temporal and territorial exclusivity basis, the latter generally relating to a single country, in other words, only one broadcasting organisation possesses the broadcasting rights of the entire series of competitions within the given time and space. This broadcasting organisation is able to distinguish itself from its competitors by having a popular sports programme in its portfolio; it is, therefore, able to attract to itself the consumers and the companies intending to advertise themselves, and the latter allow it to re-finance the premium fees paid for the exclusive broadcasting rights and to simultaneously carry out significant technical developments.[6]

Today, this broadcasting possibility constitutes the most important part of the intangible assets relating to sport activities. The seller side of the broadcasting rights market consists of the right holders of sport events. There is no uniformity as to who the right holder is in the licensing right to broadcast sport events. In the common practice of the international sport federations, they themselves enter into agreements with the television companies for different international sport events on the basis of mandates from the members, as per their articles of associations, typically in packages and with exclusivity. They grant funds, however, from their resulting revenues, in the proportion specified in the Assembly Resolution, to their member organisations, i.e. the national sport federations. The right holders of sport events are usually the organising authorities of different series of competitions.[7] In Western Europe the rights are owned either by the national sport federations (e.g. France), or the national sport federations acquire the consent of their members as per their articles of association or other regulations, so that they can conclude the agreement for the entire championship (e.g. the solution of the Hungarian Sport Act is like this). We can see examples also in football, of both the collective, i.e. central (e.g. English, Dutch, German, French championships) selling of the right, and of their individual selling per teams (e.g. Spanish championship). In case of individual selling, we can also observe a kind of cartelisation of the right holders. The agreements can be either exclusive or concluded with multiple television companies. Selling in packages typically means that the subject-matter of the agreements extends both to live broadcasts and rebroadcasts, as well as to the broadcast of summaries. The selection of the specific matches to be broadcast can be carried out by the sport federation or the broadcasters.

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[6] András Tóth, "The ECJ Judgment Transforming the Licensing Scheme of the European Sport Broadcasting Rights" *Versenytükör* Issue 2012/1.

[7] New questions arise in the matter of the identification of the right holder in case of both 1) individual sports, 2) team sports. In the latter case the team entering the competition is operated by a sport company, but the competition is organised by a sport federation or one of its sections.

In the case of central selling, the revenue from the licensing of the broadcasts is divided by the sport federation or its professional section in case of a derivative right holder. The significant part of the revenues is redistributed among the members based on different principles, the rest remaining at the sport federation or its section to recruit young players, to support the operation of lower class teams and national teams and to cover the administrative expenses.

It is a frequent phenomenon in this market as well that it is not the right holders themselves, but the sport agencies assigned with the task to take care of the selling of the rights. It is common practice that the federations enter into agreements with the television companies by giving an agency assignment to marketing companies.

The purchasers of the broadcasting rights market in professional football are different broadcasters who strive to obtain the exclusive right. The profitability of sport broadcasts for the broadcasters is explained by three reasons. Firstly, sport programmes are among the most popular television programmes, secondly, broadcasting of major sport events is suitable to strengthen the market position of a television company, and finally, advertisement revenues constitute an important source of income for the television companies.

The bargained price of broadcasting right is the factor that influences the market behaviour the most. It is shaped by the market demand and supply which is influenced by the market structure which characterises the media market, since while the seventies were characterised by a monopolistic demand, these days are characterised by a monopolistic supply.[8]

The agreement on the licensing of television sport broadcasting rights is, therefore, an agreement concluded between the sport federation, assigned by the right holders with the sale of sport broadcasting rights and the media service provider as user-broadcaster on the creation of the sport programme and the production of the broadcasting signal. [9]

Over the last decade it has become a general phenomenon that the right holders of sport events sell the broadcasting rights in an exclusive, platform-neutral manner, that is, the broadcaster purchasing the rights acquires the broadcasting rights for a specific territory and period for all the broadcasting platforms, especially satellite, cable and IP TV, as well as online and mobile streaming. In terms of major events and championships the international trend

[8] Krisztina András, *"The Market of Professional Football"* (Working Paper, 2004) 31.
[9] Péter Rippel-Szabó "The Contract on the Licensing of the Use of Television Sport Broadcasting Rights" *Infokommunikáció és Jog* Issue No. 2011/5.

is that different broadcasters purchase the platform-neutral rights in so-called packages, in order to ensure market competition.

This model for the sale of rights, which can currently be considered as common practice, is about to 'fall apart' principally in the USA by FANGs[10] and Twitter entering the broadcasting rights market, due to digitisation and, consequently, the transforming content consumption; and there are apparent signs indicating that it may soon fall apart wholly or partially in Europe as well. The broadcasters mentioned above acquire the online streaming rights for the broadcasting of sport events in their own product application (a.k.a. 'over-the-top' broadcasting). In this model the market advantage for the right holders and sponsors may be constituted by the data set available to FANGs and Twitter, individually broken down to the users, containing the consumption preferences and habits in detail, which can be specifically targeted while following the sport events, and engagement is allowed by the placement of precisely measurable advertisements and other content.[11]

3. Fundamental Principles in terms of the Freedom of Services

The free movement of services is one of the four fundamental freedoms of the European Union, which allows that the economic players having their registered seat in any of the Member States and operating as self-employed persons can freely pursue economic activity in all the Member States. The fundamental principles relating to internal market services are contained in the Treaty on the Functioning of the European Union,[12] which, in addition to the freedom to establish companies (establishment, Article 49-55) allows the freedom to provide services (Articles 56-62) for EU companies in the Member States other than the State of establishment.

These principles also appear in the judgments of the European Court of Justice, for example in the Gebhard case (C-55/94 [1995]), which was about the uniform set of conditions of the grounds of exemption permitting the Member States' restrictive measures which are allowed to be applied in terms of the 'all the freedoms granted by the contract'.[13]

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[10] Since 2018 the matches of LaLiga can be broadcast by Facebook on the subcontinent of India, while since 2019 Amazon has acquired the broadcasting rights of a specific number of matches of the English Premier League.

[11] Czermann, *„Legal Questions in E-Sport"*

[12] "Consolidated Version of the Treaty on European Union" *The Official Journal of the European Union*, C-83/47 (hereinafter: CV TEU)

[13] *Gebhard* C-55/94 [1995]

By service in the EU law, we mean an activity provided for remuneration, which does not fall under the provisions relating to the free movement of goods, persons and capital. The European Union Law classifies in the category of freedom of services the services that contain some cross-border element, in other words, in case of which the provider of the service is in a Member State other than the one of the user, so its activity is basically related to another Member State. If the conditions above are met, the scope of services typically includes industrial, commercial and artisanal activities, as well as liberal professions.[14]

Any player of the economy who provides service in any of the Member States of the European Union enjoys the freedom of services, especially those who pursue industrial, commercial, professional and liberal activities. Accordingly, any person with address or registered seat in a Member State of the Union can provide service to a person, resident in another Member State while still pursuing his/her activity in his/her own country, or showing up only temporarily in the host country, so he/she does not settle there. Any person can also enjoy the freedom of services who intends to use the services of a service provider of another Member State: therefore, those who intend to use the services of a service provider of another Member State may not be impeded from using this service.[15]

The prohibition of discrimination based on nationality naturally prevails in case of the provision of services, too: Member States may not provide for different conditions for the service providers who carry out their activity from another Member State, or those persons who use services in another Member State. Not only open and implied discrimination, but, on the basis of the practice of the European Court of Justice, any restriction is also prohibited that applies to both local and foreign service providers (or service users), but actually make the activities of the latter more difficult.

Cross-border service provision may be implemented in various ways: temporary transit by the service provider, transit by user of the service, or simply by using a tool which allows the direct provision of the service (e.g. by online, satellite broadcasting).

If someone intends to provide service without settling, and travels to another European Union Member State temporarily for this purpose, the unimpeded service provision may only be guaranteed by the regulation beyond equal treatment. In this case, in fact, the service provider must first comply with the requirements set out by his/her own country, therefore, the

[14] Ágoston Mohay – Erzsébet Sándor Szalayné, ed., *The Law of the European Union* (Pécs: Dialog Campus Publisher, 2015).

[15] Zoltán Horváth *Manual on the European Union*, (Budapest: Hvg-Orac Lap- és Könyvkiadó Kft., 2011) 242-252.

host country may not require him/her to comply again with the requirements he/she has already fulfilled (e.g. obtaining licenses, complying with qualification requirements). This would put an excessively heavy burden on the service provider. The host countries, therefore, recognize the requirements already fulfilled in the country of the service provider, and they may only enforce their own regulation in addition if it is absolutely necessary for the appropriate exercise of the service activity (e.g. consumer protection reasons), or the enforcement of other general interest (e.g. protection of public morals). If the person receiving the service travels to another country to use the service, he/she shall lose the legal protection of his/her own country and the rules of the Member State where the service is provided shall apply to him/her.[16]

Although settlement and service provision are freedoms, which may be restricted only in an extremely limited scope, there are exceptions from the exercise of these freedoms. The European Court of Justice first extended the provisions of the Keck judgment[17] to the freedom of services in the Alpine Investments case,[18] setting forth that the Member State measures which do not actually impede the access of foreign services to the market (actual impediment), are applicable to each player participating in the functioning of the economy without discrimination (normative discrimination) and affect the provision and use of both the domestic services and those originating from another Member State to an equal extent, do not constitute the restriction of the freedom of services.[19] Foreign service providers may be excluded, for example, from the exercise of services relating to public powers.[20] Furthermore, the EU Member States may restrict the respect for freedoms with reference to public order,[21] public safety or public health.[22] However, the restrictions must be proportionate to the objectives that they serve, which is interpreted by the European Court of Justice quite strictly.

In order to facilitate the provision of cross-border services without settlement, the European Union accepted a Service Directive in 2006, which obliged the Member States to remove the administrative and legal barriers. Even if the Treaties of the European Union (hereinafter: Treaties) had stated the principle of freedom to provide services before, the complicated and costly administrative Member State provisions deterred numerous service providers

[16] Horváth, *Manual on the European Union,* 242-252.
[17] *Keck*, C-267,268/91 [1993]
[18] *Alpine Investments*, C-384/93 [1995]
[19] Mohay, Szalayné, *The Law of the European Union*
[20] Article 51 CV TEU
[21] Cassis de Dijon, 120/78 [1979]
[22] Article 52 CV TEU

(especially small and medium-sized enterprises) from the cross-border provision of services.[23]

Although the effect of the Service Directive extended to a wide range of service activities, as a matter of principle audio-visual services, also discussed in this paper, do not belong to this scope; however, if they are sold during a commercial activity, they can be naturally susceptible to the effect of the Directive.[24] Contrary to the 'country of origin principle', the Directive took the view that the Member State on the territory of which the service was provided must ensure the entitlement to provide the service and to exercise this right freely: no discrimination may be applied against the service providers from another Member State. In accordance with the Directive, the Member States may only impede the eligibility to provide services on the basis of the principle of necessity and proportionality, that is, they may only provide for proportionate eligibility requirements that may be necessary for the protection of public order, public safety, public health and the environment. In principle, the Member States were not allowed to make the eligibility to provide service activity and the exercise of this right subject to a licensing scheme. In exceptional cases, if there is no 'overriding reason relating to the public interest' in this regard, licensing may be required, in which case, however, it must be guaranteed that the authorities shall not arbitrarily exercise their power of investigation.[25]

The provisions of the Service Directive did not prove to be sufficient. A Commission report explicitly pointed out the territorial restriction of internal market services, namely that, in practice, 63% of web shops, using different blocking or payment techniques, website redirection etc., impede the purchase made by customers from other Member States.[26] In view of this, the EU accepted a Regulation on the prohibition of unjustified geo-blocking and discrimination (hereinafter: Geo-Blocking Regulation).[27] The Geo-Blocking Regulation, therefore, is intended to make a new attempt to achieve that

[23] Horváth, *Manual on the European Union,* 242-252.

[24] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (Service Directive)

[25] Service Directive

[26] 'Final report on the e-commerce sector inquiry' 10.05.2017 COM (2017) 229 final (SWD 2017) 154 final Section 44.

[27] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (Text with EEA relevance.)

customers intending to purchase products and services in another Member State may not be affected by unjustified discrimination in terms of prices, sales or payment conditions.[28]

4. The Dynamic Copyright side of (Sport) Broadcasting Rights: Communication to the Public

The 2011 Murphy case[29] – discussed in detail hereafter – was the sixth time that the European Court of Justice addressed cases that affected the making of works and performance perceptible to an audience present or which can be considered to be present, i.e. the right to public performance, however, it was the first time that the ECJ addressed this issue partly in relation to the communication of a sport event to the public.

Sport broadcasts affect copyrights in the provision included in the Murphy judgment, which sets forth that while the communication of the sport event itself is not, the summaries, playbacks and interim commercial breaks are subject to the copyright provision of the Community law. The resolution made in the Murphy case analysing the encoded satellite broadcasting from the point of view of the provision of conditional access based on competition law mentions the question of communication to the public only in passing. In terms of communication to the public, the primary question is whether use is attained in a copyright sense if only a technical device suitable to make the work/performance perceptible is placed at a place which can be visited by members of the audience. If the placement of such a device is considered as use, that is, it is suitable to make the works/performance perceptible to others, does it mean making perceptible to the public in the assessed cases?[30] Agreeing with the view of Tattay, communication to the public only refers to communication in case of which the performer and his/her audience are far from each other; it, therefore, does not involve the scope of public performance. The right of communication to the public is granted to the holders of related rights specified in Article 2 of the InfoSoc Directive; contrary to the distribution right, communication to the public includes all types of remote broadcasting.[31]

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[28] Tamás Klein, András Tóth, ed., *Technology Law – Robot Law – Cyber Law*, (Budapest: Wolters Kluwer Kft., 2018), 130.

[29] *Joint cases of Football Association Premier League v QC Leisure and Karen Murphy vs. Media Protection Services Limited* No., C-403, C-429

[30] Faludi Gábor, Grad-Gyenge Anikó, op. cit.

[31] Levente Tattay, "The Practice of the European Commission in the Field of the Digital Processing of Copyrighted Works" In *Studies in honour of the 65-year-old*

The point of the SGAE case[32] is the question whether the mutates mutandis public use is attained if the operator of the hotel places a television device in the hotel rooms and the user of the commercial accommodation can perceive different television and radio programmes through it. In its decision the European Court of Justice interpreted the rules of the InfoSoc Directive[33] relating to communication to the public and the uniform (that is, applicable to the copyright of all the eligible concerned parties) preamble paragraph. The ECJ determined that whereas making the fixed assets available to use does not attain in itself communication to the public in the sense of the InfoSoc Directive, the case where programme-carrying signals are transmitted by the hotels to the television devices for the guests in the hotel rooms using any signal transmission technique must be considered as communication to the public. According to its interpretation the private nature of the hotel room does not exclude that the transmission of the works to television devices can be considered as communication to the public subject to the InfoSoc Directive.

In view of all the above, the devices do not constitute an exception conceptually, but the placement of these devices in a hotel room, that is, making available to the members of the successive public and making the work perceptible attains an act of use, however, it is important that the active contribution of the hotel's operator beyond the placement of the device is also necessary for the realisation of the use.[34]

According to the arguments, without concerns of the Advocate General acting in the Consortio Fonografici case,[35] the dentist who places a radio device in his/her waiting room and allows his/her patients to listen to the radio programme through it, is obliged to pay an appropriate remuneration to the performers and the producers of the phonogram against the indirect communication of the phonograms used in the radio programme to the public.

That is, while in the SGAE case the operator of the hotel allowed a quasi remote audience to perceive the programmes, in this case radio or television programme and direct or indirect copies of phonograms included therein are made available to be perceived by the audience in the waiting room. However, no actual difference can be observed in this case, as on the one hand the right

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Barnabás Lenkovics, edited by Keserű Barna Arnold and Kőhidi Ákos (Budapest-Győr: Eötvös József Könyv-és Lapkiadó Bt.-Széchenyi István University, Deák Ferenc Faculty of State and Law, 2015) 92.

[32] *SGAE vs. Rafael Hoteles, SA* C-306/05

[33] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

[34] Faludi Gábor, Grad-Gyenge Anikó, op. cit.

[35] *Consortio Fonografici,* C-135/10.

to communicate to the public also includes the making available to an audience present; in terms of legal concept, thus, there is no difference. On the other hand, the operator of the undertaking makes works available to the audience either present in both cases or quasi remote in both cases via a technical device.[36]

According to the opinion of the Advocate General in the Phonographic Performance Ltd. versus Ireland case,[37] the operator of a hotel or a guesthouse who operates a television or radio device in the bedrooms, to which he/she transmits signals, carries out the indirect communication of the phonograms used in the programme to the public, so he/she uses them. This conclusion is developed in full alignment with the arguments used in the SGAE case; the arguments are practically founded on the latter. The Advocate General pointed out that it is not necessary for someone to listen to (perceive) the broadcasting, but at least the physical and legal possibility of perception must be attained. It is not the case here, as the issue is not only about the availability of the devices. Finally, the Advocate General explained in terms of the appropriate remuneration that this, as well, is a concept of the European Union Law to be interpreted uniformly; although – due to its low-level definition – the Member States have an ample room in this respect, this room does not reach the level where the right holders do not receive remuneration at all. The significance of the case partly resides in the fact that the Advocate General extends the concept of communication to the public beyond the scopes of cases discussed so far, so even beyond the making of the programme perceptible: the operator of the hotel uses the phonogram for the purpose of communicating it to the public, even if it allows the records in either analogue, or digital form to be played and listened to on a record player (music player) not considered as a radio or television device. According to the Advocate General communication to the public is attained, as the operator of the hotel not only provides a playing device, but also the phonograms (similarly to the access to a television/radio programme), so he/she directly allows his/her guests to play the phonograms.

Although I will discuss the Murphy case in full detail in connection with the sale of sport broadcasting rights, I briefly refer to it here as well, due to its related aspects. The point of the decision made in the case is that it is forbidden to apply territorial restriction in the broadcasting of sport events in terms of the licensing of satellite broadcasting otherwise available in the entire territory of the EU by encoding and restricting territorial distribution of encoding cards. This infringes the freedom of services. This answer, however, only applies to the broadcasting of football matches, as service, which is not protected by the

[36] Faludi Gábor, Grad-Gyenge Anikó, op. cit.
[37] *Phonographic Performance Ltd. versus Ireland*, C-162/10.

European Union copyright (and related right) since the applicant, FAPL, is a non-governmental entity organising football games, and, on a sport law basis, having exclusive right to the broadcasting. However, there is work in the broadcasts that is protected by copyright and related right: these are solely the opening sequences, the theme music of Premier League, the pre-recorded films showing the most significant recent moments of Premier League, and specific graphics. The broadcasting of the programmes containing protected work, such as the opening sequences or the theme music of Premier League in pubs is considered as 'communication to the public' to a remote audience within the meaning of the InfoSoc Directive, which requires the license of the author. In fact, if these works are broadcast by the pub to its guests present there, it makes the works perceptible to a further public that was not taken into consideration by the authors granting license for the broadcasting of their works. In other words, the separate (in practice, territorially restricted) license for the use of the work in question is also valid, which is not considered by the decision as contrary to the European Union law.[38]

According to the decision of the European Court of Justice passed in the ITV Broadcasting case,[39] the concept of communication to the public must be interpreted in a way that it includes the transmission of terrestrial television broadcasts, which is implemented by an organisation other than the original broadcasting organisation, and which is made available to the subscribers by way of web data flow provided by this organisation, in the course of which process the subscribers continue to retransmit by being connected to the server of the organisation above, in which case the subscribers are located in the area of transmission of the above mentioned terrestrial broadcasting and can lawfully receive the broadcast on their television device.[40]

According to the interpretation explained in the Nils Svensson et al. / Retriever Sverige AB case,[41] Paragraph (1) of Article 3 of the InfoSoc Directive it must be interpreted in a way that the provision of clickable links on a website pointing at works accessible on another website is not considered as communication to the public as per this provision. The decision only applies to works freely accessible to anyone without restriction. If, however, the original communication, for example by way of subscription, was only available to a limited public, but through the hyperlink this limited nature has become circumvented, and this thereby meant an intervention without which

[38] Faludi Gábor, Grad-Gyenge Anikó, op. cit.
[39] *ITV Broadcasting Ltd. at al./TV Catch Up Ltd*, C 607/11.
[40] Tattay, "The Practice of the European Commission in the Field of the Digital Processing of Copyrighted Works" 95.
[41] *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd / Retriever Sverige AB* 5 C-466/12 [2014].

the users already mentioned could not access the communicated works, the totality of these users must be seen as a new public, which was not considered by the copyright holders when granting license for the original broadcast, and as a result, the license of the holders of copyrights is required for such communication to the public.[42]

It can be stated in conclusion that communication to the public in terms of related right does also include making perceptible to an audience present, while the term of communication to the public in terms in the EU copyright law does not. For this reason, the uniform interpretation may only apply to cases where the interpretation has been carried out by the European Commission. These are related to the making of the radio and television programmes containing phonograms and works, and phonograms available by way of a technical device, in case of which the audience is 'far' from the person/organisation making the work perceptible. Public can be simultaneous (pub) or successive (hotel room, dentist's office). The uniform interpretation, therefore, does not extend to the uses considered as communications to the public in certain Member States, and public performance in others, when the audience forming a non-successive public is present together while perceiving the works/performances.[43]

5. The Development of the European Union's Relevant Case-Law until the Murphy Judgment – with Special Regard to the Competition Law-Related Issues

In terms of sport broadcasting rights, in Western Europe, there were only public broadcasters in the 1930's and 1950's until the appearance of commercial channels in the eighties. In the nineties, subscription channels came to the fore, and after the turn of the century, the revolution of digitisation also took place, and the practice of selling in package emerged. The demands differing in each country, the territorial limitation of law and the different market specificities resulted in the territorial exclusivity of broadcasting rights.[44]

The Treaty of Nice already provided for the cultural significance of sport, but the White Book[45] was the first European document that highlighted the importance of sport broadcasting rights.

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[42] Tattay, "The Practice of the European Commission in the Field of the Digital Processing of Copyrighted Works" 97.

[43] Faludi Gábor, Grad-Gyenge Anikó, op. cit.

[44] E.g.: the English state television has 28 local channels.

[45] White Book of the European Commission on Sport, 2007.

As we have seen before, the fundamental freedoms, competition law, and copyrights are competing in the field of sport broadcasting rights.[46]

In terms of competition law, the TEU provides for both the prohibition of restriction of competition[47] and the prohibition of market abuse,[48] and the exemption mechanisms of these.

In the face of this background, sport regulation provisions from competition law aspect, can essentially be classified into three categories. Rules that do not attain restriction of competition, such as rules relating to organisation of competition, doping sanctions, or even provisions regulating the ownership relations of sport organisations belong to the first category. Restricting rules that are exempted from the provisions of the TEU CV can be classified into the second category; and agreements on the collective sale of broadcasting rights were classified in this category for a long time. Injurious and prohibited regulations which aim to develop some dominant position belong to the third category.[49]

In order to determine which restrictions concerning competition are subject to the above mentioned TEU articles, a good departing point may be constituted by the judgment of the Court passed in the Wouters case.[50] A regulation accepted by the Dutch Bar Association was in the focus of the case. The court had to decide whether organisations similar to bar associations can be qualified as associations of undertakings. Activities that offer goods or services in a specific market clearly belong to the category of economic activity. This is a perquisite for the status of undertaking, regardless of whether the exercise of their profession is regulated or not. The Court concluded that organisations having such regulatory power are not excluded from the scope of competition rules. This would only be possible if the activity realised could not be considered as an economic activity in terms of its nature, its subject or the rules applicable thereto.[51]

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[46] Lecture by Nick Fitzpatrick, the London partner of DLA PIPER law firm entitled *"The Experience of selling the broadcasting rights through the eyes of a lawyer"* held on 29 September 2011 at the conference entitled "Olympics, Competition, Sport, Law".

[47] TEU CV Article 101.

[48] TEU CV Article 102.

[49] Lecture by Ágnes Szarka, the auditor of Directorate-General for Competition held on 29 September 201. at the conference entitled *"Olympics, Competition, Sport, Law: The case-law of the European Union's Directorate-General for Competition in the sale of broadcasting rights"*

[50] Judgment in the Wouters et al. case on 18 February 2002, C-309/99, EU:C:2002:98.

[51] Burján, „*Sport Broadcasting Rights in the European Union and Hungarian Competition Law*" 131.

This principle was updated in the Piau case[52] specifically concerning sport clubs. The Court departed from the relation of clubs to football as an economic activity. As a consequence, national federations bringing together clubs as undertakings must be regarded as associations of undertakings. National federations are the holders of broadcasting rights relating to sport events along with the FIFA, so this act of theirs can be considered as an economic activity. Accordingly, a national sport federation can be defined as an undertaking in some cases, and as an association of undertakings in other cases. The undertaking status typically appears in three areas: the activity relating to the sale of tickets for sport events belong to the first area, different product tying practices and sponsorship agreements can be classified in the second, and finally, the sale of television broadcasting and other media rights belong to the third group.[53]

When judging anti-doping rules, the controversial Meca-Medina-judgment[54] departed from the fact that a purely sport rule may not result in the exclusion of an organisation passing the rule or a person subject to it from the scope of the TEU merely due to its nature, as sport rules set the conditions for sportsmen and teams for the participation in professional sport which in this way is considered as an economic activity. To judge a sport activity from the aspect of Article 101. and 102, it must be assessed whether the rule was passed by an undertaking, whether it attains restriction of competition, and whether all this affects the trade between the Member States.[55]

In terms of restrictions of competition, the Commission discussed the agreements on the selling of sport broadcasting rights numerous times. The assessed cases can be classified in three main categories: collective sale, exclusive sale of rights, and joint procurement of rights.

In terms of broadcasting rights of the UEFA Champions League, the UEFA itself submitted a request for exemption in relation to its broadcasting rights.[56] The sale of broadcasting rights of the series of competitions was carried out in a collective manner, for only one broadcaster per Member State in most of the

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[52] *Judgment Piau vs. the Commission*, T-193/02, EU:T:2005:22

[53] Similarly, the German Courts determined the "association of undertakings" nature of the (German Football Federation) (hereinafter: case no. IV/37.214 DFB - Central marketing of TV and radio broadcasting rights for certain football competitions in Germany), HL [1999] C6. 09.01.1999).

[54] Judgment in the David Meca-Medina and Igor Majcen vs. the Commission case, no. C-519/04, EU:C:2006:492.

[55] Burján, „*Sport Broadcasting Rights in the European Union and Hungarian Competition Law*" 131.

[56] Case no. IV/37.398 (UEFA - Central marketing of the commercial rights to the UEFA Champions League), HL [1999] C99, 10.04.1999, 23-24.

cases, in a single package, sometimes even extending to four seasons. The situation of the UEFA was worsened by the fact that unused rights and restrictions affecting the output were predominant, and they did not grant any exploitable rights to the clubs. As a result, the Commission, by determining the infringement of Paragraph (1) of Article 101, declared the unsuitability of the agreement for the exemption according to Paragraph (3) of Article 101. According to the reasoning, as a result of the sale in package, only large media groups have the chance to acquire the rights, which causes disproportionate limitation of competition and impedes technological development. According to the requirements of the Commission:

- a duly conducted tender which guarantees that interested parties are aware of it is indispensable;
- agreements concluded this way should cover a maximum period of three years;
- re-licensing appears as a circumstance to be assessed, but it is recommended to establish a contractual relationship with the original right holders;
- it is sensible to maintain the parallel sale of rights (meaning: in several packages) so that the clubs benefit from the media rights defining in terms of their club brand.

The UEFA transformed its previous system, and elaborated new and collective sales agreements, which included fourteen different separate packages.[57]

In the above mentioned DFB case[58] the proceeding ended by the commitment made by the DBF to offer Bundesliga matches in two packages, to both Pay-TV and free-TV, and a third package granted rights for editing delayed summaries.

This logic was developed further by the Commission in the topic of exclusivity, when it determined that for BSkyB company the exclusivity provided by FAPL for the broadcasting of the English league is anti-competitive,[59] since the agreement between the parties led to higher prices and the exclusion of competitors from the content, and also the harm done to the consumers can be determined as the number of matches which could be seen on television was limited, furthermore, in the absence of a Pay-TV

[57] Burján, „*Sport Broadcasting Rights in the European Union and Hungarian Competition Law*" 134.

[58] Case no. IV/37.214 (DFB - Central marketing of TV and radio broadcasting rights for certain football competitions in Germany), HL [1999] C6, 09.01.1999.

[59] Case no. COMP/C.2/38.173 and 38.453 (Notice published pursuant to Article 19(3) of Council Regulation No 17 – joint selling of the media rights of the FA Premier League on an exclusive basis), HL [2004] C115

subscription they had no access to the content whatsoever. Subsequently, FAPL undertook to create more balanced packages for the sale of rights and to prevent each package to be acquired by the same broadcaster. The Commission approved of these commitments in the form of a temporary agreement.

An exclusive agreement results in vertical restriction of competition from a competition law aspect, where a single buyer acquires license for the rights collected in a package for a longer period, sometimes for several years. Term and effect constitute the two types of exclusivity under competition law: exclusivity affecting a single customer or that affecting the rights at the same time. The practice of the Commission focuses on licensing for one single customer; the exclusive sale of rights, if they are sold to several customers, is not considered by the Commission as anti-competitive.

The most pronounced intervention is attained by the increase of output and the restriction of price competition. This means a problem when eventually the options of the customer are limited by the fact that exclusivity keeps away those, intending to enter the market, and the maintenance of the competitiveness of free-TVs may also become more difficult. Further restriction of competition is attained when the broadcaster acquires exclusivity for all the platforms.[60]

In case of the breach of Article 101 of the TEU a circumstance giving ground to exemption may be the grant of a re-licensing possibility and the case where exclusivity is acquired by a new market player or a player accessing the market with a new technology.[61]

Previously, other circumstances to be assessed were constituted by the so-called blocking rules, which intended to achieve that the supporters choose to view the matches live instead of watching them on TV. To this end, the time slots were specified, usually Saturday or Sunday afternoon, when not one single match could be on the screen. It became obligatory for each member federation to comply with so-called broadcast-free periods, in case of both international and domestic matches. The decision making power of the federations was limited to their possibility to determine the two and a half hour -time slot on Saturday or Sunday when broadcasting is excluded. Due to the negative effects of the provisions the Commission investigation was also in progress, but the Commission stated that in this case a competition restrictive objective may not be in place, as the provisions do not intend to achieve that the broadcasters acquire the broadcasting right of as few football matches as

[60] Burján, „*Sport Broadcasting Rights in the European Union and Hungarian Competition Law*" 134.

[61] e.g. British Satellite Broadcasting (BSB) case no. IP/02/1051 (Commission opens proceedings into joint selling of media rights to the English Premier League).

possible or to restrict the competition conducted by the broadcasters for advertising revenues. The Commission found that the existence of the anti-competition effect could not be determined, and it did not find that the question as to whether the live broadcasting has any effect on the number of viewers of matches needed to be investigated. At this point, the Commission allowed free way to the regulation of the UEFA, but at that time they were not aware that the closed periods would have serious significance in a subsequent case, that is, that the ECJ would hold a contrary view in the Murphy case.

In terms of the judgment of fundamental freedoms and related copyright relations, the ECJ has come a long way. In the Deutsche Grammophon case[62] the principle that the restriction of a fundamental freedom can be justified by the specific subject-matter of intellectual property rights was fixed, but the concept of the latter was not defined. This decision already discussed the issues of exclusivity and the prohibition of parallel import, of which only the latter was found by the ECJ to be contrary to the free movement of goods.[63]

In terms of conceptual specificities of a special subject-matter, the Court took a step forward in the Coditel I case[64] by determining that the right of the holder of the copyright and licensees to claim a fee for any broadcasting of the film is part of the material function of copyright, from which the conclusion can be drawn that the licensee can exploit its rights by separation according to methods of use.[65]

It could already be seen based on the judgments referred to above that territory-based licensing can constitute the special subject-matter of copyright, but to the question as to what extent it is allowed the Court was searching for an answer in the Coditel II case[66] primarily by a competition law-based approach. The Court explained that the territorially restricted exclusive license in itself is not contrary to the provisions of the Treaty, provided that no additional economic and legal circumstances are connected to it, which may have market restrictive or market distorting effect. Such a circumstance can be constituted by additional artificial or unjustified condition, disproportionate

[62] Judgment of the Court of 8 June 1971 - Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG. - Reference for a preliminary ruling: Oberlandesgericht Hamburg - Germany. - Sound recordings. - Case 78-70.

[63] Anikó Grad-Gyenge, "Copyright issues relating to sport broadcasts in the practice of the European Court of Justice" *Gazdaság és Jog* (2018) 7-8.

[64] SA Compagnie générale pour la diffusion de la télévision, Coditel, and company versus Ciné Vog Films et al. Case no. 62/79.

[65] Grad-Gyenge "Copyright issues relating to sport broadcasts in the practice of the European Court of Justice"

[66] Coditel SA, Compagnie générale pour la diffusion de la télévision and company versus Ciné-Vog Films SA et al., case no. 262/81.

remuneration or temporal exclusivity, while in other cases[67] the uncommonly long term of the agreement was considered by the body as such a circumstance.

Later the ECJ established a system consisting of three criteria,[68] the infringement of which means abuse of dominant position, thus exclusive licensing may not be exercised:

- The party requesting the license offers a new product or service which is not distributed by the holder of the copyright but is subject to a potential consumer demand;
- refusal of the license is not supported by objective considerations;
- refusal of the license by excluding any market competition would maintain the service market of the sales data of the products concerned (pharmaceutical goods in a given case) for the copyright holder.[69]

It can be concluded from the case-law that licensing can be of an exclusive effect, and can be carried out along the geographical borders too, but it may not target the absolute blocking of the markets, neither geographically, nor between the primary and secondary markets.[70]

6. The Murphy Case

On 4 October 2011, the Court of Justice of the European Union passed its judgment relating to the top level English football league, i.e. the Premier League's selling of sport broadcasting rights on an exclusive territory-by-territory basis amid the huge expectations of right holders and broadcasting organisations. According to the decision, absolute territorial exclusivity included in the license agreements on the satellite television transmission of broadcasting rights is contrary to the fundamental freedom to provide services and it also restricts free competition. Furthermore, the ECJ made important findings in terms of the copyright-related judgment of sport broadcasts by interpreting the concepts of copyright works and communication to the public.[71]

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[67] Regulation of the Commission 78/616/EEC passed in case RAI v. Unitel (ECR 2605).

[68] *IMS Health GmbH v. NDC Health GmbH*, C-418/01.

[69] Grad-Gyenge "Copyright issues relating to sport broadcasts in the practice of the European Court of Justice"

[70] Grad-Gyenge "Copyright issues relating to sport broadcasts in the practice of the European Court of Justice"

[71] Péter Rippel-Szabó, "The judgement of the European Court of Justice passed in the Murphy case and its expected impacts on the market of sport broadcasting right" *Infokommunikáció és Jog* (Issue 2012/1).

Although it was the first time when the ECJ dealt with the issues of the sport sector's broadcasts, the European Commission had previously examined such agreements in several cases, solely based on the rules of the TEU CV relating to free competition, on the side of both the right holders and the broadcasting organisations.[72] Therefore, the proceedings known as the 'Murphy case', discussed in this chapter, can be considered as milestones in the history of the 'interplay' affecting the law of the sport sector and the European Union.

The basis of the preliminary decision-making proceeding of the ECJ relating to the Murphy case was provided by two cases in the United Kingdom, independent from each other. Case C-403/08 between Football Association Premier League Ltd & et al, and QC Leisure & et al, and case No. C- 429/08 between Karen Murphy and Media Protection Services Ltd were pending before the English High Court of Justice.

According to the facts of the main cases, the Football Association Premier League Ltd (FAPL), i.e. Premier League, is an organisation organising the recording of the Premier League matches, transmitting the relating broadcasting signal and selling its commercial – primarily broadcasting – rights. When producing the recordings, the visual and background material made of the Premier League games was transmitted by FAPL to a production unit, which added to it logos, sequences, graphics displayed on the screen, music and commentary in English language. The signal was resent by satellite to the broadcasting organisation according to the license agreement, which added to it its own logo and perhaps commentary. Subsequently, the signal was compressed and encoded, then transmitted to the subscribers by satellite. Finally, the signal was decoded and extracted in a satellite decoding unit provided together with the subscription, the operation of which decoder required a decoding device, such as a card (hereinafter collectively 'decoder').

In the license agreements concluded with different broadcasting organisations on the selling of television broadcasting rights for a period of three years, FAPL, in order to appropriately optimise its revenues, granted exclusivity to the broadcasting organisations for the broadcasting and the economic-commercial utilisation of its matches in a specific geographical territory, usually within the borders of a given country. According to the provisions of the license agreements, in order to appropriately guarantee

[72] Of the cases before the European Court of Justice, in case of sport federations, the proceedings conducted in relation to the UEFA Champions League's commercial and broadcasting rights [COMP/37.398], and the collective selling of Premier League by FAPL, and that of the Bundesliga by DFL, while in case of broadcasters the cases of Newscopr/Telepiú [Case M.2876], Eurovision/EBU [Case 32150], and the AVS [IP/00/1352és IP/03/655] can be highlighted.

exclusivity, the broadcasting organisations were obliged to create a situation where the matches broadcast by them could not be received outside of the territory specified in the agreement. In order to achieve this goal, the broadcasters encoded the satellite signal provided by them, and the decoders could not be distributed outside of the territory concerned.

In Greece NetMed Hellas, the contracting partner of FAPL, broadcast the matches on 'Supersport' channels, on 'NOVA' platform, owned and operated by Multichoice Hellas. The channels mentioned above could only be accessed by the television viewers by subscribing for the NOVA satellite package; they had to provide a name, an address in Greece and a phone number for the subscription. In the main cases, some companies imported the decoders, legally marketed based on the license agreements, from Greece to the United Kingdom to offer them to catering establishments[73] at a price far lower than BSkyB Ltd[74], the contracting partner of FAPL in the United Kingdom. The operators of the catering establishments in the United Kingdom mentioned above broadcast the matches of Premier League to their customers live, without time difference, by using the Greek NOVA decoders.

The first main case [C- 403/08] is related to the civil proceedings of FAPL which is against the pubs where, by using the Greek decoder, Premier League matches were shown, and against those persons who supplied these decoders to the pubs. The second main case [C-429/08] concerns the criminal law proceeding against Karen Murphy, owner of a catering establishment, who broadcast Premier League matches in her pub by using Greek decoders. Media Protection Services Ltd, a legal aid organization was assigned by FALD to initiate the judicial proceedings against Murphy.

In both cases, the High Court of Justice turned to the ECJ with several questions relating to the interpretation of the EU law. The ECJ judged the cases in a joint procedure. The judgment of the ECJ can be divided into two parts: on the one hand, statements on the reception of encoded programmes from other Member States and on territorial exclusivity, and on the other hand, statements on the use of the programmes after reception, and those relating to copyright issues.[75]

In the first part of the judgment, the ECJ investigated the provisions of the applicable international legal regulations and the license agreements between

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[73] According to the news, for example Karen Murphy paid a monthly amount of 118£ for the Greek decoder instead of the monthly subscription BSkyB for 480 £.

[74] By the way, since the facts of the main cases, in addition to BSkyB the ESPN already has a smaller proportion of the broadcasting rights of Premier League in the United Kingdom.

[75] Péter Rippel-Szabó, "The judgement of the European Court of Justice passed in the Murphy case and its expected impacts on the market of sport broadcasting right"

FAPL and the different broadcasting organisations on the prohibition of the distribution of the decoders outside of the contractual territory and the impediment of the reception of satellite signals in the light of Article 56 of the TEU on the free movement of services and Article 101 regulating the agreements restricting competition.[76]

In this regard the ECJ stated that the license agreements prohibit and make it impossible that persons located outside of the national Member State due to the issue of the broadcasting signal can receive the matches of Premier League, that is, they restrict these persons from accessing the services concerned, furthermore the national legal regulations of the United Kingdom, based on which FABL submitted an action before the local courts against the persons concerned, also restricted the freedom to provide services, as they provide legal protection to the contractual restrictions mentioned above and they even envisage civil and criminal law type financial-legal sanctions in case of an infringement. This restriction cannot be justified according to the ECJ based on the arguments raised by FAP, i.e. the references to intellectual property right and the so-called closed period.[77]

In connection with intellectual property rights the ECJ stated that the restrictions cannot be justified based on the InfoSoc Directive, as according to the provisions of this directive the matches of Premier League in themselves cannot be qualified as copyright works. Furthermore, the ECJ stated that a Member State can guarantee the protection of sport matches based on intellectual property via special national regulation, and by acknowledging the agreements concluded with right holders and broadcasting organisations.

According to the ECJ such rules restricting the provision of services must be proportionate with the objective justified by the protection of the rights which constitute special subject to the intellectual property concerned, which is intended to be achieved by them. According to the ECJ the special subject aims, among other things, to guarantee to the holders of the rights concerned the protection of their rights to commercial exploitation relating to the marketing of the protected works, or making them available by granting a license against the payment of a fee. However, the special subject is intended

[76] It is worth mentioning that based on the definition of a specific illicit device, Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access specified that a foreign decoder does not become an illicit device by the fact that is was procured and/or put into operation by providing a false name or address or that it was used by infringing a contractual provision relating to an exclusive private purpose.

[77] András Tóth, "The ECJ Judgment Transforming the Licensing Scheme of the European Sport Broadcasting Rights"

to guarantee the appropriate remuneration, not the maximum remuneration intended to be achieved by Premier League by way of territorial restriction. Appropriate remuneration supposes reasonable proportionality with the value of the service, which reasonable proportionality, in this case, can be determined on the basis of all the aspects of the matches, the definition of the actual and potential audience and the language versions. According to the ECJ the total number of television viewers comprising the actual and potential audience of the programme concerned can be determined with high accuracy primarily based on the number of sold decoders. As a consequence, the premium fees paid by the broadcasters for the full territorial exclusivity granted by the license agreements lead to artificial price differences between the national markets in terms of the same service, and at the same time they result in the artificial partitioning of the internal market intended to be achieved by the TEU.[78] Therefore, the payment of a premium fee does not belong to the category of appropriate remuneration. In connection with intellectual properties it must be underlined that according to the ECJ, it is not the exclusivity recorded in the license agreements that is unlawful from the aspect of competition law, but the obligation of the broadcasting organisations not to sell decoders that would make the reception of the matches possible outside of the territory specified in the license agreement, that is, the license agreements prohibit the foreign decoders from being made available to the television viewers who would like to watch the programmes in a Member State different to which the license was granted. Such contractual obligations completely eliminate competition between the broadcasting organisations in a given territory, in other words, they grant absolute territorial protection to the distributors of the given service against each other.[79]

Secondly, FAPL referred to the institution of the so-called 'closed period', which means that in the United Kingdom no football matches can be broadcast on Saturday afternoons. According to FAPL the objective of this rule, which particularly intends to encourage attendance of lower class football games, would basically be threatened if the matches of Premier League broadcast by foreign broadcasters could be watched live. According to the ECJ, however, the timing of the broadcasts can be regulated in the license agreement, which

[78] By the way, the ECJ followed the provisions of the preliminary opinion of Juliane Kokott, general advocate acting in the case, published on 3 February 2011.

[79] Cf. Kőmíves, Attila: QC Leisure- The lessons learned from watching a match in pubs at the European Court of Justice; online publication http://jogiforum.hu/versenyjog/blog/53

would mean a more proportionate restriction of the freedom to provide services. Therefore, this justification was not accepted either.[80]

With regard to the above, any regulation of any Member State is contrary to the freedom to provide services that makes the import, sale, and use of foreign decoders allowing access to encoded satellite broadcasting service containing works from a different Member State protected by the regulation of the first Member State illegal in this first State.[81]

In terms of the use of the programmes after reception the ECJ made some very important statements on the qualification of football matches and their broadcasting as works in a copyright sense (*the static side of* copyright). The ECJ primarily emphasised that a Premier League match in itself, or therefore any sports activity, may not qualify as protected work in the sense of the InfoSoc Directive, particularly because the rules of the football game leave no scope to creative freedom. In contrast, the sequences opening the broadcast and the theme music, the summary of the games and the different graphics generated of the football game after being processed by Premier League can be considered as works. Therefore, in this case the ECJ assessed the questions relating to the InfoSec Directive only in terms of these works. In terms of reproduction, according to the ECJ, the multiplication acts carried out in the memory of the satellite encoding unit and the screen of the television fulfil the criteria included in Paragraph (1) of Article 5 of the InfoSoc Directive so, as a consequence, they can be carried out without the license granted by the holders of copyrights, as the copyright protection does not extend to this reproduction. Therefore, by applying the copyright directive the ECJ examined whether the concept of communication to the public described in Paragraph (1) of Article 3 of the InfoSoc Directive[82] covers the broadcasting of football matches to the customers in a pub carried out on TV screen and with loudspeakers. The ECJ determined this fact, that is, that broadcasting of programmes containing protected works qualifies as "communication to the public" in accordance with the InfoSoc Directive (*dynamic side of copyright).* In such cases it is necessary to obtain the license of the author of the work, that is, the license of Premier League, since, if the pub broadcasts these works

[80] András Tóth, "The ECJ Judgment Transforming the Licensing Scheme of the European Sport Broadcasting Rights"

[81] Péter Rippel-Szabó, "The judgement of the European Court of Justice passed in the Murphy case and its expected impacts on the market of sport broadcasting right"

[82] According to Paragraph (1) of Article 3 of the InfoSoc Directive: „Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them."

to the customers therein, they are transmitted to a new public, which was not considered by Premier League when concluding the license agreement.[83] The judgment has significance from a copyright point of view in terms of reproduction carried out by the decoder, as this kind of reproduction can be, in the absence of independent economic significance, carried out without the license of the holder of copyright according to Article 2 of the InfoSoc Directive, that is, it is not under copyright protection. In this sense, it means that the customer or the contractual partner lawfully buying the matches could use the recording made of the match bought by it within a contractual framework for any purpose, as the temporary reproduction act is merely a perquisite for the lawful use of the recordings. Namely, Murphy's using the Greek decoder was not unlawful because it was imported from Greece, but because she used the decoder intended for private use for a commercial purpose, and thus, she made the broadcast available to a new public for which the holder of copyright could not receive a reasonable remuneration specified in the InfoSoc Directive.[84]

Otherwise, in terms of 'the definition of protected works' given by the ECJ, the statements of the ECJ could perhaps be corrected by saying that the recording made of the football match itself could be qualified as a protected work since it is the result of a film creator's choice and work in each case.[85] Furthermore, there is an interesting conclusion arising from the judgment, namely that the act by which a paying viewer attending the game on the spot or any person makes a recording of the match and makes it available to anyone, for example, via the Internet is not unlawful based on the copyright law in accordance with the InfoSoc Directive. As a consequence of the above, in the event where it is not the right holder (but for example a broadcasting organisation) that makes the recording of the sport activity and adds the copyrighted works to it (as FAPL does), then on the basis of the InfoSoc Directive the right holder may not take any action against the infringers; only the broadcasting organisation creating the copyright-protected sport programme can. The conclusions above, however, are not justified on any other legal ground, as usually it is the sportsman, the sport organisation or the sport federations – as right holders – who are eligible to the property rights

[83] András Tóth, "The ECJ Judgment Transforming the Licensing Scheme of the European Sport Broadcasting Rights"
[84] Péter Rippel-Szabó, "The judgement of the European Court of Justice passed in the Murphy case and its expected impacts on the market of sport broadcasting right"
[85] Ibid.

associated with sport activity in the different legal systems, which legal ground grants them the possibility to take action in case of infringement.[86]

It can also be considered as a deficiency of the judgment that it does not carry out the analysis according to the Wouters criteria, and moreover fails to draw the conclusions of the distortion of competition, that is, no in-depth evaluation is included in terms of the consideration of the positive and negative impacts on competition, although the judgment determined without concerns the anti-competitiveness of the partitioning of the market.[87]

7. The Case-Law and Regulation of Geoblocking (Restrictions on a Territorial Basis) Following the Murphy Judgment– a 'Post-Murphy' Process

Several theories have been created on the potential effects of the Murphy judgment. The majority thought that the selling of sport broadcasting rights based on separate territorial restriction within the EU would cease as a whole, from which they made the necessary conclusion that the market would put a price on the loss of exclusivity, so the price structure would change, the broadcasting fees would decrease, which, according to some dramatic overtones, would lead to the amortisation of the funds spent on the recruitment of young sportsmen, amateur sport, and the development of young people.

According to other opinions, the change would not decrease the broadcasting fees substantively, so it was going to be disadvantageous for smaller sports and smaller clubs that cannot replace their revenues from other sources.

Considering the fact that the Murphy judgment deals with the broadcasts made by satellite broadcasting signal, there were some serious concerns that[88] the future extension of sport content to online and on-demand based broadcasting would seriously set back the otherwise dynamically growing web TV.[89]

There were some proposals about the maintenance of territorial exclusivity which suggest that it would be feasible that the broadcasting organisation

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[86] Péter Rippel-Szabó, "The judgement of the European Court of Justice passed in the Murphy case and its expected impacts on the market of sport broadcasting right"

[87] Burján, „*Sport Broadcasting Rights in the European Union and Hungarian Competition Law*" 134.

[88]Cf. FAPL and Pub Landlady Both Lose in ECJ Fight – So Who Wins? (lásd: http://www.olswang.com/newsarticle.asp?sid=111&aid=3597&de=&mid

[89] Burján, „*Sport Broadcasting Rights in the European Union and Hungarian Competition Law*" 135.

having acquired broadcasting rights in the territory of the given Member State, or the territory specified in the agreement, may only create commentary and sport programme for the matches in the language of the given Member State/territory,[90] or a given broadcasting organisation acquires exclusive license for the whole territory of the EU for commentary in a specific language.

Proposals were made as a potential solution that the right holders restrict the active selling of the decoders to outside of the contractual territory as per the license agreements, in other words, only the passive distribution of the decoders to territories outside of the contractual territories would be permitted, that is, at request of the potential foreign sub-licensee or customer.

It also emerged as a solution that Premier League, as well as other right holders with a similar portfolio would conclude license agreements guaranteeing exclusivity covering the whole territory of the EU. Furthermore, as when a relevant call for tender was published, in practice, four media giants could be considered at the time (Sky, Mediaset, ESPN and Canal+), a real 'price war' could have started among the tenderers, which would further increase the already quite high amount of the royalties, which would have seemed an appealing option for Premier League and other right holders. Compared to all the options, this solution would have been the most risky from a legal point of view, especially with regard to the competition rules of the TEU CV, including the market restricting effects arising in the whole territory of the EU.[91]

According to another solution recommended to the right holders, the launch of an own channel broadcasting on each platform (satellite, cable and IP-TV, Web-TV Internet, mobile phone) could be an appropriate response to the difficulties caused by the case-law. In this case, the right holders could agree with the broadcasting organisations within the framework of non-exclusive, individual license agreements, or even directly with each of the subscribers. The disadvantage of this solution for the right holders is that the

[90] In the main case the import of the Greek decoders into the United Kingdom was helped by the fact that the NOVA ensured commentary to the games in English language too in addition to Greek. It is clear that the commentary had only been available in Greek; the import of the decoders would have been less attractive even despite the significant price difference.

[91] See the EU Commission decisions analysing in detail the potential competition restrictive effects made in the cases of the exclusive broadcasting rights procured in the downstream market of the sport broadcasting rights purchasers (secondary market means: the market between intermediary organisations and consumers) and those relating to the intertwining between broadcasters, and above, has more significant case-law, see especially: case Newscorp/Telepiú [M.2876].

market risk is fully borne by them contrary to the options presented above. If, therefore, the exclusivity specific to the selling of the broadcasting rights of Premier League and other similar right holders, as a well-tried obstacle of market access, ceased that would potentially promote technical innovation and guarantee a greater range of options to the customers-audience.[92] This type of selling of broadcasting rights would also address most of the concerns relating to competition law in the downstream market of broadcasting organisations.[93] [94]

Ultimately, the statement of Tóth was adequate in the sense that Karen Murphy undoubtedly "enjoys the same popularity" among the sport federations protecting their private autonomy as Bosman or Meca-Medina and Majcen.[95]

After the toning-down of the guesses it seemed for a long time that no legislative act would follow the interpretation matured in the Murphy case, which was accompanied by a lot of worrying voices, among others that of the Hungarian Government, which – "due to its special historic conditions" called the Commission upon eliminating the restrictions on a territorial basis.[96]

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[92] Péter Rippel-Szabó, "The judgement of the European Court of Justice passed in the Murphy case and its expected impacts on the market of sport broadcasting right"

[93] On the whole this method is a half-way solution for the right holders in terms of maximising the counter-value to be paid for their products, and achieving as broad a viewership as possible. In practice Eredivisie ECV founded by the teams of the Dutch first-class football championship launched its channels available on all platforms sold non-exclusively, however, the profit production ability of this sale was not expressly convincing.

[94] It is interesting to note that the High Court of Justice referred another case to the ECJ with identical facts to those presented in this study [C-228/10]. This proceeding is pending between UEFA and the British Sky Broadcasting Ltd., and Euroview Sports Ltd. and it has an additional value as the High Court of Justice also addressed a question to the ECJ about Article 6 of the InfoSoc Directive. The question was about whether the coding of the satellite broadcasting qualifies as a technical measure in the interpretation of the directive, and if so, whether the use of a decoder granted based on a foreign subscription domestically is the avoidance of technical measure. It can be foreseen that the ECJ will see the encoding as technical measure, while in terms of the second question, in view of the responses given in the cases described in this study, the answer is expected to be no.

[95] András Tóth, "The ECJ Judgment Transforming the Licensing Scheme of the European Sport Broadcasting Rights"

[96] http://ec.europa.eu/information_society/newsroom/image/document/201551/hungary_ms_reply_12735.pdf

So, by territorial restriction (geo-blocking) we mean, as described above, the commercial practice, which restricts the purchase of any product or access to any service based on the geographical location of the customers.

Territorial restrictions are so inherent in these days that according to the data of Eurostat,[97] despite the fact that in 2015 more than 50% of the EU population made purchases online, only 16% of them made cross-border purchases online from the seller of another EU Member State.

One of the important pillars of the Digital Single Market Strategy for Europe accepted by the European Commission on 6 May 2015[98] is the creation of a better access to digital products and services. The Digital Single Market Strategy for Europe also mentions that the territory-based restriction and the application of different prices according to different countries may be justified if, for example, it arises from the legislative obligation of the seller. However, in most cases the Commission considers the application of restriction of content on a territorial basis as unjustified, which must be eliminated so that the customers and undertakings of the EU can fully benefit from the advantages of range and lower prices offered in the single market. Currently, numerous obstacles impede the elimination of content restriction on a territorial basis, such as taxation regulations and other legislative provisions differing in each country, the conflicts of interest arising in connection with copyrights, since in the latter case the right holders have an interest in territorial license agreements.[99]

Based on the Ecommerce Report prepared formulated on the Digital Single Market Strategy for Europe, which we have referred to before, 60% of the respondent content providers the right holders request the content restriction on a territorial basis to be fixed in an agreement. The license agreements for films, series and sport events contain content restriction at a higher rate than for example in case of music or news services. 65% of the content providers responded within the framework of the sector inquiry that they restrict the content and services made available in each Member State, and this practice leads to the different offer of content providers in each country. 55% of the content providers restrict the access to the content also to their existing users based on the residence of the user. 34% of the respondent content providers

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[97] Eurostat, Digital Single Market: promoting e-commerce for individuals http: //ec.europa.eu/eurostat/data/ database?node_code=isoc_bdek_smi

[98] 2 COM/2015/0192 final: European Commission: Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe.

[99] Andrea Zsuzsanna Kulcsár, Can the digital market be single? Content restriction on a territorial basis in e-commerce., 2016/2

apply blocking even for impeding the play of previously downloaded content outside of the given territory. Based on the results of the preliminary sector inquiry 74% of the license agreements contain a provision, which allows the right holders to monitor whether the content provider complies with the territorial restriction and which allows them to sanction non-compliance.[100]

A proposed regulation regulating content restriction on a territorial basis was published by the European Commission on 25 May 2016 that would prohibit the traders from preventing access to the online platforms based on the customers' residence. It was clear from the proposal that this would not apply to the audio-visual sector, and this, however, leads to an even more pronounced emphasis as to how competition law judges enforce the content restrictions based on bilateral decisions in the audio-visual sector.[101]

This exception was kept by the final regulation[102] complemented by several other subjects, such as especially music streaming services, healthcare services, taxation rules, online games etc. Thus, based on the Geo-Blocking Regulation, traders may not prevent or restrict the access of customers to the services based on citizenship, domicile or residence. The regulation discusses the general terms of access causing the most problems in practice, as well as payment terms, and it specifies appropriate exception rules for these. It makes an important competition law-related distinction between active (the seller contacts the purchaser) and passive (the purchaser contacts the seller) selling: the restriction of passive selling qualifies as competition restriction in general, while the restriction of active selling does not.[103]

Considering, therefore, that the legislator strived to solve the question of territorial content restrictions only partially, it is again the implementation bodies that had to further develop the theorems elaborated in the Murphy case.

Accordingly, on 13 January 2014 in the 'Pay-TV' case the European Commission initiated proceedings against several large film studios (Twentieth Century Fox, Warner Bros., Sony Pictures, NBC Universal, Paramount Pictures) and the largest European Pay-TV broadcasters (the British BSkyB, the French Canal Plus, the Italian Sky Italia, the German Sky Deutschland and the Spanish DTS). The proceeding investigated whether the license agreements relating to satellite and online broadcastings ensuring absolute territorial protection infringe Article 10 of the TEU CV which prohibits competition restrictive agreements. The real stake of the Pay-TV

[100] Kulcsár „Can the digital market be single?"
[101] Grad-Gyenge "Copyright issues relating to sport broadcasts in the practice of the European Court of Justice"
[102] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018. (hereinafter: Geoblocking regulation).
[103] Klein, Tóth, *Technology Law – Robot Law – Cyber Law* 132.

case, as Kulcsár puts it accurately, was actually whether the judgment relating to satellite broadcasting in the Murphy case can be extended to online broadcastings too, and thus to online content restriction on a territorial basis. Based on the preliminary view some conditions of the license agreements made between Sky UK and Hollywood film studios restrict the possibility of Sky UK to grant access to paid television services available on satellite or online outside of the territory of the United Kingdom and Ireland. The press communication about the preliminary view mentions, however, that in case of cross-border services the broadcasters must comply with the copyright regulations of the countries concerned in addition to the competition law of the EU. The proceeding ended in 2019 by the approval of the commitments offered by the parties concerned by the Commission. The main commitment specified that the parties concerned shall not conclude, renew or extend, and do not commit to conclude, renew or extend license agreements relating to pay television services which impede or restrict, in relation to any part of the territory of the EEC, any pay television broadcaster from complying with the request without formal notice of any customers living or residing within the territory of the EEC but outside of the licensed territory of the given broadcaster, that is, the extraterritorial fulfilment of the broadcasting obligation in case of passive selling.[104]

If the Commission had determined that the practice of the organisation subject to the proceedings infringed competition law, that is, it had not ended by the approval of the commitments, based on its sector inquiry it would have taken a stand in terms of a practice occurring at 60% of online content providers. It is a question, however, whether such a decision could eliminate the content restriction on a territorial basis in the audio-visual sector, or whether it would only increase the currently existing legal uncertainty in connection with license agreements. In order to avoid this legal uncertainty, an increasing demand is arising for the reconsideration of the European copyright framework, as emphasised by the Commission's press communication.[105]

[104] Summary of Commission Decision of 7 March 2019 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40023 — Cross-border access to Pay-TV) (notified under document C (2019) 1772).

[105] Kulcsár „Can the digital market be single?"

Ethical and Legal Concerns relating to Autonomous Vehicles, in the Light of Experimental Findings and Regulatory Attempts

HOHMANN, BALÁZS – SZŐKE, GERGELY LÁSZLÓ

ABSTRACT W*hen thinking about autonomous vehicles, their decision-making units and the resulting ethical and legal concerns we face many dilemmas. These dilemmas will become more pronounced as the driver gradually becomes a passenger*[1] *and loses control of the vehicle, which in many cases is the basis for liability in different jurisdictions.*

The wide range of ethical concerns that as a set of social norms in their own right, continue to influence contemporary societies, even if many authors describe their role as having an increasingly limited impact, cannot be overlooked. The reason is that in many respects it is this system of norms that fills mere formal law with appropriate content - or shapes the development and evolution of formal law - and plays a prominent role in the interpretation of substantive law, which is so often emphasised.

The paper examines the worth situation where autonomous vehicles have to choose the 'best' of several decision alternatives with explicitly negative consequences in their autonomous decision-making, without the possibility of making a consequence-free decision. Even if, at first sight this may seem to be an abstract programming issue, it is in fact, a very serious and burdensome responsibility for the creators of autonomous vehicles. In these situations, both social, ethical regulation and legal regulation must provide answers to the concerns raised - in this article we attempt to bring together these answers in order to show where the regulation of autonomous decision-making is heading in this specific area.

KEYWORDS *autonomous vehicles, liability, legal and ethical obligations, machine decision-making, artificial intelligence.*

[1] Pusztahelyi Réka, *Autonóm járművek a magyar közutakon és a veszélyes üzemi felelősség: Az üzembentartó személyét, a mentesülést és a felelősségbiztosítást érintő egyes kérdésekről* (Győr: Universitas-Győr Nonprofit Ltd., 2020), 279-302.

1. Introduction

How can the dilemmas of decision making be grasped in the light of the background decision-making processes of autonomous driving?

Looking back at the technological developments of recent times, the issue of automatic decision making machines, nowadays using artificial intelligence, and autonomous vehicles operating without driver control is constantly being raised, and the legal dilemmas raised by these issues keep legislators and legal scholars in an almost constant state of flux.

There has been a rapid technological progress in the field of vehicle manufacturing and related IT developments,[2] where we are witnessing the passing of a milestone: the point in the history of motoring when a vehicle can now travel on the road autonomously, even without driver intervention.[3] Despite the fact that this phenomenon has a long way to go before it becomes widespread or even generalised,[4] the extremely broad legal regulatory issue of

[2] Koul, Sahil, and Ali Eydgahi. "The impact of social influence, technophobia, and perceived safety on autonomous vehicle technology adoption." *Periodica Polytechnica Transportation Engineering* 48.2 (2020):133-142.

[3] From a historical perspective, with the gradual fading of the role of the driver, one could even envisage the disappearance of this function and the emergence of a special passenger role with far-reaching implications for civil and criminal liability., see Sven A. Beiker, „Legal aspects of autonomous driving," *Santa Clara Law Review* 52/1., 1146-48. and Réka Busa, Reflections of her lecture entitled "The rebirth of the concepts of driver and passenger" at the conference *Legal aspects of autonomous vehicles and intelligent systems* at Széchenyi István University (22 March 2019)

[4] It is projected that by the fourth decade of the 21st century, the number of autonomous vehicles in transport will be close to 50 million, which will still dwarf the total number of vehicles in the world by that time.
„World Vehicle Population Rose 4.6% in 2016" Sarah Petit, accessed June 6, 2020, https://subscribers.wardsintelligence.com/analysis/world-vehicle-population-rose-46-2016;
„Autonomous vehicles. The legal landscape in the US and Germany." A Norton Rose Fulbright whitepaper. *Norton Rose Fulbright, (*2016) http://www.nortonrosefulbright.com/files/20160726-autonomous-vehicles-the-legal-landscape-inthe-us-and-germany-141559.pdf, 9.

autonomous[5] vehicles is one of the most pressing in legal science today[6] and the range of stakeholders affected by the technology makes it a timely subject for in-depth study from as many angles as possible.

In this process, ethical norms can stretch the framework of legal regulation, providing itwith direction. The question of European regulation, which is increasingly hanging in the air, and the cases that arise in the wake of the spleen, thus are difficult to resolve with the existing rules, all point to this. To this end, we will first examine and analyse the ethical questions and concerns, then the solutions to them, and finally the European approach to the issue and its strategic and legal policy scope.

2. Different ethical approaches to decision-making in autonomous vehicles

Why is it important to consider the relevant ethical aspects in this process? The answer is simple, but the scientific basis for this requires much more care than is apparent at first sight. Moral, ethical norms also determine, wittingly or unwittingly, the practice of law, i.e. the process leading to the creation of autonomous vehicles and their mass application[7], and on the other hand, the relevant legal regulation must immanently incorporate the ethical requirements[8] that increasingly globalised societies are placing on normative regulation. Let us review these ethical approaches to make sense of the regulatory attempts that build on them.

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[5] By autonomous decision making we do not only mean decisions with indeterministic outcomes, especially since in sufficiently complex systems it is difficult to distinguish between decisions that take a large number of factors (data) and rules into account, but are ultimately deterministic, and (due to self-learning mechanisms) possibly truly non-deterministic decisions (Zsolt Ződi, *Platformok, robotok és a jog. Új szabályozási kihívások az információs társadalomban* [Budapest: Gondolat, 2018.] 190.) Autonomy here simply refers to the absence of direct human involvement in the given decision-making situation.

[6] Ződi, *Platformok, robotok és a jog. Új szabályozási kihívások az információs társadalomban,* 210-211.

[7] Giuseppe Contissa, Francesca Lagioia, and Giovanni Sartor, „The Ethical Knob: ethically-customisable automated vehicles and the law," *Artificial Intelligence and Law* 2017/3., 365-378.

[8] Stefan Oeter, „Conflicting Norms, Values, and Interests: A Perspective from Legal Academia," *Ethics & International Affairs*, 2019/1., 57-66.
W. Bradley Wendel, *Ethics and Law: An Introduction*, (Cambridge: Cambridge University Press, 2014) 62-66.

2.1 The lessons from the "Trolley problem" thought experiment

The "Trolley problem" is one of the most important attempts at ethical thinking. Its modern version was reintroduced into academic thinking in the mid-1960s by Philippa Foot[9], after its documented emergence in the early 20th century.[10]

The interpretative framework of the problem is quickly put together: the choice of the protagonist in the story cannot lead to an optimal decision, but only to a version that is justifiable from the point of view of the interpreter between two alternatives that are difficult to choose and entail considerable damage, and which casts serious ethical doubts. The original core of the problem is the following idea: the actor in the action is standing next to the railway switches. In the distance, he notices a runaway tram carriage moving almost unstoppably in the direction of five people tied to the tracks (in other translations, stuck and immobilised on the tracks). There is a possibility of intervention, which raises the most important ethical issue in the case: without intervention, five people are likely to be lost, but by switching the switch, the train can be diverted to another pair of rails, on which one person is rotting. Which is more ethical - and at the same time more acceptable from an individual and collective point of view? Let us look for a moment at the field of human rights and constitutional law.

In these areas of jurisprudence, the traditional modern approach typically assumes that no distinction can be made between individuals, and that all people are equally entitled to certain inalienable rights,[11] such as the right to life.[12] As such, it is typically only its conflict with other fundamental rights that is examined in detail.[13] The thought experiment highlights this white spot precisely: in critical situations, we do not necessarily have a set of norms that can be universally applied, and this pushes the individual set of actions

[9] Foot, Philippa: The Problem of Abortion and the Doctrine of the Double Effect. *Oxford Review*, 1967/5., pp. 5-15.

[10] Frank Chapman Sharp, *A Study of the Influence of Custom on the Moral Judgment,* (Madison: Bulletin of the University of Wisconsin, 1908) 138.

[11] Susanne Baer, „Dignity, liberty, equality: A fundamental rights triangle of constitutionalism," *University of Toronto Law Journal,* 59(4), (2009): 417-468.

[12] W. Paul Gormley, „The Right to Life in International Law," *Denver Journal of International Law & Policy,* 16(1), (2020): 10.

[13] Jürgen Habermas, „The concept of human dignity and the realistic utopia of human rights," in *Human Dignity,* ed. Amos Nascimento, Matthias Lutz Bachmann (London: Routledge, 2018), 52-70.

towards an almost instinctive reaction, which usually leads the decision-maker towards a utilitarian approach.[14]

Interpreted at the collective, society level, this usually finds solidarity from a societal point of view: in civil law, it is based on the principle of fault, in the case of non-contractual damages, in public administration on the principle of good faith, and in criminal law on the principle of absence of fault, which provides for less severe legal consequences in situations of extreme difficulty in making decisions. Nevertheless, what if the decision itself is not taken by a human being but by a "machine" based on algorithms?

Why is the thought experiment outlined above relevant to us in this context? It is because, in the context of autonomous vehicles, the theoretical, abstract hypothesis becomes reality and the manufacturers concerned are burdened with a very serious set of ethical and legal obligations and social expectations[15]. When a manufacturer has to decide on the hierarchy and principles of the vehicle's decision-making methodology in emergency situations, he is in fact placing his design team at the imaginary gearshift without any possibility of evasion. Since transport activities, and hence the operation of self-driving vehicles, are traditionally seen as hazardous operations, there is no way of avoiding the issue of foreseeable but unavoidable accident situations.

Let us examine what approaches are available to address this issue in the context of a specific project.

2.2 MIT Moral Machine Project

As the legal framework does not yet provide manufacturers with any definitive guidance on this decision situation, even in a global context, [16] the underlying norms of society, morality and ethical considerations, may play a crucial role.[17]

To assess this, a study that puts this idea into practice was carried out by researchers at the Massachusetts Institute of Technology, who developed an online platform through which users can vote on their individual choice of

[14] Guy Kahane, „Sidetracked by trolleys: Why sacrificial moral dilemmas tell us little (or nothing) about utilitarian judgement," *Social neuroscience* 2015/10., 551-560.

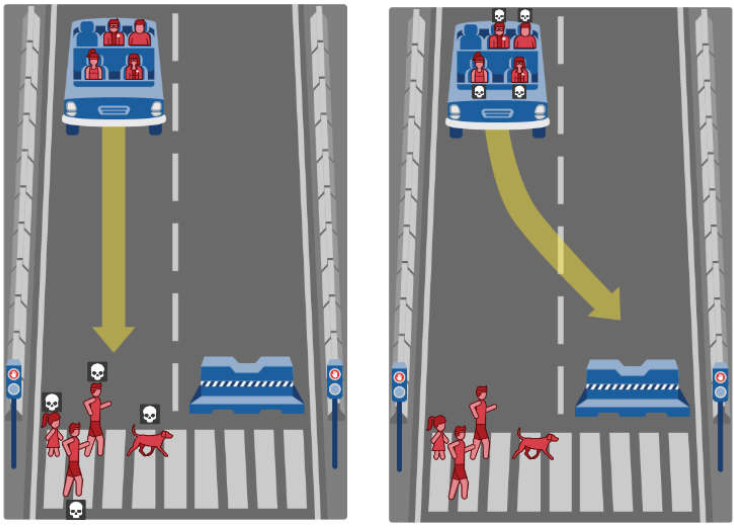
[15] Mark Coeckelbergh, "Artificial intelligence: some ethical issues and regulatory challenges," *Technology and regulation* (2019): 31-34.

[16] Corinne Cath, Sandra Wachter, Brent Mittelstadt, Mariarosaria Taddeo, and Luciano Floridi, „Artificial Intelligence and the 'Good Society': The US, EU, and UK Approach," *Science and Engineering Ethics* 2018/2. 505–528.

[17] Joanna Bryson, AlanWinfeld, „Standardizing ethical design for artifcial intelligence and autonomous systems," *Computer* 2017/3., 116–119.

what they would do in certain emergency situations instead of a self-driving vehicle.[18]

A diagram of the options in the Moral Machine experiment[19]



The results are heterogeneous in many respects: there are significant differences in preferences between Eastern and Western mindsets, continents and ethnic groups, which does not bode well for autonomous vehicles. Different choices may reflect different societal perceptions, which poses challenges for a highly rationalised automotive industry that prefers uniform, standardised solutions in terms of revenue, and which will have to adapt to these expectations in the design process. This is particularly true when we look at the survey results in the light of the responses. Indeed, the survey shows that the majority of respondents in an emergency situation would choose to:

- minimise the loss of life in the event of an accident, favouring people over animals and property damage,
- whether they are passengers in the self-driving vehicle or other road users (e.g. pedestrians) has become almost irrelevant to respondents, as has the need to break the relevant legal and traffic rules,

[18] Edmond Awad, Sohan Dsouza, Richard Kim, Jonathan Schulz, Joseph Henrich, Azim Shariff, Jean-François Bonnefon, Iyad Rahwan The Moral Machine Experiment. *Nature* 2018/563. (2018): 59-64.
[19] Forrás: moralmachine.mit.edu (2020.01.01.)

- in about half of the cases, new actors were involved in the accident by changing the original direction, risking their lives and physical integrity in order to achieve the potentially lower human cost.

For the above factors, the responses from users were broadly consistent globally, but not so for characteristics relating to gender, age and social prestige: individual respondents were split into several groups - typically by the geographical location of their residence - however, based on some of their characteristic responses, three main groups emerged.

What consequences can be drawn from these data and trends? What is certain is that the guiding considerations - ethical and diverse - in each country's moral standards and decisions may be radically different and this makes it particularly difficult to regulate emergency automated decision-making for autonomous vehicles in line with societal expectations.

In principle, it is conceivable that these vehicles could return control to the driver in an unavoidable emergency, in order to make a critical decision, but this raises concerns from both an ethical (if the manufacturer cannot create a justifiable decision, is it better to let the driver decide again?) and a technical (in the case of fast-moving accidents, the actual taking of control is questionable) point of view and does not answer the original problem.

Overall, the experiment itself seems to have raised more questions than it answered.

In what follows, we examine how Germany, a country with a traditionally strong automotive industry, is seeking answers to the questions raised by ethical concerns.

2.3 German regulatory ideas from 2017

In early 2017, Germany, through the Ethics Committee of the Federal Ministry of Transport and Digital Infrastructure, set up a working group to develop guidelines for automated decision making in autonomous vehicles, in response to the increasingly topical and even urgent issues related to autonomous vehicles. The task force, which was composed of a very broad range of experts, completed its report by June 2017,[20] summarising and detailing its findings in twenty points. The key points can be interpreted as follows:

- Automated transport could become an ethical obligation in the future.

[20] „Report of Automated and Connected Driving (Ethics Commission),” Federal Ministry of of Transport and Digital Infrastructure, Berlin, 2017, accessed January 1, 2020 https://www.bmvi.de/SharedDocs/EN/publications/report-ethics-commission.pdf?__blob=publicationFile

- The Committee started from the assumption - in order to achieve a higher level of safety (by analogy with the ban on backing out in order to protect the environment), participation in autonomous transport and the use of such vehicles could be made a requirement, an obligation or at least a moral imperative.
- In unavoidable accidents, discrimination between people on any grounds is strictly prohibited.
- The Committee's central expectation of the working group was that the document issued should not contain a recommendation that would make a questionable distinction between passengers and other transport operators, which would also raise the question of non-discrimination.
- In any situation, it should be clear who is in charge: human or computer. The software should be designed in such a way that the transfer of control from machine to human should not be sudden and unexpected for the driver in an emergency.
- Where appropriate, the safety of more people can take precedence over fewer, but outsiders cannot be put at risk.
- The Committee thus argued that the above-mentioned thought experiment should not involve touching the gearshift, as this could create a new victim pool in addition to or instead of the original victims.
- Technical systems cannot be uniformly programmed to evaluate accidents in a complex and intuitive way, in such a way that they can replace the driver who has the moral capacity to make the right decisions, and it is therefore of the utmost importance to set up an agency to investigate and evaluate accidents from autonomous transport in the future.
- This proposal from the Committee would partly take one of the most difficult design issues out of the hands of manufacturers. While an agency that systematically analyses accidents caused by autonomous vehicles could be useful indeed, we have to admit that there is no realistic chance that the organisation set up in the guidelines will provide guidance for all eventualities and all accident situations in the context of autonomous driving. This will furnish manufacturers with a wealth of experience, but without a firm grip on many future issues. Ex-post, almost regulatory review can play a useful and progressive role, but it still will not settle the initial issues satisfactorily.

3. A European approach to the regulation of autonomous vehicles

In order to provide an adequate response to the above dilemmas from the business actors involved in car manufacturing, a strong legal policy and regulatory concept is needed, and within this framework, developed detailed requirements. To this end, in order to identify the strategic orientations, the strategic orientation of the European Union towards autonomous vehicles will be examined,[21].In this respect, we can start from the premise that it has long been important for the European Union to create a common trans-European transport system[22] and the political and regulatory framework necessary to achieve this, as it is the means to achieve the free movement of the EU's fundamental values.

Autonomous vehicles must play a major role in this, as only collective action can prevent the fragmenting regulation and infrastructure that the Moral Machine thought experiment is projecting for us. This is backed up by the 2018 communication of the European Commission, which in many ways spearheads the case for autonomous driving and highlights its great importance.[23]

This is underlined by the fact that the European Commission is working closely with car manufacturers, other market partners and Member State stakeholders to lay the foundations for a European approach to autonomous mobility. The Connected and Automated Mobility (CAM)[24] policy line is the core of this cooperation, where the Commission will

- Develop policy initiatives in this area,
- Develop standards for autonomous vehicles at European level,

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[21] Piotr Czech, Katarzyna Turoń, and Jacek Barcik, "Autonomous vehicles: basic issues," *Scientific Journal of Silesian University of Technology Vol. 100* (2018): 15-22.

[22] Carsten Schürmann, Klaus Spiekermann, and Michael Wegener. "Trans-European transport networks and regional economic development." (2002). *Proceedings of The 42nd Congress of the European Regional Science Association (ERSA)*, European Regional Science Association (ERSA), Dortmund, 2002. 4-6.

[23] „On the road to automated mobility: An EU strategy for mobility of the future," European Commission, accessed June 1, 2020, https://ec.europa.eu/transport/sites/transport/files/3rd-mobility-pack/com20180283_en.pdf

[24] „Connected and automated mobility" European Commission, accessed June 1, 2020, https://digital-strategy.ec.europa.eu/en/policies/connected-and-automated-mobility

- Develop research and innovation projects - both for technical development and to deepen legal understanding,
- Initiate, if necessary, the development of EU level legislation in the field of autonomous mobility and other related areas.[25]

Approaching the issue from the line of concrete regulatory concepts, the European Union has been dealing with the issue of raising motor vehicle liability issues to the Community level and developing product liability rules since the 1980s[26]. On the liability side, this was supplemented by the directive on motor insurance[27], which further extended the scope of the relevant legislation, but, apart from a few specific exceptions, left the issue of autonomous driving untouched[28] - not by chance, since at that time it was still seen as a technical solution in its infancy.

Today, however, its widespread use has become a reality, as well as the need for common regulation of specific situations as soon as possible. This has a specific link with the evolving EU position on the legal status of AI, which has not yet reached the drafting stage in regulation, but is clearly visible in the Commission's communications[29] and related expert material[30], and is likely to happen in the near future.

4. A special perspective - can anyone exempt themselves from machine decision-making?

In addition to the above, a further question may arise: to what extent is anyone obliged to be subject to (suffer) machine decision-making and the

[25] Ibid.

[26] See: Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products

[27] Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability

[28] Florin Costinel Dima, „Fully autonomous vehicles in the EU: opportunity or threat?" (Enshede: University of Twente, 2019): 21-28.

[29] See: Communication from the Commission "Artificial intelligence for Europe" of 25 April, COM(2018) 237.

[30] The EU Commission's High-Level Expert Group on Artificial Intelligence proposed on the 18th of December 2018 a draft report on Ethics guidelines for trustworthy AI, which is addressed to all relevant stakeholders developing, deploying or using AI, accessed 1 June 2020, https://ec.europa.eu/futurium/en/system/files/ged/ai_hleg_draft_ethics_guidelines_18_december.pdf

above dilemmas. Besides the ethical approach taken so far, it is also worth reviewing a relevant legal regulation, a legal instrument of data protection law. The approach that a 'machine' should not be the sole decision-maker in matters that have a significant impact on a human being was already an early rule of the European Union's Data Protection Directive of 1995.[31]

More recently, the Big Data phenomenon, which is not at all exclusive to the field of transport, is in fact the hallmark of the era of computer perception, in which data on a wide variety of life situations and their characteristics are being created in masses and managed in electronic form (often including profiling). From the data (profiles) thus generated, computer analysis for machine decision making, and ultimately for autonomous driving, can be used to draw many conclusions that could not be drawn before. Self-driving vehicles record and process a large amount of personal and specific personal data of natural persons for the purpose of automated decision-making (self-driving capability), which can also be used to assess the personality and personality traits of these data subjects.

Moreover, the algorithms behind the various automated decision-making processes are unintentionally but often opaque - they are often referred to as black boxes for a reason. [32]

The transparency of algorithms in this respect has long been the subject of professional and scientific examination,[33] which, in addition to clarifying the scope of the data, may also include the delineation of decision methods and even third-party certification of the decision algorithm,[34] in order to prevent the misuse of software solutions.[35] Examining the problem of opacity, it may

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[31] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The so-called automated individual decision is provided for in Article 15 of the Directive.

[32] See: *C.f. Big Data:* „A Report on Algorithmic Systems, Opportunity, and Civil Rights," Executive Office of the President, Washington, 2016, accessed January 1, 2020, https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2016_0504_data_discrimination.pdf 10.

[33] Nicholas Diakopoulos, „Algorithmic Accountability Reporting: on the Investigation of Black Boxes," *Columbia Journalism School, New York,* (2014): 28.*; Sandra Wachter, Brent Mittelstadt, and Luciano Floridi, „*Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation," *International Data Privacy Law*, Vol. 7, No. 2. (2017): 76-99.

[34] Shlomit Yanisky-Ravid, Sean K. Hallisey. "Equality and Privacy by Design: A New Model of Artificial Intelligence Data Transparency Via Auditing, Certification, and Safe Harbor Regimes." *Fordham Urban Law journal* 46 (2019): 428.

[35] Robert Chesney, Danielle Keats Citron, „Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security" *California Law Review* 2019/1., 107.

also become particularly important because, despite all regulatory efforts, information imbalances have recently significantly increased to the detriment of stakeholders, and this may prove to be even more pronounced in the field of autonomous driving. In the context of the present study, not only is the decision mechanism by which a self-driving vehicle will solve the trolley problem difficult to define, but there is also a significant chance that the exact mechanism of resolution will not even be known (at least in detail) by the stakeholders.

This Data Protection Directive that contains detailed rules on this issue was replaced by the General Data Protection Regulation in May 2018[36]. The regulation is essential to us because the requirements of the GDPR apply to all profiling processes where they relate to the provision of goods or services (including autonomous vehicles which are a combination of both) to data subjects in the Union or to the monitoring of their behaviour in the Union,[37] irrespective of the place of activity of the data controller or data processor.

In fact, the GDPR names among its rules two often closely related but not necessarily coexisting conducts: profiling and automated individual decision-making. By definition, profiling is *„...any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements*"[38]

There is no explicit definition of automated individual decision-making, but Article 22, Paragraph (1) of the GDPR states that „*the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her*".

Automated decision making under Article 22 thus has two conceptual components: (1) exclusivity and (2) legal effect or similarly significant impact. If these two conditions are met, the GDPR provides an opt-out right for data subjects. It is true that exceptions to this are also provided for: explicit consent of the data subject, the conclusion of a contract between the data subject and the controller, or the authorisation of this type of decision under national law

[36] 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 Regulation (EC) No 95/46/EC [General Data Protection Regulation] (hereinafter: GDPR or Regulation)
[37] GDPR, Article 3. para (2)
[38] GDPR, Article 4., 4. point

providing appropriate safeguards. In the first two cases, however, the data subject must be able to request human intervention where appropriate.

It should be seen that profiling and automated decision-making, although often associated, are two separate elements: profiling is not necessarily based on automated decision-making and, in turn, automated decision-making is not necessarily preceded by profiling. These two legal concepts raise a number of interpretative issues, which are reviewed below. The guidelines of WP251 of the 29th Working Party on Data Protection which address the interpretative issues of both profiling and automated decision-making rules and provide examples of good practices to follow are of great help in this respect[39]. The analysis of the concept of profiling raises a question fortwith: can it include information about a person based on the data of other persons or not? This is of particular relevance, given that profiling and automated decision making in the context of autonomous vehicle control often involves drawing conclusions about the data subject on the basis of the personal data and actions (e.g. movements, individual characteristics) of others. Since the concept is used to assess certain personal characteristics of natural person (i.e. the Regulation does not denote that personal data are attributed to the data subject), it can be concluded that even the assessment of certain personal characteristics of the data subject's personal data attributed to another natural person (also) falls within the scope of the concept.

Furthermore, an important element of automated decision-making in Article 22 is that the decision is based "solely on automated processing". Therefore, if the decision is not a purely automated decision, but it involves human intervention or control, it does not meet this test. However, the ethical dilemmas discussed in this study arise precisely in cases where there is no concrete human intervention over the machine decision making in question.[40]

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[39] Guidelines of the European Commission Article 29 Data Protection Working Party WP251 under Directive 95/46/EC. accessed June 1, 2020, https://ec.europa.eu/newsroom/article29/document.cfm?action=display&doc_id=49826

[40] For the not fully autonomous vehicles currently in use, which are up to level 3 according to the National Highway Traffic Safety Administration: J3010 SAE standard, this is not the case if there is in fact human intervention in the decision situation. WP251 makes it clear that human intervention must be meaningful, from a person who has the authority and training to have a real opportunity to change or modify the machine decision. For a classification of vehicle autonomy into levels, see. Martin Cunneen, Martin Mullins, Finbarr Murphy, Darren Shannon, Irini Furchi, and Cian Ryan, "Autonomous vehicles and avoiding the trolley (dilemma): vehicle perception, classification, and the challenges of framing decision ethics." *Cybernetics and Systems* 51.1 (2020): 59-80.

The WP29 guidance also gives substance to the phrase " legal effects concerning him or her or similarly significantly affects him or her" in the GDPR, [41] which is relevant to the scope of the investigation. According to WP251, legal effects can be said to exist when a person's rights under the law are affected or are affected by his legal position or by his rights under a contract. A " similarly significantly affects" may also be met. The Panel emphasises that even if it does not affect people's legal rights, the decision-making process may still fall within the scope of Article 22 if its effect is equivalent or similar. "Similarly" means that the threshold of significance must be similar to that of a legal or contractual effect on a right. If it is interpreted from the perspective of autonomous driving, we can say that automatic vehicle detection and decision making systems based on these systems comply with Article 22 of the GDPR, and have a significant legal effect or similarly significant effect both towards the vehicle occupants and towards other stakeholders in the transport environment and, accordingly, the relevant rules of the GDPR apply to these vehicles.

The situation is exciting in two respects. One 'classic' privacy problem is that car manufacturers are moving in the direction of, and are currently working towards, the possibility of controlling self-driving vehicles remotely from the manufacturer, if necessary. This obviously implies the transfer of personal data (even to third countries) and the occasional use and even in-depth analysis of these data. This raises not only ethical but also very serious legal concerns in relation to self-driving vehicles, as it could lead to a practice that is contrary to European data protection legislation, affecting a significant number of data subjects, where the exercise of their rights and claims is interpreted within a very narrow framework.

The other, perhaps much more exciting question is how the opt-out rule can be interpreted in the case of self-driving cars. In the case of the driver of a self-driving car explicit consent may exist, but for example, in the case of self-driving public transport, this is only true if there is another alternative that does not involve automated decision-making. Nevertheless, the situation gets really exciting when the person subject to automated decision-making is, for example, a pedestrian who has no intention of participating in the situation in the first place. How can his or her right to opt out (or perhaps his or her right to request human intervention) be enforced? There are no clear answers to these questions at present, but it is certain this set of rules should be taken into account within the legal concerns of self-driving cars.

[41] WP251, p. 10.

5. Conclusion

How can we summarise our experience based on the above analysis? On the one hand, it seems clear that there is a clear need for a coherent approach to the regulation of autonomous transport on the part of the automotive industry and indeed the part of society as a whole. There are rational reasons for this from an economic, technological and even community coexistence perspective, yet if we look at the foundations, background and ethical determinants of the development of regulation, the problems and trends that emerge show a pattern of divergence rather than unification. There is a growing expectation that manufacturers should be proactive in protecting safety and the environment to the highest possible level. However, the legal and societal conditions for creating such technological solutions are not yet in place and in many respects are not conducive to progress.

Programming ethical standards and legislation for algorithms is not easy, not even technically. More precise instructions can improve the outcome, but in sufficiently complex situations it is questionable how detailed and precise rules can be created - it is no coincidence that the legal system uses abstract concepts that human law enforcers give meaning to. [42] Moreover, such developments always involve value choices, whether explicit or implicit. Our analysis above reveals that, in addition to the programming-technical difficulties, it is not yet clear which value choice should be preferred and who should decide on it.

In the area of legislation, if the relevant international and national legislation is not sufficiently rapid and thoughtful, industry practice in a market environment will be able to resolve the problems that arise with its own solutions itself. What is more, while industry self-regulation is often a good solution (at least temporarily) in areas where technological developments require new regulatory regimes, the problems we are discussing raise deep ethical and (fundamental) legal issues that may not be appropriate to be left to industry players to resolve. For a long time, the European Union has followed the pattern of leaving the determination of legal judgements to case law, nevertheless, recent developments suggest that the European Union is making progress in this area and is taking a pioneering role in order to correct, at least in part, its disadvantage in the use of AI vis-à-vis the United States and China once again. A new European regulatory framework for artificial intelligence and thus its application in autonomous vehicles, a package of regulations reflecting on the phenomena and its legal liability

[42] Seth D. Baum, „Social choice ethics in artificial intelligence," *AI & Society*, *35*(1), (2020): 165-176.

issues, is being developed, with the establishment of a regulatory framework to guide legal practice.[43]

However, the delay in developing European and global regulation could lead to the ex post remedy of certain malignant phenomena, rather than to the creation of a social situation that is initially, at least approximately, ideal.[44] Regulatory delay can lead to 'innovative, creative' legal solutions, which it would better to prevent than to remedy the disadvantages after they have arisen.

[43] Frederik J. Zuiderveen Borgesius, „Strengthening legal protection against discrimination by algorithms and artificial intelligence," *The International Journal of Human Rights*, 24(10), (2020): 1572-1593.

[44] Labhaoise Ni Fhaolain, Andrew Hines, and Vivek Nallur. "Assessing the Appetite for Trustworthiness and the Regulation of Artificial Intelligence in Europe," in *Proceedings of The 28th Irish Conference on Artificial Intelligence and Cognitive Science (AICS)*, (Dublin: National University of Ireland, 2020): 2-3.

New approaches to Big Data and Artificial intelligence regulation

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ABSTRACT *Big Data and so-called Artificial Intelligence (AI) are on the rise: already today, numerous devices which we use quite naturally are based on some type of AI, and the trend continues. But it is questionable whether the existing legal framework with regard to liability, privacy, product safety, database, copyright, industrial property rights, trade secrets, antitrust as well as contract and license law reflects all the new and complex (factual) issues that arise when AI is used. Moreover, current laws are fragmented due to either local / national or industry-specific regulations. This paper examines existing challenges with regard to Big Data and AI and what a future-proof legal approach to such techniques particularly from a data protection point of view, including ethical standards, may look like to address specific concerns with regard to Big Data and Artificial Intelligence.*

KEYWORDS *Big Data, Artificial Intelligence, risks of technology, future-proof legal approach*

1. Introduction

Big Data and so-called Artificial Intelligence (AI) are on the rise:[1] already today, numerous devices[2] which we use quite naturally are based on some type of AI, and the trend continues: the considerable increase in AI patent applications[3] seems to indicate a switch from research to even more practical applications of AI techniques, and many believe that the introduction of Big Data and AI will lead to significant growth of productivity.[4] Some say that

[1] Martin Szczepanski, "Economic Impacts of Artificial Intelligence" EP briefing paper (2019): 2, available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637967/EPRS_BRI(2019)637967_EN.pdf.

[2] For example, navigation systems and many other so-called "applications" (Apps).

[3] "Artificial Intelligence", WIPO Technology Trends 2019, available at https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1055.pdf.

[4] Background information summarized by McKinsey Global Institute: Notes from the AI Frontier "Modeling the Impact of AI on the World Economy" (September 2018),

AI's potential is so big that they speak of it as the fourth industrial revolution.[5] But it is questionable whether the existing legal framework with regard to liability, privacy, product safety, database, copyright, industrial property rights, trade secrets, antitrust as well as contract and license law reflects all the new and complex (factual[6]) issues that arise when AI is used. Moreover, current laws are fragmented due to either local / national or industry-specific regulations (e.g. finance and health sector). This paper examines existing challenges with regard to Big Data and AI and what a future-proof legal approach to such techniques particularly from a data protection point of view, including ethical standards, may look like to address specific concerns with regard to Big Data and Artificial Intelligence.

2. Potential hazards with regard to Big Data and Artificial Intelligence

From a privacy and data protection perspective, the use of Big Data, automated decision-making (ADM) and Artificial Intelligence entails a variety of risks: the combination of datasets and data aggregation have the potential to complete the picture about a human being and to reveal previously unknown facts; secondary use of data and dynamic processing of data may lead to opaqueness of processing and loss of human oversight; the probabilistic nature of certain AI processing techniques may lead to results which are not any more based on causality; the risk of identification may lead to identity threats, discrimination and vulnerability; the imbalance between the parties, i.e. "Big Tech players" on the one hand and individuals on the

available at https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Artificial%20Intelligence/Notes%20from%20the%20frontier%20Modeling%20the%20impact%20of%20AI%20on%20the%20world%20economy/MGI-Notes-from-the-AI-frontier-Modeling-the-impact-of-AI-on-the-world-economy-September-2018.ashx.

[5] However, the term does not only refer to AI, but also to other emerging techniques such as the internet of things, robots, automation, quantum computing or 3D printing: Klaus Schwab (2016): The Fourth Industrial Revolution: what it means, how to respond, online-article posted on January 14, 2016, available at https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/.

[6] For example, the impact on the labor market: Job destruction in the short term and job creation in the long term: 2018 study of the European Parliament Research Service (EPRS): Global Trends to 2035, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2018/627126/EPRS_STU(2018)627126_EN.pdf.

other hand, it may lead to information injustice; privacy self-management is at risk since users are overwhelmed[7] and because consent sometimes is nothing but a click-mechanism[8] and not about individual choice.

It even seems that existing and well-intentioned requirements like transparency lead to further problems in the area of privacy self-management and controls as they may result in undesirable trade-offs between different data protection principles:[9] in this regard, the UK's Information Commissioner's Office[10] explains that such tensions may arise between accuracy and fairness vs. privacy, and fairness vs. accuracy as well as explicability vs. accuracy and security, for example: more data may lead to more accuracy, but at the expense of the individual's privacy; if AI is tailored to avoid discrimination by removing certain indicators, this may have an impact on accuracy; if AI is tested to see if it may be discriminatory, it needs to be tested by using data that is labeled by protected characteristics, but that may be restricted under privacy laws that govern the processing of special category data.

AI may moreover implicate a variety of ethical challenges that can have a significant impact on people's chances in life: recruitment tools based on AI may lead to bias, discrimination and exclusion;[11] facial recognition algorithms return much more false positive for African American faces relative to images of Caucasians,[12] which may result in stigmatization and accusations; automated systems may leave welfare recipients cut off with nowhere to turn,[13] and that raises serious questions with regard to fairness and due process,

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[7] A recent study found that 14.2% of App Privacy Policies contained logical contradicting statements about data collection: online-article by Odia Kagan published on January 26, 2020, available at https://dataprivacy.foxrothschild.com/2020/01/articles/privacy-policies/study-of-android-app-privacy-policies-finds-contradicting-language/.

[8] And very often misunderstood by businesses, for example when they treat transparency like terms and conditions and force users to consent to their privacy policy instead of obtaining a specific opt-in as appropriate.

[9] Reuben Binns and Valeria Gallo, "Trade-offs" July 25, 2019, available at https://ico.org.uk/about-the-ico/news-and-events/ai-blog-trade-offs/.

[10] Ibid.

[11] Maya Oppenheim, "Amazon scraps 'sexist AI' recruitment tool" posted on October 11, 2018, available at https://www.independent.co.uk/life-style/gadgets-and-tech/amazon-ai-sexist-recruitment-tool-algorithm-a8579161.html.

[12] Background information on the study by the National Institute of Standards and Technology (NIST), that was published in late 2019, is available at https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software.

[13] Luke Henriques-Gomes, "The Automated System Leaving Welfare Recipients Cut off with Nowhere to Turn" (October 16, 2019) available at

and in some countries, so-called social scoring that tracks and evaluates all aspects of life, is a reality.[14] In addition, the case of Cambridge Analytica[15] has shown the political dimension of non-transparent use of data to pursue profane or even illegal objectives.

From an economical and societal perspective, automation with the help of a new "virtual workforce" may lead to serious consequences for the "traditional workforce": the more AI solutions replace routine labor, the stronger the impact on the labor market may be with desired effects like productivity growth[16] and undesired effects like job destruction.[17] There are estimates that as many as fifty percent of jobs in the EU face the risk of replacement by computerization within the next twenty years.[18] Therefore, some conclude that the use of Artificial Intelligence will reinforce inequality

https://www.theguardian.com/technology/2019/oct/16/automated-messages-welfare-australia-system?etcc_med=newsletter&etcc_cmp=nl_algoethik_13834&etcc_plc=aufmacher&etcc_grp=

[14] Nicole Kobie, "The complicated truth about China's social credit system" (June 7, 2019) available at https://www.wired.co.uk/article/china-social-credit-system-explained.

[15] Facebook transferred millions of user profiles to the data mining company of Cambridge Analytica. Background information on the case can be found at the website of the Electronic Privacy Information Center (EPIC), available at https://epic.org/privacy/facebook/cambridge-analytica/.

[16] The so-called productivity paradox was examined by Erik Brynjolfsson, Daniel Rock, Chad Syverson in their 2017 paper: Artificial Intelligence and the Modern Productivity Paradox – a Clash of Expectations and Statistics, National Bureau of Economic Research (NBER) working paper no. 24001, available at https://www.nber.org/papers/w24001.pdf.

[17] Job destruction in the short term and job creation in the long term 2018 study of the European Parliament Research Service (EPRS): Global Trends to 2035, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2018/627126/EPRS_STU(2018)627126_EN.pdf.

[18] Jeremy Bowles, "The computerisation of European jobs" online-article for the think-tank Bruegel (July 24, 2014) available at https://bruegel.org/2014/07/the-computerisation-of-european-jobs/.

by making society as such richer,[19] but at the expense of certain industry sectors[20] as well as individuals who may suffer loss of employment.[21]

3. The trouble with the existing legal framework

The general problem is that the legal development is lagging behind the technological progress since there is no harmonized regulatory framework governing the use of Big Data and AI. From a data protection perspective, the General Data Protection Regulation (GDPR) has rules on automated decision-making, profiling, transparency, security, outsourcing and consent. But these rules do not offer enough ethical safeguards[22] and they do not seem to be sufficient to tackle the so-called black-box problem[23] and to ensure explicability of decisions: in contrast to transparency, explicability requires the delivery of information beyond the algorithmic decision systems itself.[24]

In addition, clear liability guidance is needed to further harmonize the regulatory framework of AI to treat this technology appropriately, and that is why some argue to develop a proportionate civil liability regime including product liability, negligence and strict liability models as well as compulsory

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[19] An interesting idea in this context is taxation of robots to the extent 'normal workforce' would have been taxed for their labor: Kevin Delaney, "The robot that takes your job should pay taxes says Bill Gates" (February 17, 2017) available at https://qz.com/911968/bill-gates-the-robot-that-takes-your-job-should-pay-taxes/.

[20] "Notes from the AI Frontier" Mckinsey&Company discussion paper issued in April 2018, available at https://www.mckinsey.com/%7E/media/mckinsey/featured%20insights/artificial%20intelligence/notes%20from%20the%20ai%20frontier%20applications%20and%20value%20of%20deep%20learning/notes-from-the-ai-frontier-insights-from-hundreds-of-use-cases-discussion-paper.ashx.

[21] Background information on this issue is provided by Martin Szczepanski, "Economic impacts of Artificial Intelligence" EP briefing paper, (2019): 7, available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637967/EPRS_BRI(2019)637967_EN.pdf.

[22] Background information on this issue can be found in the EPRS document: EU guidelines on ethics in artificial intelligence, (2019), available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/640163/EPRS_BRI(2019)640163_EN.pdf.

[23] IBM is working on ways to make AI more transparent: Martin Beyer, "IBM will KI transparenter machen" (September 20, 2019) available at https://www.computerwoche.de/a/ibm-will-ki-transparenter-machen,3545816.

[24] "Understanding algorithmic decision-making" EPRS study, (2019): 6-7, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2019/624261/EPRS_STU(2019)624261_EN.pdf.

insurance schemes to ensure a clear division of responsibilities among designers, manufacturers, service providers and end users.[25] Consequently, the European Commission dealt with the issue in their expert report on liability for Artificial Intelligence and other emerging technologies[26] and came up with various recommendations with regard to liability amongst manufacturers, service providers and users. The Commission suggested instances in which strict liability should be applied and explained situations in which the degree of control over the product or service in question should be taken into account in order to determine liability; the Commission also expressed the opinion that a facilitation of proof was needed, that the destruction of data should be regarded as (compensable) damage, and that there was no need for new legal personalities. The European Parliament's resolution on 'Civil law rules on robotics' also concluded that robots should not be given a legal personality, even if robots interacted independently with third parties.[27] Difficulties also arise from the fact that the existing product liability has not been amended to reflect specific implications AI may involve: the European Commission determined that the Directive, which had been in place for over thirty years, required further work, but was still fit for purpose.[28] But AI-driven products should be subject to product safety as well as cyber-security rules[29] to properly

[25] Mihalis Kritikos, "Artificial Intelligence ante portas: Legal and ethical reflections" EPRS briefing, 3, available at https://www.europarl.europa.eu/at-your-service/files/be-heard/religious-and-non-confessional-dialogue/events/en-20190319-artificial-intelligence-ante-portas.pdf.

[26] The report was written by the Expert Group on Liability and New Technologies (New Technologies Formation), (2019), available at https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=36608.

[27] European Parliament: European Civil Law Rules on Robotics (2017): 16, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571379/IPOL_STU(2016)571379_EN.pdf.

[28] Report on the Application of the Council Directive on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products (85/374/EEC) issued on May 7, 2018, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1525769201372&uri=COM:2018:246:FIN.

[29] *See* also rules on internet-connected device: background on the IoT regulatory framework for Europe is provided in the Vodafone White Paper published in June 2019, available at https://www.vodafone.com/content/dam/vodcom/files/public-policy/iot-whitepaper/IoT_whitepaper_.pdf.

address the risk of accidents[30] and damage resulting from interaction with humans. The question of whether or not data ownership[31] might strengthen individuals' position and help to complete the regulatory landscape is also unresolved, and in some cases, even antitrust issues may be a factor to consider as the recent German Facebook case has shown.[32]

The complexity of the legal framework as such is a challenge, and another issue to consider is that existing rules on the regulation of Artificial Intelligence at present are rather about soft law, and that is why many call for clarification and harmonization[33] as well as standardization / certification regimes. As a matter of fact, various standardization organizations are already working on AI technical standards.[34] Others discuss the idea of specific algorithmic impact assessments to strengthen accountability[35] or the introduction of (mandatory independent) audits, for example in the context of the possible military application of algorithms or evidence-based sentencing,[36]

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[30] For example, self-driving car fatalities: 'Wired' reported about the latest Tesla car crash on May 16, 2019: https://www.wired.com/story/teslas-latest-autopilot-death-looks-like-prior-crash/.

[31] Jürgen Kühling and Florian Sackmann, „Irrweg Dateneigentum, Zeitschrift für Datenschutz" (2020): 24-30.

[32] The antitrust authority's ruling that social-media giant abused its dominance was reversed: Sara Germano online-article (August 26, 2019), available at https://www.wsj.com/articles/facebook-wins-appeal-against-german-data-collection-ban-11566835967.

[33] Tambiama Madiega, "EU guidelines on ethics in artificial intelligence: Context and implementation" EP briefing paper, 7, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/640163/EPRS_BRI(2019)640163_EN.pdf.

[34] For example, the joint technical committee of the International Organization for Standardization (ISO) and the International Electro-technical Commission (IEC) or the Institute of Electrical and Electronics Engineers (IEEE), source: Tambiama Madiega, "EU guidelines on ethics in artificial intelligence: Context and implementation" EP briefing paper (2019): 8, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/640163/EPRS_BRI(2019)640163_EN.pdf.

[35] Background information on this approach is provided by Tambiama Madiega, "EU guidelines on ethics in artificial intelligence: Context and implementation" EP briefing paper, (2019): 5, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/640163/EPRS_BRI(2019)640163_EN.pdf

[36] Mihalis Kritikos, "What if algorithms could abide by ethical principles?" EPRS briefing paper, (2019): 2, available at http://www.europarl.europa.eu/RegData/etudes/ATAG/2018/624267/EPRS_ATA(2018)624267_EN.pdf.

which could even become a condition for rewarding procurement contracts.[37] Further initiatives deal with the establishment of oversight bodies[38] or ethical committees in order to monitor effects of AI systems, to take long-term risks into consideration and to set up a public debate in this field[39] and discuss new data subject rights, for example, the right not to be measured and the right to meaningful human contact. Others argue for expanding the powers of regulators[40] or for the creation of a new regulatory body for algorithmic decision-making tasked with defining criteria to differentiate acceptable ADMS – including the prohibition of certain systems.[41] In the context of Artificial Intelligence, some discuss the introduction of technology-specific rules (for example for facial recognition[42]), and the amendment of GDPR rules in certain areas (for example the health sector[43]), or think about the development of a code of ethical conduct for robotics engineers.[44] This is interesting insofar as regulatory approaches do consider principles like

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[37] Alan Winfield, "Ethical standards in Robotics and AI" Nature Electronics vol. 2, (2019) available at https://doi.org/10.1038/s41928-019-0213-6.

[38] New York City has recently introduced an Automated Decision System Task Force. Background information can be found in the corresponding report which was published in November 2019, available at https://www1.nyc.gov/assets/adstaskforce/downloads/pdf/ADS-Report-11192019.pdf.

[39] For example, France's AI strategy: Cédric Villani, "For a Meaningful Artificial Intelligence: Towards a French and European Strategy" 2018, the full report is available at https://www.aiforhumanity.fr/pdfs/MissionVillani_Report_ENG-VF.pdf.

[40] Kate Crawford, Roel Dobbe, Theodora Dryer, Genevieve Fried, Ben Green, Elizabeth Kaziunas, Amba Kak, Varoon Mathur, Erin McElroy, Andrea Nill Sánchez, Deborah Raji, Joy Lisi Rankin, Rashida Richardson, Jason Schultz, Sarah Myers West, Meredith Whittaker, "AI Now 2019 Report" AI Now Institute, 2019, available at https://ainowinstitute.org/AI_Now_2019_Report.pdf.

[41] EPRS study, "A governance framework for algorithmic accountability and transparency" (April 2019) available at https://www.europarl.europa.eu/RegData/etudes/STUD/2019/624262/EPRS_STU(2019)624262_EN.pdf.

[42] Interim report of the Biometrics and Forensics Ethics Group Facial Recognition Working Group, "Ethical issues arising from the police use of live facial recognition technology" (2019) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781745/Facial_Recognition_Briefing_BFEG_February_2019.pdf.

[43] In 2018, the University of Oxford conducted a study in which it stressed the need to analyze the implementation of the GDPR in the field of health research: Healthcare, Artificial Intelligence, Data and Ethics – A 2030 vision, available at https://www.digitaleurope.org/wp/wp-content/uploads/2019/02/Healthcare-AI-Data-Ethics-2030-vision.pdf#page=28.

[44] Kritikos "Artificial Intelligence ante portas: Legal and ethical reflections" 6

accountability, but this is not the same as imposing direct obligations on the humans behind the design and the users of AI applications: system design plays an important role in terms of preventing bias and respecting individuals' rights and liberties.

The fact that there are so many different challenges with regard to AI has caused the European Union's High-Level Expert Group (HLEG) to conclude that AI shall be tailored in a new, trustworthy (i.e. lawful, ethical and robust) manner,[45] and this requires a human-centered approach that takes ethical[46] and societal[47] consequences into consideration. Since the existing legal framework does not seem to be tailored to meet all the potential risks of Big Data and Artificial Intelligence, HLEG's recommendations for trustworthy AI even go so far as to talk about not only the evaluation, but also the potential revision of EU laws.[48] This shows that there may indeed be a need for new provisions to ensure an adequate protection from adverse impacts which go beyond current (privacy) documentation, transparency and assessment requirements in order to adopt an adequate legal framework for Big Data and Artificial Intelligence. However, the European Data Protection Board recently published a letter on the appropriateness of the GDPR as a legal framework to protect citizens from unfair algorithms and expressed their view that there was no immediate need for new laws to address unfair algorithms.[49] But the above-described potential impacts show that Artificial Intelligence may indeed have real life implications, and that is why it is worth thinking about new approaches, in other words: even though no law can encode the entire complexity of technology, it is time for an "*ethical regulation of the digital*

[45] On 8 April 2019, the High-Level Expert Group on AI presented Ethics Guidelines for Trustworthy Artificial Intelligence. The guidelines are available at https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai.

[46] For example, challenges with regard to discrimination that may occur if AI is not programmed in a manner that avoids potentially negative consequences.

[47] For example, challenges for the labor market that go along with digitization.

[48] "HLEG's Policy and Investment Recommendations" (June 26, 2019), available at https://ec.europa.eu/digital-single-market/en/news/policy-and-investment-recommendations-trustworthy-artificial-intelligence.

[49] Odia Kagan, "EDPB: No Immediate Need for New Laws to Address Unfair Algorithms" (February 3, 2020.) available at https://dataprivacy.foxrothschild.com/2020/02/articles/european-union/edpb-no-immediate-need-for-new-laws-to-address-unfair-algorithms/?utm_source=Fox+Rothschild+LLP+-+Privacy+Compliance+%26+Data+Security&utm_campaign=e33b276dbc-RSS_EMAIL_CAMPAIGN&utm_medium=email&utm_term=0_8c56221025-e33b276dbc-74997709.

revolution".[50] The recent case of Clearview,[51] an App capable of identifying individuals based on a single photo is an alarming example of vast and non-transparent harvesting and secondary use of personal data: by the time the public[52] became aware of this, the App had already been in use by hundreds of law enforcement agencies.[53] Facial recognition is such a sensitive topic that the EU is considering a temporary ban in public places for up to five years until safeguards to mitigate the technology's risks are in place.[54]

4. New approaches

As regards GDPR, apart from rules regarding automated individual decision-making and profiling including the right to object (which some interpret as a prohibition) and the treatment of sensitive data, there is no specific regulation of Artificial Intelligence. Therefore, the Council of Europe has recently called for further clarification on how the GDPR applies to new technologies[55] since they may challenge fundamental rights. One may say that the regulation of AI is still in its infancy, but the relevance of Big Data and Artificial Intelligence for the economy together with the above-described potential for risks lead to several initiatives at international and national level: the International

[50] Kritikos "What if algorithms could abide by ethical principles?"

[51] The German newspaper "Süddeutsche" called the case a "nightmare for privacy", a "software that shocks": online-article by Jannis Brühl and Simon Hurtz posted on January 20, 2020, available at https://www.sueddeutsche.de/digital/gesichtserkennung-clearview-app-polizei-gesicht-1.4764389.

[52] Several companies have contacted Clearview requesting that the(ir) material shall be deleted: Facebook adds itself to the list of companies demanding Clearview cease scraping its websites. Online-article by Cal Jeffrey, posted on February 6, 2020, available at https://www.techspot.com/news/83900-facebook-adds-itself-list-companies-demanding-clearview-cease.html.

[53] Jon Porter, "Go read this – NYT expose on a creepy new facial recognition database used by US police" (January 20, 2020) available at https://www.theverge.com/2020/1/20/21073718/clearview-ai-facial-recognition-database-new-york-times-investigation-go-read-this.

[54] Anthony Spadafora, "EU calls for five-year ban for facial recognition" online-article posted on January 20, 2020, available at https://www.techradar.com/news/eu-calls-for-five-year-ban-on-facial-recognition.

[55] Council position and findings on the application of the General Data Protection Regulation (GDPR) issued on December 19, 2019, available at https://www.huntonprivacyblog.com/wp-content/uploads/sites/28/2019/12/EU-Perm-Reps-GDPR-Position.pdf.

Conference of Data Protection and Privacy Commissioners (ICDPPC)[56], the International Working Group on Data Protection in Telecommunications (IWGDPT)[57] as well as the European Commission,[58] the Council of Europe[59] and the Organization for Economic Co-operation and Development (OECD)[60] issued guidance and recommendations for AI, and the European Parliament published European Civil Law Rules on Robotics.[61] Moreover, the European Parliament has approved a resolution on AI and automated decision-making.[62] Recently, the first supervisory authorities have issued statements on data processing and artificial intelligence.[63] Expert groups have also developed

[56] "Declaration on Ethics and Data Protection in Artificial Intelligence" (2018) available at https://icdppc.org/wp-content/uploads/2018/10/20180922_ICDPPC-40th_AI-Declaration_ADOPTED.pdf.

[57] "Working Paper on Privacy and Artificial Intelligence" (2019) available at https://www.datenschutz-berlin.de/infothek-und-service/veroeffentlichungen/working-paper/.

[58] Background information about the Commission's High Level Expert Group on Artificial Intelligence is available at https://ec.europa.eu/digital-single-market/en/high-level-expert-group-artificial-intelligence.

[59] Up to date news on the Council's work in the area of artificial intelligence is available at https://www.coe.int/en/web/artificial-intelligence/-/new-guidelines-on-artificial-intelligence-and-data-protection.

[60] OECD 2019 Recommendation of the Council on Artificial Intelligence is available at https://www.oecd.org/going-digital/ai/principles/. Moreover, in June 2019, G20 issued a Ministerial Statement on Trade and Digital Economy which included "human-centered AI Principles" that draw from the OECD AI Principles.

[61] "European Civil Law Rules on Robotics" (2016), available at https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571379/IPOL_STU(2016)571379_EN.pdf.

[62] The resolution was issued in January 2020. The full text is available at https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/IMCO/DV/2020/01-22/RE_1194746_EN.pdf.

[63] In Germany, the Conference of Independent Data Protection Supervisory Authorities issued the "Hambacher Erklärung" on April 3, 2019. The text of the declaration is available at https://www.datenschutzkonferenz-online.de/media/en/20190405_hambacher_erklaerung.pdf. Moreover, Latin American and Spanish DPAs issued A joint statement on data processing and AI, its key recommendations are summarized by Odia Kagan in an online-article that was published on October 24, 2019, available at https://dataprivacy.foxrothschild.com/2019/10/articles/general-privacy-data-security-news-developments/latin-american-and-spanish-dpas-issue-joint-statement-on-data-processing-and-ai/.

papers on AI[64] and data ethics[65] and liability for Artificial Intelligence and other emerging technologies.[66] Even though their statements are non-binding, the opinion of experts has weight when it comes to interpreting the challenges of AI, and any such 'soft law' may help to stimulate discussions and further shape the regulatory framework on AI. It is also important to note that meanwhile, sector[67]- / product-specific rules have been enacted, for example, "MiFiD" II[68] for the financial market when algorithms are used for high frequency algorithmic trading[69] or rules and regulations with regard to (lethal) autonomous weapon systems (LAWS)[70] as well as autonomous driving: the

[64] For example: "Universal Guidelines for AI" the Public Voice, (2018), available at https://thepublicvoice.org/ai-universal-guidelines/ or "Protecting the Right to Equality and Non-Discrimination in Machine Learning Systems" Amnesty International & Access Now, Toronto Declaration, 2018, available at https://www.accessnow.org/cms/assets/uploads/2018/08/The-Toronto-Declaration_ENG_08-2018.pdf.

[65] "Top 10 Principles for Ethical Artificial Intelligence" UNI Global Union, (2017), available at http://www.thefutureworldofwork.org/media/35420/uni_ethical_ai.pdf.

[66] "Liability for Artificial Intelligence and other emerging digital technologies" European Commission, (2019) available at https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=36608.

[67] For example, the European Parliament has recently endorsed a Digital Health Resolution to enable the digital transformation in the health sector: "*The resolution calls on the European Commission to take a number of actions to foster the development of digital health systems in Europe to improve patient care and support research efforts — particularly those using innovative technologies such as AI*": online-article by Sam Jungyun Choi, posted on January 13, 2020, available at https://www.covingtondigitalhealth.com/2020/01/european-parliament-endorses-digital-health-resolution/.

[68] Markets in Financial Instruments (MiFID II). The text of Directive 2014/65/EU is available at https://ec.europa.eu/info/law/markets-financial-instruments-mifid-ii-directive-2014-65-eu_en.

[69] Danny Busch (2017): MiFID II - Regulating High Frequency Trading, Other Forms of Algorithmic Trading and Direct Electronic Market Access, Law and Financial Markets Review 2016/2, available at: https://ssrn.com/abstract=3068104 or http://dx.doi.org/10.2139/ssrn.3068104 explains how algorithmic trading is subject to supervision.

[70] Background information on the topic is provided by Kenneth Anderson and Matthew Waxman, "Law and Ethics for Autonomous Weapon Systems: Why a Ban Won't Work and How the Laws of War Can" American University Washington College of Law, 2013, Research Paper No. 2013-11, available at http://ssrn.com/abstract=2250126.

1968 Vienna Convention on Road Traffic was amended in 2016[71] in order to allow for transferring driving tasks to autonomous vehicles (AV); AV is considered one of the most remarkable use cases and one of the most critical components in the so-called Fourth Industrial Revolution.[72]

In addition, various countries started working on national strategies to develop own frameworks and strengthen their competitive position with regard to AI, for example Canada,[73] Japan,[74] Australia,[75] China,[76] Brazil,[77]

[71] The corresponding press release: UNECE paves the way for automated driving by updating UN international convention was published on March 23, 2016 and is available at https://www.unece.org/info/media/presscurrent-press-h/transport/2016/unece-paves-the-way-for-automated-driving-by-updating-un-international-convention/doc.html.

[72] "Filling Legislative Gaps in Automated Vehicles" World Economic Forum, White Paper in cooperation with Sompo Holdings Inc. (April 2019), available at http://www3.weforum.org/docs/WEF_Filling_Legislative_Gaps_in_Automated_Vehicles.pdf.

[73] Canada and France work with the international community to support the responsible use of artificial intelligence. The corresponding press release from May 16, 2019. is available online at https://www.gouvernement.fr/sites/default/files/locale/piece-jointe/2019/05/23_cedrico_press_release_ia_canada.pdf.

[74] A translation of Japan's Draft AI R&D Guidelines for international discussion (2019) is available at http://www.soumu.go.jp/main_content/000507517.pdf.

[75] The Australian government issued a statement on AI Ethics in 2019. Background information and components are available at https://www.industry.gov.au/data-and-publications/building-australias-artificial-intelligence-capability/ai-ethics-framework.

[76] China established an AI Governance Expert Committee and released eight non-binding AI principles to guide AI development. The guidelines were published on June 17, 2019. by China's Ministry of Science and Technology. English translation is available at https://perma.cc/V9FL-H6J7.

[77] Brazil also started working on a national strategy for AI: online-article by Arkady Petrov posted on December 17, 2019. available at https://riotimesonline.com/brazil-news/technology/brazil-advances-to-regulate-the-use-of-artificial-intelligence/.

France,[78] Germany[79] or India[80] and the USA.[81] Already in 2008, South Korea enacted a general law on the "intelligent robot industry" which authorized the government to enact a charter on intelligent robot ethics.[82] Some countries even took first steps to introduce AI in the area of justice.[83] The progression in the United States is interesting as there seems to be a trend towards a comprehensive privacy bill and a trend to shape the U.S. policy on artificial intelligence: in November 2019, Democratic Senators introduced the Consumer Online Privacy Rights Act (COPRA),[84] a major initiative after the California Consumer Privacy Act (CCPA).[85] Further initiatives[86] include rules on algorithmic accountability, which require large companies that possess or control large amounts of personal data to conduct impact assessments or the establishment of a national AI Coordination Office based on the Artificial Intelligence Initiative Act (AI-IA). Even companies have taken up the topic

[78] France developed an AI strategy in 2018. The paper is available at https://www.aiforhumanity.fr/pdfs/MissionVillani_Report_ENG-VF.pdf.

[79] The country's AI strategy was presented in November 2018 and is available at https://ec.europa.eu/knowledge4policy/publication/germany-artificial-intelligence-strategy_en.

[80] EPRS, EU Guidelines on Ethics in Artificial Intelligence, (2019): 11.

[81] In February 2019, the White House published an "Executive Order on Maintaining American Leadership in Artificial Intelligence", available at https://www.whitehouse.gov/presidential-actions/executive-order-maintaining-american-leadership-artificial-intelligence/. In addition, on November 2019, the Senate released a set of "core principles" for federal privacy legislation. The text of this new privacy and data protection framework is available at https://www.huntonprivacyblog.com/2019/11/22/senate-democrats-unveil-privacy-and-data-protection-framework/.

[82] Intelligent Robots Development and Promotion Act (Act No. 9014) of 2008 amended in 2016 by Act No. 13744, available at http://elaw.klri.re.kr/eng_service/lawView.do?hseq=39153&lang=ENG.

[83] On 27 September 2018, the Council of Europe European Commission for the efficiency of justice (CEPEJ) and the Courts Administration of the Latvia organized a conference on "Artificial Intelligence at the Service of the Judiciary" in Latvia; the corresponding presentation and background information is available at https://www.coe.int/en/web/cepej/justice-of-the-future-predictive-justice-and-artificial-intelligence.

[84] The text of the bill is available at https://www.cantwell.senate.gov/imo/media/doc/COPRA%20Bill%20Text.pdf.

[85] The text of the bill is available at https://oag.ca.gov/system/files/initiatives/pdfs/19-0021A1%20%28Consumer%20Privacy%20-%20Version%203%29_1.pdf.

[86] An overview over AI legislation in the United States is provided by the Center for Data Innovation within their 'AI Tracker' last updated on December 2, 2019, available at https://www.datainnovation.org/ai-policy-leadership/ai-legislation-tracker/.

and developed their own guidelines on this subject[87] so that developments do not only take place at legislative level, but also within the private sector. However, the difference being that the latter is about self-regulation. Despite the fact that there are deviations in detail, all of the initiatives share some common thoughts, mostly with focus on transparency, accountability, fairness, safety, privacy as well as the respect for individual rights and non-discrimination. Further key objectives are accuracy, reliability, auditability, explicability, reproducibility, contestability, human oversight, assessment, the prevention of harm and data ethics. Some also mention the need for interoperability of systems and societal well-being as a long-term aspect to consider.

New developments in the area of Big Data and Artificial Intelligence can be demonstrated by using the examples of the Universal Guidelines on AI and the Ethics Guidelines for trustworthy AI, the expert opinion of the German Data Ethics Commission and the European Parliament's resolution on AI and automated decision-making: The Universal Guidelines for Artificial Intelligence[88] suggest that all individuals have the right to a final determination made by a person, and that *"an institution that has established an AI system has an affirmative obligation to terminate the system if it will lose control of the system*". Human determination is a well-known factor that has been much discussed in the framework of automated decision-making and profiling, but the termination obligation is a new aspect. The same applies to further requirements the Universal Guidelines on AI introduce, for example the reproducibility of decisions: there is a subtle but important difference between providing meaningful information and being able to replicate a decision in detail, since the latter refers to the specific, individual decision, not the general logic behind the processing operation. One could argue that this prerequisite is met when general transparency needs and specific individuals' access rights are combined, but providing information about purposes, categories and recipients of data, etc. as mentioned in GDPR Article 15 (1) as

[87] For example, telecommunication companies like the German Telekom (https://www.telekom.com/en/company/digital-responsibility/digital-ethics-deutsche-telekoms-ai-guideline) and Telefónica (https://www.telefonica.com/en/web/responsible-business/our-commitments/ai-principles).

[88] The Universal Guidelines on Artificial Intelligence were announced during a data protection conference in Brussels. More than 150 experts and 40 NGOs, representing 30 countries around the world endorsed the guidelines, see Candace Paul: Universal Guidelines for Artificial Intelligence Announced in Brussels, blog entry posted online on October 23, 2018, available at https://blog.epic.org/2018/10/23/universal-guidelines-artificial-intelligence-announced-brussels/.

well as "a copy of the personal data undergoing processing" in accordance with GDPR Article 15 (3) is not the same as providing a replicable decision. This might be problematic when dynamic, autonomous processing of personal data is in question as this would involve the need to track the way the decision was taken. Another important requirement the Universal Guidelines on AI suggest is the prohibition of secret profiling, which is also reflected in Fair Information Practices[89]: while it is true that the Regulation stipulates that processing of personal data must be made transparent, the challenge is to meet that prerequisite in situations where not even the controller knows in detail what exactly the virtual workforce is doing since they may operate independently. A further interesting aspect of the Universal Guidelines on AI that contributes to the discussion is that the true operator of an AI system must be made known to the public and that institutions shall assess the public safety risks which arise from the deployment of AI systems that direct or control physical devices. Both ideas go beyond current requirements: at first sight, the identification obligation seems to be the same like GDPR's obligation to provide information about the identity of the controller. Once more, a slight difference has a big, and probably significant impact given that nowadays, in many instances, a multitude of service providers are involved in data processing[90], and that the dominant and decisive part of processing operations is outsourced, for example: if a person submits a credit loan, people assume that the bank as the contracting party is processing their data. In fact, the bank itself relies on (several) rating agencies to assess the individual's creditworthiness, and the information the data subject has provided directly is of less value than the (combination of) data other vendors have contributed.[91]

As regards the idea that institutions shall assess the public safety risks in the context of AI systems which direct or control physical devices, this is also not the same like privacy impact assessments the Regulation foresees, because the focus of assessments under GDPR Article 35 is the evaluation of risks to the rights and freedoms of natural persons and their impacts of the envisaged processing operations on the protection of personal data. Recital 75, which specifies risks to the rights and freedoms of natural persons, is very broad; it refers to physical, material or non-material damage or any other significant

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[89] Daniel Solove, *Understanding Privacy* (Cambridge Massachusetts: Harvard University Press, 2008), 133.

[90] PayPal's third party information (available at https://www.paypal.com/de/webapps/mpp/ua/third-parties-list) is a good example: printed, the document contains more than 80 pages.

[91] Which is all the more true given that various compliance obligations have to be met in the context of risk management, for example, matching against and monitoring of sanction lists or screenings of "politically exposed persons".

economic or social disadvantage. It names a lot of concrete examples of risks such as discrimination, identity theft, fraud, financial loss, damage to the reputation, loss of control, unauthorized reversal of pseudonymization. It also covers many scenarios like processing operations in which sensitive data like genetic or health data, data concerning criminal convictions and offences are used; processing operations which reveal racial or ethnic origin, political opinions, religion or philosophical beliefs or trade union membership, or in which personal aspects are evaluated that may serve to analyze or predict performance at work, economic situation, health, personal preferences or interests, behavior or movements – the list is quite long, but it does not include public safety risks which may arise from the deployment of AI systems.

The European Union had taken an important initiative with regard to Artificial Intelligence: 25 European countries signed a declaration of cooperation on Artificial Intelligence in which they declared their will to join forces and engage in a European approach to the topic.[92] In spring 2019, the High-Level expert group on AI presented ethics guidelines for trustworthy Artificial Intelligence.[93] According to these guidelines, AI can only be considered trustworthy if it respects and incorporates both, applicable laws and regulations, as well as ethical principles and values. The guidelines present the following key requirements AI-systems have to meet in order to be considered trustworthy:[94] transparency, fairness, accountability, diversity and non-discrimination, privacy, data governance, human agency and oversight, technical robustness and safety, societal and environmental well-being. Trustworthy AI can therefore be described as lawful, (technically) robust and ethical, and the core principle of the EU guidelines is the idea of a "human-centric" approach to AI.[95]

Most of these requirements can also be found in the Universal Guidelines for Artificial Intelligence, and these seem to contain more far-reaching provisions: apart from common principles like accountability, transparency and fairness, those guidelines contain obligations with regard to validity,

[92] European Commission news entry posted online on April 10, 2018: EU Member States sign up to cooperate on Artificial Intelligence, available at https://ec.europa.eu/digital-single-market/en/news/eu-member-states-sign-cooperate-artificial-intelligence.

[93] European Commission news entry posted online on April 18, 2019: Ethics guidelines for trustworthy AI, available at https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai.

[94] The full text of the guidelines is available at https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai.

[95] EPRS, EU Guidelines on Ethics in Artificial Intelligence, (2019): 3.

reliability, data quality and accuracy,[96] and most importantly, reproducibility of decisions, prohibition of secret profiling and national scoring, public safety and cyber-security, transparency about true operators of AI systems and the termination obligation in the event of loss of control. The idea of reproducibility of decisions together with the prohibition of secret profiling and scoring, the termination obligation and the suggestion that AI operators must be made known is truly significant and may well contribute to the rights and freedoms of individuals – if interpreted in the light of individual rights and freedoms as set forth in the United Nations Declaration of Human Rights (UDHR),[97] the European Convention on Human Rights (ECHR),[98] the Charter of Fundamental Rights of the European Union (the Charter)[99] or the Council of Europe Data Protection Convention (Convention 108+).[100] Even though these ideas sound familiar to existing GDPR provisions, they are not the same: transparency[101] is less than reproducibility; the assessment obligation[102] is less than the suggested termination obligation, and prohibition of processing of

[96] Even seemingly simple aspects like data quality shall not be underestimated: since Big Data typically relies on the combination of large datasets and the use of external data – i.e. data that was not collected directly from the data subject – accuracy of data has a direct impact on the quality of data.

[97] UDHR Article 12 sets forth that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks".

[98] ECHR Article 8 states that "everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

[99] Article 7 of the Charter deals with the "right to respect for his or her private and family life, home and communications", and Article 8 specifically addresses the protection of personal data; the relationship between these articles is disputed.

[100] This convention lays down a number of principles to ensure that personal data are processed only for specific purposes, not retained longer than necessary for the underlying purpose(s), and that the collection and processing of data are not excessive in relation to the purposes, the text of the "Modernised Convention 108: novelties in a nutshell" is available at https://rm.coe.int/16808accf8.

[101] GDPR Article 5 (1) lit. a, 12, 13, 14.

[102] GDPR Article 35.

certain types of data[103] is less than the prohibition[104] of certain types of data processing.

The recently published expert opinion of the German Data Ethics Commission[105] stresses values like non-discrimination, confirms well-established core principles and underlines the need for a human-centric approach. In total, it presents 75 recommendations for the use and control of Artificial Intelligence, including the call for a regulation for Algorithmic Systems and the introduction of a number of entirely new approaches to AI, for example labeling requirements; licensing procedures; a specific right to access for researchers and journalists in sectors that are of particular interest to society; specific duties with regard to interconnectivity in certain sectors (e.g. messaging services, social media); a risk-based regulatory approach based on a graded model for AI reflecting the degree of criticality involved in the data processing activity. The idea of a right to data ownership that has been discussed in the literature[106] as one possible way to strengthen individuals' rights is not recommended by the Ethics Commission since the introduction of new exclusive rights is believed to complicate the legal framework rather than solve existing problems.

Finally, the European Parliament's resolution on AI and automated decision-making might have the potential to provide a roadmap of areas of reform since it references several existing EU instruments that are relevant for AI[107] – not only the Product Liability Directive, but also specific product safety rules (e.g. the Machinery or the Toy Safety Directive) and the Proportionality Test Directive that stresses the importance of properly assessing risks before automating professional services: the European

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[103] GDPR Article 9 (1) with several exceptions in GDPR Article 9 (2).

[104] There is controversy if GDPR Article 22 shall be understood as an individual right or as a prohibition, see Article 29 Working Party's Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, adopted on October 3, 2017, page 20.

[105] The "Gutachten der Datenethikkommission" was published in October 2019 and is available at https://www.bmi.bund.de/SharedDocs/downloads/DE/publikationen/themen/it-digitalpolitik/gutachten-datenethikkommission.pdf;jsessionid=92BB855CAF2B68DFB5D0EB3D32FD72E4.2_cid287?__blob=publicationFile&v=5.

[106] Udo Kornmeier, „Anne Baranowski, Eigentum an Daten – Zugang statt Zuordnung" *Der Betriebsberater 2019*, 1219-1225.

[107] Lisa Peets, Marty Hansen and Sam Jungyun Choi, "European Parliament Committee Approves Resolution on AI for Consumers" (January 27, 2020), available at https://www.insideprivacy.com/artificial-intelligence/european-parliament-committee-approves-resolution-on-ai-for-consumers/.

Parliament calls for a risk-based approach to regulation, for explicable and unbiased algorithms, for internal review structures businesses have to implement to enable human intervention and correct mistakes if need be.

5. Summary

The existing legal framework seems to be insufficient to control or mitigate all potential risks of Big Data applications including automated decision-making and Artificial Intelligence. Current rules (including those on robotics) are rather about soft law as opposed to codes or certification schemes, and useful adjustments of existing relevant rules, for example, with regard to (product) liability, are still missing. Numerous ideas on how AI may be regulated in the future have been presented and several guidelines have been issued, but those approaches are not harmonized, and certain new initiatives have already faced criticism since the recommended rules do not offer enough clarity, starting with the reliability of definitions and ending with the issue of the hierarchy of principles.[108] However, the absence of effective regulation may accelerate the use of inappropriate, unaccountable or untrustworthy AI techniques in both the commercial and the public sector, and this could cause serious harm to individuals who may be exposed to opaque or unprovable decisions in areas such as employment, loans or healthcare, meaning that "*new algorithmic decision-makers are sovereign over important aspects of individuals' lives. If law and due process are absent from this field, we are essentially paving the way to a new feudal order of unaccountable reputational intermediaries*".[109] Given the severe real-life consequences certain AI and ADM applications may involve, it seems the time has come to think about the introduction of AI-specific rules for accountability, liability and redress and to examine their long-term consequences.[110]

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[108] European Parliamentary Research Service Blog, posted on September 19, 2019: EU guidelines on ethics in artificial intelligence: Context and implementation, available at https://epthinktank.eu/2019/09/19/eu-guidelines-on-ethics-in-artificial-intelligence-context-and-implementation/.

[109] Petition for rulemaking concerning use of Artificial Intelligence in Commerce before the Federal Trade Commission, submitted by the Electronic Privacy Information Center (EPIC) (February 2, 2020): 4, available at https://epic.org/privacy/ftc/ai/EPIC-FTC-AI-Petition.pdf.

[110] The EU is considering a temporary ban in public places for up to five years until safeguards to mitigate the technology's risks are in place: news by MIT Technology Review, (January 17, 2020) available at https://www.technologyreview.com/f/615068/facial-recognition-european-union-temporary-ban-privacy-ethics-regulation/.

Neighbouring rights for press publishers: A compromise on copyright in the digital single market

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ABSTRACT *Digital intermediaries that dominate the digital news ecosystem generate significant advertising revenue by repurposing traditional press news content and optimising it for search. The European Union is trying to persuade these digital giants to contribute to the financing of European content, mainly through competition law or by taking steps to improve the competitive position of European companies. The rules on press publishers in the EU Copyright Directive, adopted in 2019, are designed to do the same. This paper reviews the implementation of these rules in the Member States and considers possible future directions for regulation.*

KEYWORDS *Copyright law, neighbouring rights, publishers, intermediaries, European law*

1. Introduction

Press publishers spend billions on producing quality journalism each year. While the costs of producing well supported, quality journalism manifest in producing the original content, i.e. the very first copy, further costs – due to digitization – are negligible. Parallel to this, prosperous business models thrive on re-using articles in press publications, as well as optimizing them for search and social media platforms. In many cases, content displayed on these secondary platforms is more attractive than the web site that produced and published the original content. However, visits and clicks generate revenue. Moreover, revenue from advertisements is what could make up for the loss on sales of print media. It seems that financial advantage does not go hand in hand with producing original content, which eventually hinders publishers' return on investment, and ultimately undermines the long-term sustainability of high-quality journalistic achievements.

To illustrate how big this business really is, it is worth quoting some figures. As early as 2008, the value of online advertising revenue was at $ 23.4

billion.[1] According to another study from 2017, Google and Facebook collectively hold about 20% of the world's total advertising revenue, which effectively means that one in every five dollars spent on advertising goes to these companies. In addition, 65% of the advertising revenue generated in the digital world and 85% of every new US dollar spent on advertising materializes at these two company groups.[2] Dominant platform business groups such as Alphabet (Google), Amazon, Apple, Facebook and Microsoft have a combined market capitalization of more than $ 3.5 billion.[3] Indeed, in 2017, IT companies were the most valuable economic players in the world in terms of total market value.[4] The company value of Apple, Amazon, Microsoft, Alphabet, and Facebook is 3-5 times higher than that of traditional media companies such as AT&T, Walt Disney, Comcast, Twenty-First Century Fox, or Thompson Reuters. YouTube and Facebook now allow the consumption of more media content than any other business group.[5]

However, this is only one, rather narrow copyright aspect of the problems arising from news aggregation, newsgathering, news sharing, and the economic models that this creates. In a broader context, phenomena such as the transformation of the concept of publicity,[6] changes in the concept and technique of censorship, the filter bubble phenomenon,[7] issues around fake

[1] Kimberly Isbell, "The Rise of the News Aggregator: Legal Implications and Best Practices," *Berkman Center Research Publication*, no. 2010-10 (2010): 1-28.
[2] Julie E. Cohen, "Law for the Platform Economy," *University of California D. L. Rev.* 51, no. 133 (2017): 142.
[3] Ibid.
[4] Jason Whittaker, *Tech Giants, Artificial Intelligence, and the Future of Journalism* (New York: Routledge, 2019), Introduction, 1-10.
[5] Ibid.
[6] Zsolt Ződi, *Platformok, robotok és a jog* (Budapest: Gondolat Kiadó, 2018), 56-59.; Katie Pearce, "Zeynep Tufekci on tech's powers and perils for democracy," *HUB*, Feb 11, 2019, https://hub.jhu.edu/2019/02/11/zeynep-tufekci-democracy-dialogues/; Zeynep Tufekci, "An Avalanche of Speech Can Bury Democracy," *The Politico* 50 (September/October 2018), https://www.politico.com/magazine/story/2018/09/05/too-much-free-speech-bad-democracy-219587.
[7] Gábor Polyák, „A frekvenciaszűkösségtől a szűrőbuborékig," in *Technológia Jog*, ed. András Tóth (Budapest: Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar, 2016); Cass Sunstein, *Echo Chambers: Bush v. Gore, Impeachment and Beyond* (Princeton: Princeton University Press, 2001).

news,[8] inequalities in power as a result of information,[9] and – as a consequence – the economic imbalance of revenues, all form part of it.

Voices demanding regulation of internet intermediaries among regulators, politicians, and competitors alike have increased in recent years. Moreover, companies in the focus of these demands are getting more keen on regulation themselves, this way hoping to be able to influence the direction regulation might take. Facebook's founder and CEO, Mark Zuckerberg, himself initiated a more active government and regulatory role in an article published in the Washington Post in late March 2019.[10] According to him, regulatory intervention may be limited to certain areas.

Zuckerberg highlighted four areas for regulation: governing the distribution of harmful content, protecting elections, privacy and data protection. Facebook claims to employ 30,000 people worldwide to ensure security and protection online. It revealed that between October and December 2018, some 5.4 million pieces of violent content were removed from its site,[11] several of which were detected and deleted with the help of automatic detection technology.

The European Commission has long been monitoring the impact of internet intermediaries on the online market. In December 2015, the European Commission issued a Communication *Towards a Modern European Copyright Framework*.[12] This Communication outlines the measures the Commission intends to take in order to achieve a more modern European copyright framework.

Eventually, by September 2016, the European Commission was ready to publish two draft regulations; a draft regulation laying down the rules applicable to the exercise of copyright and related rights in broadcasting

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[8] Tackling online disinformation is a policy goal in the EU, for further initiatives and reports please go to: https://ec.europa.eu/digital-single-market/en/tackling-online-disinformation.

[9] Viktor Mayer-Schonberger and Thomas Ramge, "A Big Choice for Big Tech: Share Data or Suffer the Consequences," *Foreign Affairs* 97, no. 5 (2018): 48-54.

[10] Mark Zuckerberg, "The Internet needs new rules. Let's start in these four areas," *The Washington Post*, March 30, 2019, https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html?noredirect=on&utm_term=.a916cfd40a49.

[11] "Social media: How can governments regulate it?" *BBC News*, April 8, 2019, https://www.bbc.com/news/technology-47135058.

[12] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards a modern, more European copyright framework COM (2015) 626, 9.12.2015.

organizations and the retransmission of television and radio programs; [13] and the draft directive on copyright in the digital single market[14].

The latter draft directive was finalized as a result of a compromise reached at the trialogues between the European institutions. After its publication in the Official Journal[15] of the European Union, Member States have two years for its transposition.

The purpose of this study is to provide an overview of the efforts of European Member States to find ways to address the loss of revenue incurred by press publishers through a stronger copyright protection, i.e. by extending copyright protection to press publishers. Following these scarce and individual actions of the Member States, now action is taken at the Community level. Rules relating to press publishers are part of the directive on copyright in the digital single market and will be analysed in detail below.

2. Early birds: German and Spanish answers to the copyright problems of press publishers

In the recent past through the lobby power of the press industry, the need to recoup constant costs associated to producing content in journalism has served as the basis for individual Member State actions. While copyright is attributed to the author or creator of the original content, copyright legislation has developed an additional form of protection[16] for those groups who, not being authors themselves, have played a significant role in distributing this content and making it publicly available. Through their investment, it seemed appropriate to provide them with some legal protection in order to recoup their costs.

[13] Proposal for a regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes COM (2016) 594, 14.09.2016.; (COD) 2016/0284.

[14] Proposal for a directive of the European Parliament and of the Council on copyright and related rights in the digital single market COM (2016) 593, 14.09.2019.; (COD) 2016/0280.

[15] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, 17 April 2019, *OJ L 130, 17.5.2019, 92-125. CELEX* 32019L0790.

[16] Often referred to as ancillary copyright, neighbouring copyright, or related copyright.

As a result of lobbying by BDZV, the Bundesverband Deutscher Zeitungsverleger e.V.,[17] a draft was prepared in July 2012 and was adopted in Germany in 2013. Incorporated in the Copyright law Part 2, Chapter 7 gives press publishers the exclusive right to make their press product or parts thereof available to the public for commercial purposes.[18] An exception to this right occurs when the use is limited to individual words or very short text excerpts from the original press product. The right of press publishers expires one year from the date of publication.[19]

VG Media, a copyright collection society was authorized by law to collect and manage any fees that may incur by transferring these exclusive rights of use. Initially in June 2014, VG Media determined a flat rate of 11% on all revenues stemming from advertising besides a news item, but short after, in October lowered it to around 6%. Following the entry into force of the law nicknamed the Google Tax law however, Google refused to pay royalties claiming that Google News did not run any ads and, consequently, generated no ad revenue in relation to its news services. In fact, it argued, Google and Google News drives additional traffic to news portals, thereby providing broader access to news in general. In addition, the opt-out system that it operates gives press publishers the ability to request removal of their content from Google sites. Parallel to this, Google removed short excerpts (snippets) of articles that appeared under the links of German press articles in its search results.

In response to these actions, VG Media initiated antitrust proceedings against Google with the Bundeskartellamt[20] for abuse of its dominant position. However, contrary to the hopes of VG Media, the competition authority did not finally pursue any action against Google. In its decision, it argued that the ancillary copyright introduced by the law is a proprietary right, which is intended to protect publishers' investments in order to ensure their return. Consequently, it is a fundamentally forbidding type of right that allows publishers to prohibit the use of their copyrighted content in order to protect their investment. In other words, Google fulfils this requirement by operating an *opt-out* system whereby individual press publishers may withdraw their

[17] Zoltán Nemessányi and Dávid Ujhelyi, „Breaking the news? A kiegészítő (szerzői) jog szerepe és megítélése," *Iparjogvédelmi és Szerzői Jogi Szemle* 11 (121), no. 6 (2016): 30.
[18] Urheberrechtsgesetz, UrhG, 7. fejezet, 87f cikk (1) bekezdés, https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html
[19] https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0660
[20] Bundeskartellamt B-126/14, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B6-126-14.html;jsessionid=4F3C74DB789A513A6BBB4D0836305409.1_cid371

approval to appear on Google. There is no additional obligation under Competition law that would suggest that Google can only obtain this exclusive right through onerous contract; or that it should display search results beyond the exceptions provided by the Copyright law to the extent protected by Copyright law. From an economic point of view, the market value – in this case one that equals a zero value license – is also acceptable.

In addition, VG Media filed a lawsuit alleging copyright infringement.[21] However, the Berlin court referred the matter to the Court of Justice of the European Union for a preliminary ruling to determine whether the amendments to the German copyright law could be lawfully applied if the European Commission had not been notified before the amendments were passed, although it is clear, that these amendments contain technical regulations specifically aimed at information society service providers.[22]

Finally, Europe's largest publishing company, Axel Springer, also claimed to be reinstated in the Google search engine because it calculated that traffic directed from Google to its website decreased by 40% and traffic from Google News by 80% as a consequence of the snippets disappearing from the search results. Overall, it can be stated that the introduction of the ancillary copyright into German law did not achieve its intended purpose, and publishers eventually gave their content away for free.

The other Member State which attempted to extend and codify such a neighbouring right into its Copyright law, was Spain. The Spanish legislation entered into force on 1 January 2015 as part of the Intellectual Property Act.

Spanish legislation relies heavily on its predecessor, the German example, but goes well beyond that. For example, it is not only about press publishers' publishing rights, but – more generally – intends to cover all aggregate-type commercial uses.[23] It also states that the statutory right cannot be waived and

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[21] Peter Sayer, "Google case raises doubts about German news copyright law," *PCWorld*, May 9, 2017, https://www.pcworld.com/article/3195443/internet/google-case-raises-doubts-about-german-news-copyright-law.html.

[22] Colin Dwyer, "German Publishers' Lawsuit Against Google Threatens to Backfire," *NPR*, May 10, 2017, https://www.npr.org/sections/thetwo-way/2017/05/10/527800498/german-publishers-lawsuit-against-google-threatens-to-backfire?t=1530013754704; and also Foo Yun Chee, "German ruling on Google licesing should be haulted: EU court advisor," *Reuters*, Dec 13, 2018, https://www.reuters.com/article/us-germany-copyright-publishers/german-ruling-on-google-licensing-fees-should-be-halted-eu-court-adviser-idUSKBN1OC18L.

[23] Texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las Disposiciones Legales Vigentes sobre la Materia (aprobado por el Real Decreto legislativo N° 1/1996 de 12 de abril de 1996, y modificado hasta el Real Decreto-ley N° 2/2018, de 13 de abril de 2018) 32.2., http://www.wipo.int/wipolex/en/text.jsp?file_id=469890

that adequate compensation shall be provided. This, in other words, excludes the possibility of a free transfer of the right (in order to prevent what has happened in Germany, i.e. that the market value of content equalled zero).[24] The regulator envisaged a very high penalty of up to € 600,000 for non-compliance with the law.

In protest, Google made Google News services in Spain unavailable from December 2014. The Google News exit affected both major news sites, their traffic dropped by 6%, as well as smaller news sites, where traffic dropped by 14%. Here, too, the new law did not bring the expected results, and press publishers did not see any revenue generated.

In addition, the opinion of CNMC, the Spanish competition authority issued in 2014, questions the economic basis of legal provisions.[25] Firstly, it points out that there are technical solutions that send a clear message if a news portal does not want to make its content available free of charge. If this is not the case, then the *opt-in - opt-out* system used in Germany is essentially an expression of will. Secondly, by fixing a predetermined price in the news market means that there is no room for market conditions to work. In fact, press publishers are not fully against news aggregators, but the new legal obligations create significant barriers to entry for new companies on the market.[26]

In brief, judging these two Member States' legal initiatives from the perspective of their revenue-generating effect to the press industry, we can conclude that they are so far not fulfilling what has originally been hoped for. At the same time, market has begun to find its own solutions. For example, the German Axel Springer has in the meantime established a strategic partnership with Samsung Electronics and created the UPDAY app for Galaxy mobile phones. It offers two types of content: the "need to know" part shows local, editorially selected content, and the "want to know" part provides algorithm-driven, personalized, server-driven news recommendations to its users.

3. Joint Action by the European Union: A compromise on copyright in the Digital Single Market

[24] Ibid.

[25] Eleonora Rosati, "Link and threat? Why the story with hyperlinks and copyright is not over yet," http://ipkitten.blogspot.com/2014/10/link-and-threat-why-story-with.html.

[26] Cristina Ramon, "Propiedad intelectual, editores y la 'tasa Google'," *CNMC Blog*, May 28, 2014, https://blog.cnmc.es/2014/05/28/propiedad-intelectual-editores-y-la-tasa-google/.

Opportunities offered by the digital environment have multiplied the ways in which works and protected content are produced, created, distributed and utilized. The traditional equilibrium between authors and rightholders vis-a-vis the rights and interests of users has lurched off balance. It is also clear from the examples above that the digital environment has raised cross-border issues that cannot be effectively addressed by purely national rules. Based on this recognition, the European Commission revised the existing Community copyright rules between 2013 and 2016 with the aim of adapting them to the new digital environment. As a result of a series of strategic documents and careful planning, in September 2016 the European Commission published two pieces of draft legislation. A draft regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes[27] and the draft directive on copyright in the digital single market.[28] The adoption of a regulation[29] and a directive[30] to fulfil international obligations arising from the Marrakesh Treaty[31] is also part of this package.

During the negotiations on the draft directive on copyright in the digital single market (further referred to as the new Copyright directive), a compromise was needed on two points. It is precisely these two points that are

[27] Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC (Text with EEA relevance), O*J L 130, 17.5.2019, 82-91.*

[28] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance), *OJ L 130, 17.5.2019, 92-125. CELEX* 32019L0790.

[29] Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled. *OJ L 242, 20.9.2017, 1-5.*

[30] Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. *OJ L 242, 20.9.2017, 6-13.*

[31] This foresees improvement of access to intellectual property for the blind, visually impaired and people with reduced reading ability.

relevant to generating revenue for online uses of content produced by press publishers, and precisely these rules will be discussed below.

A free and pluralist press is essential to ensure quality journalism and access to information. Nowadays, on the one hand press publications available online are subject to significant business utilization through news portals or media monitoring services, while on the other hand, these press publishers' organizational and financial investments to produce the content are not compensated for. Therefore, a related right to copyright is introduced in the European Union to compensate for the online uses of press publications by information society service providers for the reproduction and making available of press publishers content.

Title IV of the new Copyright directive covers measures to achieve a well-functioning marketplace for copyright. This includes the establishment of a neighbouring right for press publications concerning online uses, and a set of rules that apply to the use of protected content by online content-sharing service providers. A well-functioning internal market is characterised by competition. Nevertheless, a system ensuring that competition is not distorted in the internal market is also a hallmark of a well-functioning marketplace. The wording of the title therefore, already suggests a Competition law approach to the issues.

3.1 Rules for the protection of press publications (Article 15)

The purpose of this Article is to acknowledge the dedicated contribution of publishers to producing press publications and – by extending certain rights – to encourage the sustainability of the press-publishing sector. The justification for the protection of rightholders is performance, investment that facilitates making press publications available to the public.

According to recital 55, the concept of *publisher* must be interpreted to include service providers of press publications, such as news agencies and news publishers. However, this protection does not apply to periodical publications published for scientific or academic purposes, such as scientific journals for example; or to websites or blogs that are not carried out under the initiative, editorial responsibility and control of a service provider.

The definition of press publication is provided accordingly, in Article 2 (4) of the new Copyright directive. This defines those characteristics that altogether constitute a press publication. In other words, the three criteria enumerated must be present concurrently in order for a publication to be classified as a press publication. Thus, a collection of individual itemswithin a periodical or a regularly updated publication under a single title, with the purpose of providing information related to news and other topics, to inform

the public, that is published in any media under the initiative, editorial responsibility and control of a service provider, but is not a periodical which is intended for scientific or academic purposes can be understood as a press publication. This includes, for example, daily newspapers, weekly or monthly magazines (general or specialist journals). In conclusion, we can state that for acquiring the related legal right the following characteristics are of paramount importance: the fact of editing, editorial responsibility, editorial control and regularity of publishing, as well as the purpose of the publication.

According to the wording of the new Copyright directive, a press publication can be published in any media, which includes press publications on the Internet such as Internet news sites, blogs of press publications, provided that they meet the above combined criteria.

Legal protection is available only to those press publishers who have established themselves in a Member State. Particularly, to press publishers having their registered office, central administration or principal place of business in an EU Member State.

At an EU level, harmonized legal protection is intended only for online uses of press publications by information society service providers. Therefore, it does not affect non-online uses or online use of press publications by individual users, whether for private or non-commercial use.

The new Copyright directive addresses the scope of the rights of press publishers by a reference. With regard to the online uses of press publications by information society service providers, the scope of the rights of the press publishers should be similar to the scope of the reproduction rights and right of communication to the public set out in directive 2001/29/EC (InfoSoc). In other words, copyright licenses should be obtained from press publishers with regard to online uses of reproduction or communication to the public of press publications by information society service providers.

However, the protection offered by the related right cannot be extended to hyperlinks. In particular, the protection cannot affect individual users, who – for private or non-commercial purposes – share an online link to a copyrighted work of a press publication.

Nor can the protection cover mere facts disclosed. In other words, news facts themselves are still not protected by copyright, but formation and expression, related analysis, and specific wording of press publications that carry the essence of the work that has been produced, and therefore, are entitled to copyright protection.

Online use of press publications by information society service providers can vary in scope. It can specifically mean for example full use (use of the whole publication), or partial use, partial use of an article, or certain details of it (such as words, titles or introductory lines, snippets taken from the article).

The new Copyright directive states that individual words or very short extracts of a press publication are not covered by protection.

It will be particularly interesting to see how this passage is interpreted by Member States. Whether it will be further interpreted by legislation or jurisprudence will decide on the online use of those few lines usually following the title, the so-called snippet. Will individual court action be needed to decide on originality on a case-by-case basis, or will there be a uniform interpretation provided by law?

Broadly speaking, online uses of press publications covered by the reproduction right include not only news aggregators, and news portals (such as Google News or Yahoo News) that specifically collect news items, but it also encompasses the results listed on general search engine sites. In this case, titles are the result of the hit list, with a few words or sentences accompanying them to help user choice, and consequently, these appearances are subject to the related rights of press publishers too.

A particularly exciting question is how law considers aggregation as a technique used by press publishers in their relation to one another. Particularly, how will they interpret licensing of online use when press publications take stories from each other? In Hungary, the issue will need further consideration given the fact that the Hungarian News Agency (Magyar Távirati Iroda) offers its news services for both private individuals and other media services free-of-charge, and is often a basic source for news.

Neighbouring legal protection for press publishers is separate from the rights otherwise enjoyed by authors and other rightholders. In other words, it does not affect the rights of the authors and other rightholders to exploit their works and other protected subject matter, unless otherwise provided by a contractual agreement.

In addition, further limits, such as the lawful use exception provided for in directive 2001/29/EC (InfoSoc), constitute a restriction on the enforcement of the related rights of press publishers.

While the new Copyright directive seeks to promote press publishers by allowing them to gain returns on their investments, it also ensures that authors whose works are incorporated in a press publication be entitled to an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers. EU legislation lays down only the criterion of an *appropriate share* but leaves it up to the Member States to regulate both the extent and the mechanism for its distribution. Moreover, Member States already having a mechanism for compensation sharing of remuneration stemming from reprography or public lending schemes between authors and publishers may retain it. On the contrary, if such a system of compensation sharing is not in place because

authors alone are entitled to these revenues, the new Copyright directive will not force a new scheme to be put in place.

This new Copyright directive is without prejudice to national rules on the management of rights and on remuneration rights. It is also a matter of national legislation to decide how to relieve press publishers from the burden of supporting their claim in court, which, for example, may facilitate court proceedings during enforcement.

The related right of press publications expires two years from the date of publication, a significant shift from the originally planned and criticized 20 years. This time span is definitely more in line with the nature of the works concerned, which are essentially valuable because of their topicality and news worthiness. The two-year period is calculated from 1 January of the year following the date on which the press publication is published.

During negotiations, it could be observed that Member States are split on supporting or opposing the related right mainly along the lines of how big they are or how wide spread the language of the Member State is. It seemed easy to spot that Member States whose languages are less spoken worldwide, especially those in Central and Eastern European Member States, were not supportive of the proposed articles. These news markets seem to represent smaller market value and therefore, interest in news items in their original language is more or less limited to the size of the countries. In contrast, France, Germany or Spain were particularly interested in pulling the new Copyright directive through.

The new Copyright directive creates regulatory uniformity by harmonizing and extending related rights to press publishers. However, there is no guarantee that the market response to regulation will likewise be uniform. Linguistic fragmentation may also be linked with market value and large companies may decide not to treat the EU market as a single entity. In other words, they may decide to selectively collaborate with certain press publishers and withdraw from the news markets of some European countries, particularly the smaller, linguistically limited digital news markets of Central and Eastern Europe. On the other hand, however, the new Copyright directive imposes obligations on all Member States. It is likely that an enforcement system will have to be established which for example may involve collective rights management companies, including administrative and operational costs, which ultimately impose additional costs on those news market that may not profit from the new system at all.

News aggregation as a technique is widely used not only by those big tech companies that are currently the target for regulation, but also by press publishers and press agencies themselves. However, when a competing press product or news site takes over content, it essentially makes it its own content.

Consequently, it is even more likely that it directs traffic away from the website of the original content producer. On the other hand, the title or snippet displayed on the platform is of interest to the user, and it actually helps direct traffic to the content producer, though it may not be the original news page. This contradiction is still not resolved in the new Copyright directive.

A free and pluralist press is essential to ensure quality journalism and it is the basis for providing information to citizens. By contributing to public debate, it also ensures the principles of the democratic functioning of a society. This, as an objective, is also stated in the recital of the new Copyright directive.[32] However, extending copyright to all press publications is actually no guarantee for supporting quality journalism in itself, consequently, the causal relationship between the rationale for the regulation and its mode does not seem to be in line with one another.

Prior to the EU directive, two Member States had already introduced a similar related right into their copyright laws. The German and the Spanish examples – detailed above – proved unsuccessful in financial terms.

In our view, both of these Member States' solutions meet the conditions set out in the new Copyright directive, which does not provide for or exclude the obligation to obtain the license through onerous contract. Consequently, it will be up to each Member State to decide whether to implement a zero-price regime.

Certain issues, such as sharing news items on community portals (e.g. Facebook, Twitter) by individual users, or individual copying of longer quotes is not solved by the proposed related right of press publishers. Article 17 of the new Copyright directive is particularly interesting in this light and will be examined further below through the lens of the use of press publications.

3.2 Rules on the use of protected content by online content-sharing services (Article 17)

While Article 15 seeks to improve the competitive position of press publications against such giant companies as Google and news aggregator services such as Google News or Yahoo News, the Article that eventually triggered mass protests, in particular, in Germany, is Article 17 of the new Copyright directive.

To date, functioning of the online market includes such services where content can be shared online. Such online content-sharing services as YouTube and Facebook for example, provide access to a large amount of copyright-protected content uploaded by their users. Therefore, the new

[32] Recital 54 of the new Copyright directive 2019/790.

Copyright directive aims to facilitate the development of the licensing market by providing legal certainty on what is to be considered a copyright relevant act.

However, these online content sharing platforms also offer a wealth of news, news-based content, and news content created by press publishers. Thus, press publishers may count on revenues from new licensing agreements with online content-sharing services.

Rules for online-content sharing services were specifically designed by the EU legislator to enhance competition and counterbalance the market weight of internet intermediaries. Recital 62 of the new Copyright directive clearly states that rules should target only online services that play an important role on the online content market by competing with other online content services. One of the most important goals of these online content-sharing services is to store and enable users to upload and share large amounts of copyright protected content with the purpose of obtaining a profit directly or indirectly therefrom. In order to serve a wider audience, the content is organized and promoted by the online content-sharing service, for example, through categorization or targeted promotion.

As far as the scope of the new Copyright directive is concerned regarding online content-sharing services, the definition[33] of an online content sharing provider explicitly emphasizes the nature of the activity, i.e. organizing and promoting copyright protected content for profit making purposes.

It is also here that certain types of activities are excluded from the definition of online content-sharing service providers. These include non-profit online encyclopaedias, non-profit educational and scientific repositories, open source software-developing and -sharing platforms, providers of electronic communications services,[34] online marketplaces, business-to-business cloud services, and cloud services to which their users upload content for their own use.

For legal certainty, the new Copyright directive is very clear that when an online content-sharing service provider gives the public access to copyright-protected works or other protected subject matter uploaded by its users, it in fact, performs an act of communication to the public or an act of making available to the public. Consequently, authorization from the rightholders for the use of their works must be obtained and, therefore, the liability exemption

[33] New Copyright directive 2019/790 Article 2 point 6.

[34] Electronic communications service as defined in Directive (EU) 2018/1972 of the European Parliament and of the Council of 11. December 2018 establishing he European Electronic Communications Code.

provided in Directive 2000/31/EC[35] for host services cannot be applied. A license can be obtained for example, by concluding a licensing agreement with the right holder.

Inspired by competition law, rules impose an obligation on online content-sharing service providers based on their market position, that is, only on providers with a significant market power. These online content-sharing service providers are burdened to obtain permission from copyright holders for the use of their media content posted and shared on the platform of the online content-sharing service provider.

The licenses obtained by the online content-sharing service provider must also cover the acts of their users, even in cases when those users are acting for non-commercial purposes, such as sharing their content(s) without generating revenue or without generating significant revenue.

In case the online content-sharing service provider does not conclude a licensing agreement, nevertheless, the user of its service shared copyright-protected content online, the online content-sharing service provider is primarily liable for copyright breach.

The online content-sharing service provider may only be exempted from liability if it can demonstrate that it made best efforts to obtain an authorisation, and – in accordance with high industry standards of professional diligence – made best efforts to ensure that those works, which the rightholders have provided the service providers with the relevant and necessary information, are not available. Furthermore, in all cases, upon receipt of a duly reasoned notice from the rightholders, it took immediate action to disable access to, or to remove, or it made best efforts to prevent future upload of the content.

Several factors need to be considered to determine whether the service provider complied with the above obligations. The principle of proportionality needs to be taken into account too. Therefore, factors that should be examined include the type, the audience, the size of the service, the types of works uploaded by the users, the availability of suitable and effective means to disable access to content and the costs this would entail for service providers.

Major criticism was voiced in this respect. Interpretation of the provisions lends itself to be encouraging of pre-censoring content by online content-sharing service providers in order to prevent infringements and lower levels of liability. Larger online content-sharing service providers, such as Facebook or YouTube, have already been employing technology-based so-called *upload*

[35] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), Article 14. (1).

filters that pre-screen certain types of content (such as harmful content for minors or content related to weapons) to prevent them from being uploaded. An analysis of cost-effectiveness may conclude that developing these content filters further, to make them even more effective may – in the long run – be less costly for online content-sharing service providers, than investing in finding lesser-known copyright holders, negotiating a licensing agreement and paying royalties; or entering lengthy copyright infringement processes. In other words, big info-tech companies may give a selective response to different copyright holders in the market. It may well be the case that licensing agreements with more powerful copyright holders will be concluded, while others will be left out, and ultimately the supply of content will be reduced, or will be tilted to the benefit of larger content providers. On the other hand, it may even lead to stronger ex ante content control, since companies have already invested billions in technology development; it makes sense to use that technology.

In addition, provisions of the new Copyright directive may have a counter competition effect, as only companies that are financially strong enough to develop or procure similar detection technology and/or pay sufficient royalties will potentially be able to compete with those online content-sharing service providers that currently enjoy a quasi-monopoly on the market.

On the one hand, provisions of the new Copyright directive[36] clearly state that during transposition Member States have to refrain from an interpretation that leads to imposing a general monitoring obligation on online content-sharing service providers. However, on the other hand, there may well be cases when disabling access to unauthorised content can only be avoided based on the notifications received from rightholders. The meaning of this latter sentence implies that there is pre-screening of the content, but when this is unsuccessful and copyright protected content appears online, disabling access can only be carried out based on the notification sent by the rightholder.

In order to improve the conditions of competition, and to improve the positions of start-ups with low turnover and small audiences as well as to develop new business models, the new Copyright directive provides for exceptions to the above strict rules. New online content-sharing service providers that have been providing services for less than 3 years and have an annual turnover[37] of less than € 10 million and an average monthly visitor number of less than 5 million in the Union need to demonstrate that they have made best effort to obtain a license. This, however, does not affect the

[36] New Copyright directive 2019/790, Recital (66), Article 17 (8).

[37] The value of annual turnover calculated in in line with Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises.

availability of other legal remedies, such as the adoption of decisions prohibiting copyright infringements by national courts or administrative authorities. If the monthly average number of visitors in the Union, based on numbers of the previous calendar year, exceeds 5 million to the services of the online content-sharing service provider, they also have to prove that they have made every effort to prevent the availability of unauthorized works. Finally, preferential treatment for new online content-sharing service providers should be discontinued after the elapse of three years from the first online availability of the service in the European Union. In addition, services created or provided under a new name, which carry on the activities of an existing online content-sharing service provider, should be excluded from the benefits described above.

The various measures taken by online content-sharing service providers must be made transparent to rightholders. These measures concern, in particular, those ones that affect cooperation with rightholders, and the mechanisms applied when there is unauthorized use of rightholders' content online.[38] Such information, however, does not imply that online content-sharing service providers would be obliged to provide detailed and individualised information for each work identified, unless this requirement is clearly part of the licensing agreement between the parties. Licensing agreements between online content-sharing service providers and rightholders may contain specific provisions on the types, frequency etc. of information to be provided to the rightholder.

The new Copyright directive specifically emphasizes the limits of cooperation[39] between online content-sharing service providers and copyright holders. These exceptions and limitations are enlisted in the directive. Users may rely on any of the following exceptions or limitations: quotation, criticism, review, and use for the purpose of caricature, parody or pastiche.

To resolve disputes, online content-sharing service providers need to put an effective and fast complaints and redress mechanism in place. These cases can only be handled by human review. Online content-sharing service providers should make best efforts to provide users with their services with out-of-court redress mechanisms, in particular, but they should be able to appeal to a court or other competent authority to assert a use of an exception or limitation to copyright and related rights.

[38] For example, how to send a duly justified request to online content-sharing service providers or what the appropriate industry standards for professional diligence mean.
[39] New Copyright directive 2019/790 Article 17 (7).

The European Commission, too, intends to facilitate the universal application of the provisions by proposing guidelines for the interpretation of Article 17.

4. Short summary

In summary, it can clearly be established that provisions of the new Copyright directive intend to take actions to improve competition in the online market of the European Union.

Rules introduced for online content-sharing service providers in particular, demonstrate an approach visible in Competition law by providing a quantifiable description in the definition of a dominant market player.

Due to the overproduction of information, competition focuses primarily on gaining the attention of users and on achieving advertising revenue flowing from this attention. An undoubtedly interesting observation demonstrates how for example, the MailOnline, the Sun and the Mirror have benefited from publishing edited details[40] of the Christchurch, New Zealand assassination video in their newspaper editions online, while there has been a race to delete these videos from social media platforms.

The crisis of values is well illustrated by this example. A free and pluralist press is essential to ensure quality journalism and access to information. Quality journalism and access to information are essential elements of democratic functioning. Nevertheless, competition alone is not enough to guarantee this.

[40] Jim Waterson, "Facebook removed 1.5m videos of New Zealand terror attack in first 24 hours," *The Guardian*, March 17, 2019, https://www.theguardian.com/world/2019/mar/17/facebook-removed-15m-videos-new-zealand-terror-attack. However, it is also true, that the assassin first chose the YouTube channel to broadcast his assassination directly, which he could not have done on any newspaper website.

The Hungarian Regulation of the National Referendum

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ABSTRACT *According to Article B) Section (4) of the Fundamental Law of Hungary, "The power shall be exercised by the people through elected representatives or, in exceptional cases, directly". The means of direct exercise of power is the referendum, which has been in the focus of political and public interest in Hungary almost continuously since the change of regime in 1990. A referendum or a popular initiative allows the people to "seize" the direct decision-making at any time.[1] After presenting the legislation, the article describes who can initiate a national referendum. The initiator should formulate and submit the question. He then presents the process of the referendum procedure, the rules for authenticating the issue and collecting signatures, and the ordering and setting of a national referendum based on these. If the issue complies with the law and the collection of signatures was also regular, then a valid and effective referendum can give effect to the instrument of direct exercise of power.*

KEYWORDS *referendum, initiator, question, authentication, signature collection, nomination, parallel issues*

1. Legal background

The Hungarian Fundamental Law renewed the rules of the national referendum with its entry into force on 1st January, 2012. It abolished the opinion expressing referendum and the institution of popular initiative[2]. The detailed rules for the national referendum initiative are set out in Act CCXXXVIII of 2013 on Initiating Referendums, the European Citizens'

[1] András Patyi, " Gondolatok a magyar helyi önkormányzati rendszer általános szabályairól" in *Tanulmányok a 70 éves Bihari Mihály tiszteletére,* eds. Gergely Deli and Katalin Szoboszlai-Kiss (Győr: UNIVERSITAS-GYŐR Nonprofit Kft., 2013), 379-395.

[2] Elżbieta Kużelewska, "How far can citizens influence the decision-making process? Analysis of the effectiveness of referenda in the Czech Republic, Slovakia and Hungary in 1989–2015," *Baltic Journal of European Studies* 5, no. 2 (2015): 175-176.

Initiative and Referendum Procedure[3] (hereinafter referred to as: *Nsztv*.), which entered into force on 18th January, 2014. The new referendum act sets out the rules for the national referendum procedure in accordance with the provisions of the Fundamental Law.

The Fundamental Law broadened the circle of those who are entitled to vote on the national referendum, ensuring the right for Hungarian voters abroad to participate as well. It also reinstated the previous regulation on the validity of referendum, i.e. it requires the participation of more than 50% of voters as a condition of validity. The Fundamental Law slightly modified the scope of prohibited objects, as well as the rules for initiating a referendum and the rules of the binding power thereof. The *Nsztv*. regulates the rules for initiating and conducting local and national referendum within auniform approach on procedural framework, and rectifies the omissions previously established by the Constitutional Court[4], with the concerning subject of terms of legal remedy, issues with same content and the revocability of the initiative.[5]

According to the above-mentioned legislation, there are two types of national referendum in Hungary:

1. Compulsory referendum: referendum must be held if it is initiated by 200,000 voters,
2. Optional referendum: if the referendum is initiated by the President of the Republic, the Government or 100,000 voters, the Parliament is free to decide whether to order the referendum.

In order to comprehensively inform the voters, the proposed referendum questions submitted by the initiators are published by the National Election Office (hereinafter referred to as: NEO) on its official website.

[3] Victor Cuesta-López, "A comparative approach to the regulation on the European Citizens' initiative," *Perspectives on European Politics and Society* 13, no. 3 (2012): 257-260.

[4] Laszlo Solyom et al., *Constitutional judiciary in a new democracy: the Hungarian Constitutional Court* (Michigan: University of Michigan Press, 2000), 371-375.

[5] Adrián Fábián, "A Nemzeti Választási Bizottság szerepe és gyakorlata az országos népszavazási kezdeményezések kérdéseinek hitelesítésében," in *A népszavazás szabályozása és gyakorlata Európában és Magyarországon: tanulmánykötet a Nemzeti Közszolgálati Egyetem és a Nemzeti Választási Iroda 2015. szeptember 24-én rendezett közös konferenciáján elhangzott előadásokból*, eds. Krisztián Gáva and András Téglási (Budapest: Nordex, 2016), 123-136.

2. Initiator of the national referendum

Depending on who initiates the national referendum, we can talk about voters' initiative or a referendum initiated by the Government or the President of the Republic. At least 100,000 voters can initiate a national referendum. The collection of signatures shall be coordinated by the organizer of the initiative. Organizer of national referendum initiative can be any adult Hungarian citizen who has not been disenfranchised by court from the exercise of right to vote and has Hungarian address or in lack of Hungarian address he/she has been entered in the central electoral register upon his/her request. In addition to natural persons, political parties or other associations may also be initiators, but only in matters subject to the scope of activities registered in their memorandum of association. An initiative may have several organizers. In this case, one person shall be appointed who is entitled to liaise with the election bodies, such as the NEO or the National Election Commission (hereinafter referred to as: NEC), on behalf of the organizers. The Government or the President of the Republic may also initiate a national referendum. However, an important difference is that while the voters' initiative may be binding or optional depending on the number of signatures, the initiative of the Government and the President of the Republic is always optional, i.e. the Parliament has the right to decide to order or to refuse to order the referendum[6]. Before commencing the collection of signatures, the proposed referendum question shall be submitted to the NEC for certification, on the template of the signature sheets provided for this purpose. There can be only one question on the signature sheet. The template of the signature sheet of the national referendum is stipulated in KIM Decree 37/2013. (XII. 30.). When submitting a question, the private individual organiser shall give his name, home address and personal identification number to the National Election Commission, if he/she has no personal identification number, the number of the document proving his/her identity, and the association shall attach its deed of foundation. In order to preserve the constitutional function and seriousness of the national referendum initiative, the *Nsztv*. stipulates that the organizer of a voters' initiative shall submit the question on the signature sheet with signatures of support from at least twenty voters whose maximum number must not exceed thirty. If the organizer of the initiative is a private individual, his/her signature must also be included in the required 20 support signatures. The initiative can be supported by the signature of the person who has the right to vote in the national referendum, i.e. any adult Hungarian citizen who has

[6] Markku Suksi, *Bringing in the people: A comparison of constitutional forms and practices of the referendum* (Dordrecht: Martinus Nijhoff Publishers, 1993), 5-15.

not been disenfranchised by court from the exercise of right to vote and has Hungarian address or has no Hungarian address but he/she has been entered in the central electoral register upon his/her request.

The collection of supporting signatures has been previously considered as data proccessing and had to be reported to the Hungarian National Authority for Data Protection and Freedom of Information (*NAIH*). The data protection register has been abolished by the Act XXXVIII of 2018 on the amendment of Act CXII of 2011 on the right to informational self-determination and on the freedom of information related to the data protection reform of the European Union and on the amendment of other related laws entered into force on 26 July, 2018. Since then data processing related to the voters giving their supporting signatures to the referendum initiative shall not have to be reported to the NAIH[7]. The requirement for a supporting signature of at least twenty but no more than thirty voters was not included in the previous legislation, so it may have occured that an individual person submitted 140 questions on his/her own at one time, in handwritten form, on a checkered booklet. The first referendum initiative on the expansion of the Paks Nuclear Power Plant after the *Nsztv*. entered into force was submitted without supporting signatures[8]. This fact later decisively effected the certification of the initiative, namely after the rejection of the NEO, the NEC had to refuse to certificate the question submitted with valid supporting signatures due to the collision with a prohibited subject related to the international agreement concluded in the meantime.

3. Formulation of the referendum question

The content of the referendum question is governed by the following main requirements: the question proposed for referendum shall concern subjects within the tasks and competences of the National Assembly, shall be clear and the wording and content shall be in accordance with the constitutional purpose

[7] The limits and a framework of data protection issues, see Moira Paterson and Mcdonagh Maeve, "Data Protection in an era of Big Data: The challenges posed by big personal data," *Monash University Law Review* 44, no. 1 (2018): 1-17.

[8] Viktor Glied, "Social Conflicts in the Shadow of the Paks Nuclear Power Plant," *Geographical Locality Studies* 1, no. 1 (2013): 209-210.; Balázs Hohmann, "Civil szervezetek és a társadalom részvételi lehetőségei a környezet védelmét érintő hatósági eljárásokban," in *XIII. Kárpát-medencei Környezettudományi Konferencia*, eds. Lívia-Irma Szigyártó and Attila Szikszai (Cluj-Napoca: Sapientia University, 2017), 280-285.

of the legal institution of the national referendum[9]. Thus, a national referendum may be held on matters on which the National Assembly is entitled to make decisions. However, there are so-called prohibited subjects that cannot be the subject of a referendum despite the fact that they fall within the tasks and competence of the National Assembly.

According to Article 8 of the Fundamental Law of Hungary no national referendum may be held on:

a) any matter aimed at the amendment of the Fundamental Law;
b) the content of the Acts on the central budget, the implementation of the central budget, central taxes, duties, contributions, customs duties or the central conditions for local taxes;
c) the content of the Acts on the elections of Members of the National Assembly, local government representatives and mayors or Members of the European Parliament;
d) any obligation arising from international treaties;
e) person- and organisation-related matters falling within the competence of the National Assembly;
f) the dissolution of the National Assembly;
g) the dissolution of a representative body;
h) the declaration of a state of war, state of national crisis and state of emergency; furthermore, on the declaration and extension of a state of preventive defence;
i) any matter related to participation in military operations;
j) the granting of amnesty.

Another important requirement against the question proposed for the referendum is to be unequivocal both for the voters and for the National Assembly. The former requirement is called voter clarity, while the latter is called legislative clarity. From the point of view of voter clarity, the referendum question is clear if it is well understandable, the question complies with the rules of Hungarian orthography and its essence is clear, its wording is precise, understandable in one way only and thus it can be clearly answered, its consequences are clear (so-called predictability), and voters can assess the effects and possible consequences of the referendum at the moment of the decision. It should be emphasized that precise wording means intelligibility in the ordinary sense, i.e. the use of the relevant professional language is not obligatory for the initiator of the referendum. If the initiator takes the possibility to use technical terms, he/she should seek to make the question

[9] François Rocher and André Lecours, "Does the wording of a referendum question matter?," in *The Routledge Handbook to Referendums and Direct Democracy*, eds. Laurence Morel and Matt Qvortrup (New York: Routledge, 2017), 227-230.

understandable to all voters. From the point of legislative clarity it is important that the question is clear to the National Assembly as well, i.e. it permits the National Assembly to decide whether it has the obligation to make a law, and if so, with what kind of content it is obliged to make the law. The constitutional purpose of the institution of national referendum is to enable people of the country, as the holder of power, to directly make decisions in the most important issues affecting the fate of the country. Referendum questions containing any unworthy expression or content to the legal institution of referendum shall not be ordered to referendum. According to Section 9 subsection 2 of the *Nsztv*. a question proposed for referendum shall not contain any obscene expression or any other expression shocking in any other way.[10]

4. Submission of the referendum question

The question proposed for the referendum shall be submitted to the NEC in person for the purpose of certification, at its address. Individual organizers may submit an initiative in person or through a proxy, or in case of a political party or other association the initiative may be submitted by the legal representative or a person authorized to represent the legal representative (for example a proxy). The question can be sent by post. Since the supporting signatures can only be attached on an original document, it is not possible to submit a referendum initiative by email or fax. The NEO publishes the submitted questions together with the name of the organizer and the date of submission. Although it is not mandatory, but it is advisable to collect the 20-30 supporting signatures on the signature sheets provided by the NEO to ensure that the data at the time of submission is complete. Signature sheets for the signature of voters with a personal ID differs from the signature sheet for the signature of voters living abroad who do not have a personal identification. The preliminary review of the voters' initiative is carried out by the president of the NEO within 5 days, during which he reviews whether the referendum initiative complies with the legal requirements for formal conditions (e.g.: the existence of required number of valid supporting signatures), the question is in accordance with the constitutional purpose of the national referendum, the prohibition does exist that no other question with the same content shall be submitted. Based on the preliminary review the president of the NEO lays the referendum question before the NEC if it complies with the legal requirements, or rejects the question by means of resolution if the initiative does not meet any of the legal requirements. If the president of the NEO rejects

[10] Maija Setälä, "On the problems of responsibility and accountability in referendums," *European Journal of Political Research* 45, no. 4 (2006): 699-711.

the question, the decision shall be sent to the organizer by short route (if e-mail/fax contact is available) and by post as well on the day it is taken. The NEO also publishes the decision on its official website[11]. There is no appeal against the decision of the president of the NEO, but the organiser may re-submit the question within fifteen days after the publication of the resolution. In case of re-submission, the NEC will put the adjudged referendum question on the agenda within 30 days after the re-submission (except when the number of valid supporting voters does not attain 20).

5. Authentication of the question

The NEC shall examine, as to its substance the referendum question within 30 days of its submission, in the framework of whether the referendum initiative complies with the formal and content requirements[12] set out in the legislation. Based on these, the NEC can make the following decisions:

1. certifies the referendum question if it complies with the legal requirements, i.e. the provisions of the Fundamental Law and the referendum act;
2. rejects the initiative without an in-depth examination if it contains an obscene expression or any other expression shocking in any other way;
3. refuses to certify the referendum question if it does not meet with a legal requirement, for example e.g. the question does not fall within the competence of the National Assembly, the question falls within the scope of prohibited objects stipulated in the Fundamental Law, the submission of the question did not comply with the requirements of the referendum act, the question is not unequivocal, the question with same subject was submitted under the parellel moratorium.[13]

Questions with the same subject cannot be certified after the NEC has determined by a final resolution that the number of valid signatures of an earlier submitted and certified question with the same content is at least two hundred thousand, or the National Assembly has finally ordered the

[11] Balázs Hohmann, "The Principles and Fundamental Requirements of the Transparency on the Public Administrative Proceedings," in *Proceedings of the IIER International Conference Dubai*, ed. Padma Suresh (Dubai: International Institute of Engineers and Researchers, 2019), 1-2.

[12] Robert Sasvári, "The Procedure of Authentication of the Question of the Quota-Referendum-From a Practitioner's Perspective," *Jura*, no. 2 (2017): 411-412.

[13] Zoltán T. Pállinger, "Direct democracy in an increasingly illiberal setting: the case of the Hungarian national referendum," *Contemporary Politics* 25, no. 1 (2019): 62-77.

referendum on the basis of the President of the Republic, the Government or such an initiative where the number of valid signatures attains one hundred thousand but does not attain two hundred thousand. The resolution of the NEC will be sent to the organizer by short route (e-mail/fax) and by post as well exactly the same day the resolution is taken. The resolution of the committee is published on the official website of NEO on the exact day of the resolution. In case the NEC has certified the question, the resolution is published in the Official Gazette of Hungary[14]. The Official Gazette of Hungary is a periodical, edited by the Ministry of Justice, publishing legislation and other legal documents that do not qualify as legislation. If the NEC refuses to certify a question about its resolution, a notice is published in the Official Gazette of Hungary. A judicial review request against the resolution of NEC in connection with the certification of the referendum question shall be addressed to the Curia, the supreme judicial forum of Hungary, by submitting it to the NEC in person, by post, or electronically to the e-mail address of NEO within 15 days after the publication of the resolution on the official website. Legal representation is mandatory in a judicial review procedure. A person with a professional examination in law may act in his/her own case without legal representation. While submitting a judicial review request electronically, the electronic document must be signed by the legal representative with a qualified electronic signature. Court procedure is not exempt from duty upon its subject matter, but the submitter of the application of legal remedy has fee deferral due to the subject matter of the action. The essence of cost deferral is that it exempts from duty advance payment and the advance payable of costs incurred during the procedure, but not from the payment of costs, i.e. the Curia may oblige the applicant to pay thereof in its decision. This is helpful however, because the procedure can be initiated and payment obligation may arise at the end of it. The Curia shall adjudge the judicial review request within ninety days, either upholding or altering the resolution of the NEC. The Curia publishes its decision on the exact day of the decision making on its official website. In addition, the Curia publishes its decision in the Official Gazette of Hungary as well, unless it upholds the resolution of the NEC to refuse to certify the question, while in this case a notice of its decision will be published in the Official Gazette of Hungary. The decision of the Curia shall not be subject to further legal remedy. If the NEC rejected the initiative without an in-depth examination since it contains obscene expressions or any other expression shocking in any other way, the Curia adjudges the judicial review

[14] András Bencsik et al., "A közigazgatás és a média kapcsolódási pontjai," *Pro Publico Bono* 3, no. 4 (2015): 61-65.

request within 30 days. The Curia shall either uphold the resolution of the NEC or instruct the Commission to conduct a new procedure.

6. Signature collection

The voters' national referendum initiative can be signed on the signature sheet issued by the NEO after the final certification of the question. The NEO indicates the question proposed for the referendum on the signature sheets and assigns each sheet with a unique serial number. Thereby, the recommendation sheet is unique and identifiable, cannot be copied, and is forgery-resistant. The sheets must be requested by the organizer, indicating how many sheets is needed for the signature collection. It is advisable for the organizer to submit the request for the signature sheets immediately after the decision on the certification of the question has become final. The NEO will provide the required sheets forthwith, but not later than five days. The organizer may request additional signature sheets at any time during the signature collection process. A separate signature sheet is provided for voters with a personal identification number and voters without a personal identification number. Disregarding to do so will result the invalidity of the signature. Signatures can be collected for 120 days from receipt of the sheets.

A national referendum initiative can be supported by the signiture of any adult Hungarian citizen who has not been excluded by court from exercise of right to vote and has a Hungarian address or in lack of Hungarian address he/she has been entered in the central electoral register upon his/her request[15]. The voter's family and first name as well as his/her personal identification number, in case of voters who do not have personal identification number the number of the document proving their Hungarian citizenship (passport, certificate of naturalization or citizenship certificate) and his/her mother's name must be written in a legible form on the signature sheet. In addition, the signature sheet must be signed by the voter in person. If the voter's name or his/her mother's name is so long that it does not fit in the available box, the name can be continued on the next line of the sheet. It is very important that voters shall provide their data correctly, as only that signature can be accepted as valid in which the indicated data correspond to the data of the central electoral register during the verification of signatures. The central electoral register, the register of citizens without voting right, the register of polling

[15] Yanina Welp, "Recall referendum around the world: origins, institutional designs and current debates," in *The Routledge Handbook to Referendums and Direct Democracy*, eds. Laurence Morel and Matt Qvortrup (New York: Routledge, 2017), 454-460.

districts and electoral districts, the register of nominating organizations, candidates and lists, and the register of representatives fall within the scope of national data assets, a computer center for the operation of the IT infrastructure of the state registers managed by the Minister of Interior and a part of the election information system based on computer workstations connected to it in a secure network connection. The above rule is intended to ensure the legitimacy of the referendum, as the matches of the data shows whether the initiative was signed actually by the person entitled to it. A voter may support the initiative by a single signature, his further signatures shall be invalid. Signatures can be collected by anyone who has a personal identification number or a document certifying Hungarian citizenship. On the signature sheet the person collecting the signature must also indicate his/her name and personal identification number or the number of his/her document certifying his/her Hungarian citizenship, as well as his/her signature. It is very important that the person collecting signatures shall provide his/her data on the signature sheet correctly as the case of an incomplete or incorrect data will result the invalidity of all supporting signatures on the sheet. Signatures may be collected anywhere without harassing voters, with the exceptions listed below. No signature shall be collected at the workplace of the person collecting or providing the signature during working hours, or while one or the other is fulfilling his or her obligations to perform work arising from employment or other legal relation concerning performance of work, from persons in service in the Hungarian Armed Forces or a central administration body at their service post or while they are performing their duty, on means of public transport, in the official premises of state, local governments and minority self-government bodies, on the premises of healthcare providers, in higher education and public education institutions. The restrictions mentioned above intend to ensure that the signature is not influenced. Locations where the person giving the signature may be vulnerable to the person collecting the signature are excluded. It is forbidden to give or promise money or any other benefit to the voter for his/her signature. The voter giving his/her signature shall not ask for money or other advantage in return for giving his/her signature nor accept an advantage or a promise. However, during the collection of signatures, the remuneration by the organizer to the persons performing the collection of signatures is not prohibited. In the period between the fortieth day before the date of the general election of Members of Parliament, Members of the European Parliament, municipal representatives and mayors, and representatives of national minority self-governments, and the fortieth day after the date of one or more of these elections, the collection of signatures shall cease. Where the organiser does not finish collecting the signatures until the fortieth day before the date of the election, he/she must

hand over the signature sheets so far collected and signature sheets without signatures as well to the National Election Office not later than thirty-nine days before the date of the poll. In case of a failure to comply with this obligation, the NEC on its own motion shall impose a fine of one thousand forints for each signature sheet not handed over.

The legal consequence of failing to meet the deadline, in addition to the fine imposed, is that the signatures on these sheets will be invalid. On the fortieth day after the date of the poll, the collection of signatures may continue, and the NEO shall hand over new signature sheets to the organiser. No additional signature sheet may be issued to the organizer and the sheets already issued shall be handed over to the NEO if the final resolution of the NEC has established that the number of valid signatures collected in support of another question on the same subject is at least two hundred thousand, or the National Assembly has ordered the referendum in a legally binding way on the same subject on the basis of the President of the Republic, the Government or voters' initiative supported by one hundred thousand valid signatures. The handed out signature sheets after reception within one hundred and twenty days may be submitted by the organiser or its representative on one occasion to the NEO. At that time, but not later than 16.00 o'clock on the 120th day, all received signature sheets, i.e. signature sheets with signatures and without signatures must be handed over to the NEO. If the organizer fails to do so, the NEC will impose a fine of one thousand forints per sheet. There is no exculpation from the failure to meet the time limit. There is no impediment to the organizer to submit the collected signatures within 120 days thereafter, but within 120 days to submit the not yet submitted sheets as well. As the issued sheets can only be submitted to the NEO on one occasion, the signatures on the sheets submitted later cannot be verified, they are invalid, but in this way imposition of fine can be avoided. When submitting signature sheets the number of signatures or the number of signature sheets submitted shall be verified. The received signature sheets shall be handed over even if the organizer has not been able to collect the required number of signatures or if he/she does not wish to order the referendum. Within five days following the inconclusive expiry of the deadline for legal remedy against the decision to certify the question, or – in the case of a legal remedy – within five days following the communication to the local election commission – of the decision of a county court to uphold the certification or to certify the question, the head of the local election office shall affix a certification clause to the template of the signature sheet, and shall hand it over to the organiser. As in the case of supporting signatures submitted for the certification of the question, in the case of the processing of signature sheets, due to data protection, register has been abolished by the Act XXXVIII of 2018 on the

amendment of Act CXII of 2011 on the right to informational self-determination and on the freedom of information related to the data protection reform of the European Union and on the amendment of other related laws entered into force on 26 July, 2018, the data processing related to the voters giving their supporting signatures to the referendum initiative shall not be reported to the NAIH[16].

If the voter or the political party (or any other natural or legal person involved in the case) experiences an infringement of right related to the collection or verification of signatures, they may submit an objection in writing - in person, by letter, fax or e-mail - to the NEC within 5 days of the infringement. If the last day of the period does not fall on a working day, the period shall expire only at 16.00 o'clock on the next working day. The objection must contain an indication of the infringement (indication of legislation, legal section and subsection), evidence of the infringement (e.g. statement, document, photograph, testimony, material evidence), the name and address (registered office) and the postal notification address if it differs from his/her address (registered office) of the objection submitter, the personal identification number of the objection submitter, or if the voter living abroad does not have a Hungarian address and personal identification number, the type and number of his/her document certifying his/her Hungarian citizenship or, in case of an organization the court registration number. The NEC will adjudge the objection within 5 days. If the last day of the time limit does not fall on a working day, the period shall expire only at 16.00 o'cock on the next working day. A judicial review request may be submitted to the Curia against the decision of the NEC within five days of the date of the resolution. The request for review shall be addressed to the Curia and submitted by letter or by electronic document to the NEC. Legal representation in the judicial procedure is mandatory. A person with a professional examination in law may act in his/her own case without legal representation. While submitting a judicial review request electronically, the electronic document must be signed by the legal representative with a qualified electronic signature. Court procedure is not exempt from duty upon its subject matter, but the submitter of the application of legal remedy has fee deferral due to the subject matter of the action. The Curia shall adjudge the judicial review request within five days. If the last day of the time limit does not fall on a working day, the period

[16] But the data recorded will nevertheless be considered personal data and will be subject to personal data protection rules, which will be even more strongly protected after the entry into force of the General Data Protection Regulation (GDPR), see for details: Bence Kis Kelemen and Balázs Hohmann, „A Schrems ítélet hatásai az európai uniós és magyar adattovábbítási gyakorlatokra," *Infokommunikáció és Jog,* 13, no. 2, (2016): 64-70.

shall expire only at 16.00 o'clock on the next working day. The decision of the Curia shall not be subject to further legal remedy.

7. Ordering and setting a referendum

If the number of valid signatures does attain at least one hundred thousand, the president of NEC notifies the Speaker of the National Assembly of the result of the verification of signatures on the next working day of its resolution becoming legally final. The Speaker of the National Assembly shall announce the initiative to the National Assembly on the next day following the receipt of the information received from the president of the NEC. Thereafter, within 30 days, the National Assembly may decide as follows:

1. If the number of valid signatures reaches 200,000 (compulsory referendum[17]), the National Assembly must order the referendum.
2. If the number of valid signatures is between 100,000 and 200,000, or if the referendum was initiated by the Government or the President of the Republic (optional referendum), it falls within the competence of the National Assembly to decide to order or not to order a referendum[18].

The decision on the order of the referendum will be published in the Official Gazette of Hungary. If the National Assembly has ordered a national referendum or refused to order the mandatory referendum, anyone may initiate a judicial review of the decision at the Constitutional Court within 15 days after the publication of the related decision. The application can only be based on a circumstance in which there was a significant change between the certification of the signature sheet and the ordering of the referendum, and which the NEC and the Curia could not take into account during the certification of the question. Thus, constitutional concerns solely about the content of the referendum question or related to the certification of the question cannot be invoked. The Constitutional Court makes its decision within 30 days, during the procedure it examines the conformity and legality of the resolution of the National Assembly with the Fundamental Law. In the event of a substantive examination, the Constitutional Court upholds the resolution of the National Assembly or, in addition to annulling the resolution, calls the National Assembly to adopt a new resolution. The President of the

[17] Gábor Soós, "Local government reforms and the capacity for local governance in Hungary," in *Reforming Local Government in Europe*, eds. Norbert Kersting and Angelika Vetter (Wiesbaden: VS Verlag für Sozialwissenschaften, 2003), 243-250.
[18] Fabio Ratto Trabucco, "The evolution of referendum experience in Hungary," *Jura*, no. 1 (2017): 208-215.

Republic shall fix the date of the referendum. The date of the referendum shall be fixed within fifteen days after the inconclusive expiry of the deadline for legal remedy against the parliamentary resolution ordering the referendum, or – in the case of a legal remedy – after the adjudgment of that legal remedy. The referendum shall be called so that the day of the vote in Hungary falls between the seventieth and the ninetieth day after the day of the calling. The vote shall take place on Sunday. If a referendum on another question has been previously called, a referendum on the other question may be held at the same time if there are at least fifty days left until the date of the referendum, and the holding on the same date of the referendum on the new question does not jeopardize the legal conduct of the voting. No national referendum shall be called on the day of the general election of Members of Parliament, Members of the European Parliament, municipal representatives and mayors, and within a period of 41 days before and 41 days after that day. In this case the national referendum shall be called within a period of 131 days after the election. The decision on calling the date of the referendum shall be published in the Official Gazette of Hungary.

8. Effectiveness and binding force of the referendum

The national referendum is valid if more than half of all voters, i.e. voters with a Hungarian address and voters without Hungarian address but registered into the central electoral register vote validly. A national referendum can be deemed successful if more than half of the validly voting voters gave the same answer to the formulated question, i.e. there is no equality of votes. The decision made by a referendum is binding on the National Assembly for 3 years. In case the National Assembly is required to enact a law on the basis of the result of the referendum, it must fulfill this obligation within six months.

9. The issue of referendum initiatives on the same subject

Two questions are considered to have the same subject matter if they impose - even in part - the same or mutually exclusive obligation on the National Assembly, i.e. in case of two valid and effective referendums, the legislative body would be obliged to regulate the same legal relationship, either with the same or with different content[19]. Therefore, identicality does not mean the literal similarity or complete opposition of two questions, but the existence of identicality in relation to the subject-matter wished to be

[19] David B. Magleby, "Let the Voters Decide-An Assessment of the Initiative and Referendum Process," *University of Colorado Law Review* 66 (1994): 13-17.

regulated. In the interest of predictable procedure, in case of the submission of several referendum initiatives on the same subject, it is necessary to clarify which one prevails, i.e. in which question may be held a national referendum. The prohibition on submitting referendum questions on the same subject (the so-called parallel moratorium) was significantly eased with the amendment of the referendum act on 21 May, 2016. In the case of voters' initiatives, several questions with the same subject may "run" in parallel until the signatures are collected. Whether the question proposed for the referendum has the same subject matter as a national referendum initiative that has already been adjudged, the NEC will make the decision in its question certifying resolution[20]. If several questions on the same subject are certified, the NEO will provide information upon this in writing by sending the final decision to the organizer of the first question. The NEO informs voters about initiatives on the same subject on the official website of the elections. No other question with the same content shall be submitted after a final resolution of the National Election Commission has stated that the number of valid signatures is at least two hundred thousand, until the resolution refusing to order the referendum has become final, until the referendum has been held, if the referendum is inconclusive, or until the expiration of the binding force of an earlier called national referendum on the same subject (for three years from the promulgation of the law made on the basis of the referendum). No question on the same subject may be submitted after the National Assembly has lawfully ordered a referendum on another question initiated by one hundred thousand voters, the Government or the President of the Republic until the referendum was held if the referendum was inconclusive, or until binding force (three years from the promulgation of the law passed on the basis of the referendum) of the a national referendum called earlier on the same subject.

Following the submission of a voters' initiative, no other question with the same content shall be submitted by the President of the Republic or by the Government within sixteen days following the rejection by the president of the NEO, if no re-submission has been made, until the expiry of the deadline for submitting judicial review requests against the decision of the NEC concerning the certification of the question (on the 15th day after the publication of the resolution on the website www.valasztas.hu), if no judicial review request against the decision refusing to certify that question has been submitted, up until 0.00 o'clock on the day after the publication in the Official

[20] Adrián Fábián and Emese Pál, "Választási bizottságok működése Magyarországon, különös tekintettel a 2014. évi helyi önkormányzati választásokra," in *Választási dilemmák: Tanulmányok az új választási eljárási törvény nóvumai és első megmérettetése tárgyában,* ed. Ákos Cserny (Budapest: National University of Public Service, 2015), 38-45.

Gazette of Hungary the resolution of the Curia upholding the decision of the NEC to refuse the certification, or rejecting, without an in-depth examination, the judicial review request submitted against that decision, or altering the decision of the National Election Commission certifying the question, until the referendum initiative is withdrawn, (which is possible until the submission of signature sheets), until the deadline for the submission of signature sheets expires inconclusively, until the resolution refusing to order the referendum has become final, until the referendum has been held, if the referendum was inconclusive, or the expiry of the binding force of a national referendum held on the same subject earlier (for three years from the promulgation of the referendum law). In case of signature collection of several questions on the same subject, the NEO will first check the signatures on the earliest submitted signature collection forms. If signatures are collected on several questions on the same subject and the number of valid signatures on signature sheets firstly submitted in time (so-called primary submission) is more than one hundred thousand, but does not reach two hundred thousand, and the decision establishing the result of signature verification has become final, until the 85th day after the primary submission (so-called suspension submission deadline) all other signature sheets shall be submitted (so-called secondary submission) to the NEO by the other organizers. Failure to do so will result in the imposition of the usual fine (one thousand HUF/sheet). There is no exculpation in case of failure to meet the time limit. During the secondary submission, the organizer (who submits the sheets secondly, thirdly, etc.) must declare that he/she requests the suspension of the collection of signatures, requests the verification of the submitted signatures, or withdraws his/her referendum initiative. If the organizer does not make a statement, the referendum initiative shall be deemed withdrawned. The president of the NEO shall notify the Speaker of the National Assembly on the working day following the entry into force of the result of the verification of the signatures submitted and requested to be verified by the suspension submission deadline. This notification shall also include the final result of the verification, the order of submission of the supporting signatures on the same subject submitted and verified until the suspension submission deadline.

The National Assembly makes decisions on the initiatives in the order of the submission of the sheets. The National Assembly may order only one referendum on a question with the same subject matter. From the day following the suspension submission deadline until the decision of the National Assembly on order of optional referendum, the NEO does not issue signature sheets. If the organizer has requested the suspension of the signature collection on the occasion of the secondary submission, the suspension shall be terminated on the day the National Assembly decides not to hold an

optional referendum, and within five days the NEO shall provide the organizer the requested number of signature sheets. From the date of the secondary submission until the handover of the signature sheets the 120-day time limit for collection is suspended. However, if the National Assembly has finally ordered the referendum on the first question submitted with at least one hundred thousand valid signatures, the suspended referendum initiative shall be terminated. If signatures are collected on several issues of the same subject and the final decision of the NEC establishes that the number of valid signatures collected in support of question submitted in time at first is at least two hundred thousand, for other referendum initiatives on the same subject the issuance of signature sheets will be suspended from the day after the resolution of the NEC becomes final and also the 120 days time limit for collecting signatures. Within 15 days of the entry into force of the Commission's decision establishing the existence of two hundred thousand valid signatures, the organizer collecting signatures on the same subject shall hand over all signature sheets to the NEO. Upon handover, the organizer may declare the withdrawal of his/her referendum initiative. In case of failure with the obligation to hand over the sheets, the NEC acting ex officio, will impose a fine of one thousand forints per signature sheet. There is no exculpation in case of failure. Nevertheless, if the decision of the National Assembly to order the referendum does not become final due to legal remedy, the suspension shall be terminated on the day following the publication of the decision of the Constitutional Court. In this case, the NEO will provide the organizer the requested number of signature sheets within five days and the signature collection can continue. In the event that the NEC establishes by a final resolution that the number of valid signatures is at least two hundred thousand, or that the National Assembly has finally ordered a referendum on the basis of the President of the Republic[21], the Government or voters's initiative supported by one hundred thousand valid signatures, signatures collected and submitted in support of further referendum initiatives on the same subject are no longer verified by the NEO. However, despite the final resolution of the NEC establishing that the number of valid signatures has reached two hundred thousand, but due to legal remedy, the decision of the National Assembly to hold a referendum does not become final, the NEO will carry out the itemized verification of the signatures collected in support of other referendum initiatives on the same subject following the publication of the decision of the Constitutional Court.

[21] Patrick O'neil, "Presidential power in post-communist Europe: The Hungarian case in comparative perspective," *The Journal of Communist Studies and Transition Politics* 9, no. 3 (1993): 180-195.

10. Conclusion

The institution of a national referendum, as we have seen above, originally serves to enforce the will of the voters in Hungary, who can express their will and opinion on certain issues between parliamentary elections in this way. However, most of the initiatives do not lead to the actual holding of the vote. In Hungary, from 1989 to the present day only seven national referendums were held: on 26 November, 1989 the so-called "four-part referendum", on 29 July, 1990 on the direct election of the President of the Republic, on 16 November, 1997 about NATO accession, on 12 April, 2003 was the referendum on EU membership, in addition we can remember the referendum of 5 December, 2004, the "referendum on visit fee" held on 9 March, 2008 and the "quota referendum" held on 2 October, 2016. One of the main reasons for holding a relatively small number of national referendums is that many initiatives do not have the ultimate goal of holding a referendum. This can be clearly seen from the fact that in countless cases the organizers do not start collecting signatures despite the final resolution of NEC on the certification of the question. Publishing their question on the website of NEO or in the Official Gazette of Hungary is satisfactory for them. So we can say that the real goal of national referendum initiatives is usually to draw public attention to a problem or a political party supporting strata to be addressed during the political off-season. National referendums were tools of the political elite in the past as well to mobilize voters, good opportunities for political parties to identify their own committed voters from the masses of voters through signature collections. The referendums did not function as an autonomous initiative of the voters. In the history of national referendums it can be observed that the referendums ordered so far have been usually initiated by the Government or political opposition parties, while unsuccessful referendum initiatives have been mostly initiated by private individuals.[22] In summary, it can be stated that the Hungarian referendum regulations are not among the strictest in an international context and the legal conditions of national referendum initiatives do not seem unachievable. Nonetheless, the number of rejected initiatives is high. This may be due - among other things - to the fact that the challenge of a clear and prohibited subject non-affecting wording of the referendum question cannot be fulfilled by the majority of the initiators. In most cases questions asked in a referendum fail on the test of clarity, especially with regard to voters' clarity. We can therefore say that the current legal environment creates a more or less good basis for the exercise of direct

[22] Csaba Cservák, "A politikai részvétel előmozdítása," in *Jó állam jelentés*, ed. Tamás Kaiser (Budapest: Nordex, 2016), 107.

democracy in Hungary. The possibility of initiating referendums is assured for a very broad scale, although clarity requirements and prohibited subjects significantly limit concretely what questions may be asked in a referendum.

Changes in the responsibility and authority of the Hungarian State Treasury from the regime change to nowadays

VARGHA, ÉVA

ABSTRACT *The first part of the study presents the path leading to the establishment of the Treasury, and the second part presents the changes in its tasks and competences from its foundation to the present day. By taking into account the changes, the current structure, operation, and place of the Treasury in public administration can be assessed. The Treasury bears marks of the financial and administrative tendencies of the last thirty years, so the aim of the study is to strengthen transparency, responsible management and cost-effectiveness through the consideration of the changes and experiences of the past.*

KEYWORDS *Hungarian State Treasury, responsibility, authority*

Changes in organization, tasks and competences are driven by the need for responsible management, the need to increase cost efficiency as well as transparency, higher service standards, government intentions, and international trends. Most major organizational changes were rather the result of a kind of change in political ideology (e.g., the regional structure). Of course, decision-makers were expected to achieve cost savings, higher professional standards, and transparency, but these objectives reflect external administrative and governmental tendencies rather than mapping actual internal transformation needs. In general, the aim of expanding payment activities is to increase the demand for money and, at the same time, to improve liquidity, to increase budgetary discipline in the case of the regulation and management of programs, appropriations, applications, and receivables, to achieve a more efficient and professional performance of tasks in the case of pension insurance, and to induce a more efficient flow of information in the case of activities supporting the operation of public finances.

By today, the concept of the treasury has become complex. On the one hand, in the sense of private law, it represents the state's private legal entity, and in this context, the state "loses" and renounces its public authority, and thus it plays a co-ordinate role in this legal relationship. Here, state ownership

and state power are sharply separated. Historically, this happened as a result of the separation of the ruler's private property and state property and the struggles of the bourgeoisie in Europe in the 18th and 19th centuries, when state property was raised to the same level as other private property. On the other hand, in the public law sense, the treasury is the complete system of bodies responsible for the operation of state property and also means the totality of the state assets they manage. In a narrow sense, by the treasury in Hungary we mean the Hungarian State Treasury (hereinafter referred to as the Treasury).[1]

1. Establishment of the Hungarian State Treasury

The Treasury is a trusted, supervised, strictly governed body that carries out the following tasks: it manages the state's and taxpayers' money, which requires special care, including the exclusion of the possibility of corruption and waste, on the other hand, it fulfils the need to share power in the state financial system. "Actual public administration and the administration of public finances must be separated" – as is stated by the German Public Finance Act. In other words, "who has the power to make decisions should not handle money, and who manages the money should not have the power to make decisions."[2]

It needs an explanation why I am talking about "revival" and not about establishment? The history of the treasury is as old as the development of the state. The peculiar nature and size of the state's assets necessitated its supervision right from the beginning. Until the end of the Second World War, the Hungarian Public Finance System was on a par with that of Western Europe, but then it gradually became outdated, and until the regime change, the possibilities of introducing a modern financial system did not exist.

From the late 1980s, the idea of establishing a Treasury had arisen several times. Several ideas had also emerged concerning its operation and organization. At the end of the 1980s and in the early 1990s, the central budget deficit drastically increased, which virtually brought to life several new types of money supplies and financing. The transition was delayed, which was largely due to the strong resistance of the budgetary authorities. The reason for this was that their management would become more and more fixed and transparent with the new system, since they would not manage funds, but

[1] http://jogikar.uni-miskolc.hu/download.php?fileName=/projectSetup/files/koi/kozig-3/kozig3_nyomda_2.pdf.

[2] Iván Illés, "A Kincstár bevezetésének háttere," *Info-társadalomtudomány* 34 (1995): 30.

typically appropriations.[3] After the regime change, the demand for the elimination of "wasteful state management" arose with elemental force, and the formation of today's organizational system began.

The Public Finance Reform to be prepared was formulated in Government Decision 1128/1994 (XII.30.), in which the Government launched the Public Finance Reform Commission (including the Minister of Finance, the Minister of the Interior, the President of the State Audit Office and that of the National Bank of Hungary), of which the tasks included, among other things, the preparation of the establishment of the Treasury and the elaboration of details.

Government Decision 2189/1995 (VII.4.) laid down the basic principles of the financial reform of public finances, the financial organization and tasks of the new public finance system. The organizational structure of the Treasury existing to this day was already defined there as being divided into central and regional directorates.[4] Not only the organizational structure was defined here, but also its legal framework, according to which the establishment of the Treasury was to be ensured with the modification of Act XXXVIII of 1992 (hereinafter referred to as Áht.). So, in the end, Parliament "brought the Treasury to life again" by modifying the Áht. Although even the Government was entitled to the establishment of a central budgetary body under the Constitution of that time[5], it was nevertheless set up by an Act of Parliament. Perhaps it was justifiable to regulate change at the level of a legislative enactment in the interests of a commitment to reform, a faster consolidation of the new structure and because of the critical points.

Iván Illés believed that, in relation to the re-establishment of the Treasury, "the consensus is so great that it is almost suspicious. Government-led motives are clear: the announced public finance reform is progressing slowly, facing great social resistance. Finally, it is an action in which it is possible to make progress relatively painlessly, with less resistance, and to produce results. The right-minded opposition also knows that in the reform of public finances, besides the many "nos", they should also say yes to something or some things. On the other hand, the setting up of a Treasury that does not violate the direct interests of the public could also be set against other, more painful steps of the reform."[6]

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[3] Report on the financial-economic control of the establishment and operation of the Hungarian State Treasury. State Audit Office. Report no. 386, 1996. 1-11.

[4] Ibid.

[5] Act XX of 1949, subsection 3 of section 40 of the Constitution of the Republic of Hungary: "The Government has the right to supervise any branch of public administration directly and to establish separate bodies for this purpose."

[6] Illés, "A Kincstár bevezetésének háttere", 29.

"There are few economic laws nowadays the adoption of which in Parliament was so unanimous as that of the amending Bill proposing to set up the Treasury. Not only the government parties, but also the opposition parties supported it, with the exception of the Independent Smallholders' Party. Opposition criticism came mainly in the following form: "it should have been done earlier, why the delay?"[7] The consensus was well reflected by the fact that the proposal for amendment was submitted by the Minister of Finance on 24 October 1995[8] and it was already published in the Hungarian Official Gazette (Magyar Közlöny) on 13 December 1995. It should be noted that the adoption of the proposal became urgent, since from 1 January of the following year, the legal background for the functioning of the financial system of the state had to be ensured.

The idea of the Treasury brought two fundamental changes: on the one hand, it created the treasury system as a fundamentally different way of financing, and on the other, it created the conditions necessary to underpin future financial reforms. László Bogár - in his parliamentary address related to the legislative amendment - stated that the Treasury contributed to reform changes of a technical character, but that questions of the reform of public finances of strategic importance relating to economic policy and political power are still waiting to be solved.[9]

In order to understand the Treasury, it is indispensable to present the typical public finance system. At that time, there was a special financial system in Hungary, which induced a very wasteful financial management. Scientifically speaking, in budget money supply - quasi thereby obscuring its complete irrationality - the principle of gross view was realized. The actual movement of budget revenues and expenditures took place through the entire institutional system. The result of the extensive - both in volume and direction - cash flow was a non-transparent and uncontrollable circulation of funds. It is a meaningful data that only about 8% of the funds from the central budget were paid to the ultimate income holders. Meanwhile, the same ratio was 80% in Germany, 90% in France and 50% in the United States.[10] Due to the chaos of the information system, the budget was virtually not authentic and genuine, as the data of the institutions were aggregated and thus the financial flows between the institutions were practically twice taken into account due to the gross view.[11]

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[7] Ibid.
[8] http://www.parlament.hu/iromany/01543ir.htm
[9] http://www.parlament.hu/naplo35/121/1210047.htm
[10] Ibid.
[11] János Eörsi, "Interjú Naszvadi Györggyel," http://beszelo.c3.hu/cikkek/kincstari-szoveg

Not only the financial movements, but also the money supplies of the budgetary bodies were irrational. The central budget disbursed to the budgetary authorities the 1/12th part of the amount of budgetary appropriations at the beginning of each month. The subsidy was independent of the expenditure incurred[12]. The municipalities were financed in gross terms, i.e., they received the full time-proportionate subsidy, and then they paid back the funds due to the central budget (e.g., Social Security Contribution, Personal Income Tax, etc.). The money in its physical reality made its circles completely unnecessarily. Time-proportional support caused confusion on both sides. The biggest problem for the centre was the premature financing need, as the central government's liquidity was largely maintained by borrowing, so the demand for financing also meant a requirement for loans.

On the side of the budgetary bodies, it was a problem that higher expenditures in their budget (other than normal operations) had to be postponed until the necessary funds could be accumulated from the monthly proportional funding amounts. In addition, this type of public finance system also generated many other problems. It was a very grotesque picture that while some local governments and institutions accumulated significant amounts in their commercial bank accounts and other financial and payment institutions, the central budget was forced to withdraw significant amounts of cash and struggled with liquidity problems. At this time, almost no constraints existed as to the bank where a given budgetary organization could have a bank account.

Budgetary forints were not only meaninglessly "circulating", but even control was missing from the system, as nothing assured that commitments would not break away from appropriations. (The reasons why this particular system could have developed could be discussed endlessly. One thing is certain: the structure served the interests of the deconcentrated and decentralized bodies rather than those of the centre.)

Not only was the public finance system underdeveloped, but the restored two-tier banking and financial system was also just trying its wings. The system's primitiveness and regulatory-surveillance deficiencies were exploited by many. One of the flagrant examples of this is the bankruptcy of the Ybl Bank: its bankers considered their bank as their own "wallet", so after a few years of operation bankruptcy was announced, with coverage being available only for 10% of the deposits. The central budget paid out about HUF 5.5 billion to compensate depositors.

[12] István Csillag, "A Kincstár működése és ennek következményei," *Info-társadalomtudomány* 34 (1995): 38.

The other major scandal consuming huge amounts of state money was the case of the Lupis Brokerage House. The financial enterprise practically gambled with the money of its investors, which resulted in the bankruptcy of the company. Investments included a significant amount of money from the state budget.

These scandals did not only have financial implications, but also evoked distrust in the banking and financial system. In general, the information obtained from the public finance system was useless, the elimination of accumulations was an impossible task, which was due in part to the special accounting records system and to the irrational migration of money. This initial period resulted in very high operating costs for the central budget.

In view of the reasons presented, the following professional arguments were formulated for setting up the Treasury:

1) alleviating the liquidity problems of the budget,
2) reducing the central government's need for loans.

The task was urgent, as public debt had already reached critical proportions. In addition to the huge debt stock, the budget deficit - the consolidated deficit of public finances, which exceeded 8% of the GDP and the deficit of the balance of payments, which reached 10% of the GDP in 1994 - (twin deficit) plunged the economy into imbalance. The maturity structure of public debt was also very unfavourable, with almost half of its maturity within 3 years, which led to almost constant, large-scale debt renewal, with market vulnerability and liquidity risks.[13] The reduction in loan demand was planned to be composed of three sources. Firstly, the abolition of monthly, time-proportional budget financing and the introduction of post-financing, which would result in savings in interest and resources, since the aid is only paid out in the event of the costs occurring. Thus, there would be no way to unreasonably accumulate budget aids, while spending could be more predictable and schedulable.

The new financing system - treasury payment - was to be as follows: as a first step, the budgetary authority would submit to the Treasury the supplier's invoice or payroll underlying the payment and instruct the Treasury to make the payment out of the approved budget appropriation. This step was missing before, since the budgetary authority itself instructed the financial institution to make a payment without any underlying document. In the next step, the Treasury would examine whether there is sufficient coverage of the payment

[13] István Unger, "A Határőrség kincstári gazdálkodási tevékenységének elemzése, továbbfejlesztése lehetséges irányainak vizsgálata az Európai Uniós követelmények tükrében" (PhD diss., Zrínyi Miklós Nemzetvédelmi Egyetem, 2005), http://archiv.uni-nke.hu/downloads/konyvtar/digitgy/phd/2005/unger_istvan.pdf.

in the appropriate budget of the budgetary authority and whether the remittance is formally appropriate. Control would be formal, it would not be based on content or expediency. This step was not part of the previous system, occasional appropriation overruns came to light only following the reports. As a third step, if the payment was enforceable, the Treasury would fulfil it from the Treasury Account (KESZ). Payments could be made by the Treasury by transfer or cash (e.g., supplier, employees, insured) or by transfer between accounts (e.g., payroll contributions). As a fourth step, the Treasury would account the performed payment to the debit of the budgetary authority's appropriations. (Formerly, only the budgetary authority itself kept an account of the economic transaction.)

The Treasury prepares a regular and periodic statement of the state of appropriations for both the budgetary authorities and their supervisory bodies. "This registration and accounting feature allows us to collect information based on the actual cash flow. Planning can be more accurate and budget control can be more targeted due to the information gathered in the Treasury. Cash flow data provided by the Treasury render possible function analysis, comparing the tasks performed, and the costs incurred later, as well as monitoring the use of public funds more closely."[14] On the other hand, by eliminating cash flows within the public finances and reducing them to the minimum necessary,[15] with a reduction in the money demand (introduction of net funding) the central budget's loan demand would also be decreasing. Thirdly, with the tightening of budgetary discipline, the management of appropriations to be introduced would not allow the budgetary authorities to dispose of funds in excess of their appropriations.

Another very important and urgent reason was providing accurate and up-to-date information to decision-makers and other budget actors about the current and predictable state and financing needs of the budget. The change was to be achieved through the creation and coordination of a unified treasury account management system and the use of a registry IT system for recording obligations, appropriations, and transactions. The introduction of the system also resulted in savings (interest savings), since with up-to-date information, public debt and liquidity management could operate more efficiently. Such a system did not exist before, the existing primitive IT systems and mostly paper-based documents were not directly suitable for providing management information, so supplying such information took longer. In addition to the lot

[14] Csillag, "A Kincstár működése és ennek következményei," 38-39.

[15] The essence of net financing is that revenue from the central budget is deducted from some of the budget subsidies to be disbursed. The accounting principle itself is unchanged, the principle of gross settlement continues to apply, the principle of cash flow changes only on the net principle.

of data and information generated, most of them were not used, basic information was missing, or the data were incomplete. The availability of data over time and the incomparability of data over the years was a persistent problem.

It was argued that the system to be introduced would result in job and personnel savings through the centralization of tasks.[16] (The argument was more of a hope than a realistic goal, as it was unlikely that savings could be achieved in the longer term, but if yes, then this could only be explained by eliminating the parallel task performance.)

Treasury account management would eliminate the risk of public funds management by financial institutions. With the introduction of the Treasury Unified Account, the current payment accounts of the government revolving fund and the central budgetary bodies managed so far would be abolished. The account would be a unified funding base.[17] The state revolving fund was the central institution for the execution of payments in the state budget. MNB managed the state revolving fund and its related revenue and expenditure accounts.[18] The following table is informative about the money stock with respect to the state revolving fund and central budgetary bodies:

[16] Illés, "A Kincstár bevezetésének háttere", 30-32.

[17] Csaba Gárdos, "A kincstári rendszer létrejötte, fejlődése, bővítési stratégiák, lépések a szubszidiaritás irányába," *Prosperitas* II., no. 1 (2015): 81-97.

[18] Act CIV of 1990 on the State Budget of the Republic of Hungary and the Rules of Public Finance in 1991.

Table 3: State revolving fund and central government budgetary funds, 1993-1994[19]

Organization/Year	10th month of 1993 HUF billion	10th month of 1994 HUF billion
Revolving funds	54.3	8.7
Other Central Budget Accounts*	19.4	20.1
Budget Chapters and Bodies	43.5	52.9
Social Security	7.7	3.8
Separated state funds	15.5	24.7
All	140.4	110.2

* Collection accounts; depository, administering, blocked accounts; State Property Agency and accounts of other asset managers.

The table shows that the state's solvency can be significantly increased by the "common account". Not only does the cash available temporarily in other subsystems increase the benefit of the central budget, but, since so far, the institutions bought treasury bills from their temporarily free funds, which was followed by interest, this can also be saved. The turnover is not negligible, as we can conclude from the financial stocks that it is a money amount of billions (in October 1994, the budgetary bodies bought government securities for a total of HUF 17.8 billion and they sold them at HUF 15.9 billion).[20]

With the introduction of the IT system, the budget could shift to the GFS-based (government financial statistics system developed by the International Monetary Fund) budgetary nomenclature, which would allow international comparisons of public finance data. The Government already prepared the 1996 budget in this way, so the question arose if the proposal to amend the law was not adopted, how the emerging situation would be resolved. The previously applied and GFS-based nomenclature was made using a different methodology, so until the budget was made in the old-fashioned way, a completely new financing could not be created without interruption. The task was urgent, because on the one hand we were not able to properly fulfil our reporting obligations regarding the state budget with our accession to the EU

[19] Own editing based on http://beszelo.c3.hu/keretes/szegeny-kozpont
[20] János Eörsi, "Szegény Központ!" http://beszelo.c3.hu/keretes/szegeny-kozpont.

and the contacts with the international financial organizations were also difficult.[21]

The introduction of the treasury system was not only motivated by internal influences, but also by the recommendations and assistance of foreign organizations and international organizations (IMF, World Bank), which led to the development of the Hungarian public finance system as well. The Ministries of Finance of France and the United States also offered their assistance in developing the system.[22] The World Bank provided not only professional but also financial support to Hungary for the establishment of the Treasury system as part of the Public Finance Management Project, which was approved in 1996. Part of the support was granted in the form of a loan, some of which was granted as subsidy. The total cost of the project was $10.39 million,[23] of which $7.26 million consisted of loans and the remainder came from other supports and subsidies.[24]

On the basis of the proposal to amend the law, in 1996, the central budget and then in 1997 the social security funds and local governments entered the treasury system. The deadline for the entry of local governments was soon extended to 1998 in view of conflicts of interest and constitutional problems. Already it was feared that at the time of the municipal and parliamentary elections, the government would not engage in the involvement of local governments or the resulting conflicts in the hope of initial modest results.

"It should also be taken into account that the interests of OTP, which is the country's strongest bank and, moreover it is increasingly owned by foreigners, must be crossed. It is therefore feared that the treasury system will be an "unfinished" investment, of which the part which would bring some income is not finished,"[25] Unfortunately, the prediction of Iván Illés has been confirmed, because the integration of the local government system into the treasury has been pending for 20 years now.

Municipalities may choose to keep their treasury accounts, but obviously they do not, as commercial banks offer much more favourable terms and a wider range of services. The Ministry of Finance estimated the net savings resulting from the introduction of the entire system at HUF 35-36 billion at

[21] Government Decree 2189/1995 (VII. 4.) on the reform of the financial system of public finances, the establishment of the Treasury, and the proposal providing a basis for this.

[22] Lajos Bokros and Jean-Jacques Dethier, *Public Financing Reform during the transition, The Experience of Hungary* (Washington: The World Bank, 1998), 381.

[23] http://documents.worldbank.org/curated/en/484191468750276327/pdf/multi0page.pdf, 8.

[24] Ibid.

[25] Illés, "A Kincstár bevezetésének háttere", 34.

that time. The cost of savings and the extraction of funds is primarily paid for by the financial and payment institutions, to which real losses would only be caused if the accounts of local governments were managed by the treasury.

Following the presentation of the history of the treasury, it is easy to deduce the three basic pillars of the treasury system.

1) *The first pillar is the system of state funds: an institutional system that has the exclusive right to receive state revenues, to meet the expenditures and to manage funds.* [26]
2) *The second pillar is* "*management of appropriations and post-financing based on an invoice.* So, there is no money in the hands of public institutions or in their bank accounts – except for daily spending"[27] Post-financing is an essential and cost-effective solution, as money must be available only after the professional performance of the task. With this method, the financing needs of the national budget can be significantly reduced. The Treasury examines in the case of the performance of expenditure whether the institution has an appropriation to meet the expenditure, it checks the invoice only from a formal point of view - in some countries, in terms of content as well - and then it completes the payment in case of compliance (Earlier before the war this was the task of the audit office).
3) *Finally, the third pillar is the elimination of money flows within the public finance system.* (Formerly, the Hungarian Royal Postal Savings Bank performed this task).[28] *With the operation of KESZ*, it is possible to realize accounting between institutions belonging to the treasury system without cash flow, through transfers. It is worth noting not only the significant cost saving aspect, but also the international and modern demands and expectations.

Knowing the basic pillars, it can be seen that the Treasury is the depository of state money management, "the establishment of the Treasury – as they say in Budapest - means that the "treasury key" has been put into the hands of the financial government."[29] "In the future, publicly funded institutions will not meet their payments from their own cash register, but through the Treasury. They will not manage money, but only manage appropriations […]. The revival of the Treasury has undoubtedly a centralizing effect. In the future, institutions will not be able to hide their cash flows from the sight of the centre,

[26] Not a recent concept, such a solution has been used for centuries for chambers, salt offices, etc. and then for example the Royal Hungarian Savings Bank.
[27] Illés, "A Kincstár bevezetésének háttere", 30.
[28] Ibid.
[29] Élet és Tudomány, A Kincstár 1996/35. 1119.

as they cannot transfer a single forint without the interposition of the Treasury […].

The creation of the Treasury was motivated by the need for the economical management of public funds. The Treasury can save money from being transferred within the system of public finances, while allowing accounting without cash flow. Temporarily free funds also bear an interest for the Treasury, not for the institutions. Over-spending in this system is also quite difficult. The positive impact of these benefits is greatly reduced by the increase in bureaucracy and the weakening of institutional autonomy."[30] "The establishment of the Treasury reflects the recognition that most of the funds used in the budget sector are public money, which can only be spent purposefully and only at the time when it is absolutely necessary."[31]

The question arises as to whether the necessary changes could have been made in other ways. Obviously, the financial system that fits into the spirit of the age can be imagined with a different structure and division of tasks as well, as we may see some examples in several countries. These tasks can be solved without creating a separate legal entity, for example, within the Ministry of Finance. But with this solution, the power-sharing requirement for the public finance system is being undermined. In this context, I mean an organisationally separated implementation and control which is non-dependent on decision-making. The generous execution of the task can take place through the creation of an independent ministry, and there can be many solutions between the two extremes, which are influenced mainly by the historical traditions and, secondly, by the size of the state, the public finance system, and the principles of state organization. Our chosen solution is ideal and timely, since with the establishment of an independent institution, at the same time "the Treasury system is also part of the "checks and balances" system of the democratic state, as well as that of the institutions that control and balance each other."[32] The idea may arise due to the service-providing nature of the Treasury that it should be operated as a business company, but this may raise many unnecessary problems, for example, regulatory constraints and the disciplinary responsibility of employees may be narrower, and so on.

The Treasury was organized on the basis of the respective departments of the Ministry of Finance, the National Bank of Hungary (MNB) as well as the State Development Institute. The Territorial Public Finance and Public Administration Information Service, i.e., the TÁKISZ, the Regional

[30] Ibid.
[31] Csillag, "A Kincstár működése és ennek következményei," 38.
[32] Illés, "A Kincstár bevezetésének háttere", 30.

Territorial Public Finance and Public Administration Information Service, i.e., the FÁKISZ and the county directorates of the National Bank of Hungary (MNB), were reorganized into the Treasury's central and regional directorates. The Treasury thus became a service provider performing special financial activities and its headquarters were established on the basis of the State Development Institute by merging the treasury departments of the Ministry of Finance and the MNB. As of 1 November 1995, the Minister of Finance signed its Charter of Foundation with the effect that from 1 January 1996 it would perform the tasks laid down by amending Act XXXVIII of 1992 - as a nationally independent, self-managed budgetary body. It was defined as a financial manager for the implementation of the budget of the public finance subsystems.[33]

At its establishment, the Treasury's central organization consisted of five directorates, their departments and sub-departments, and other departments and sub-departments directly managed by the President.[34] The legal framework for the financing of the deficit in the central budget was set out in the annual budget laws. The given finance minister in office was authorized - in the annual budget laws - to issue government securities. Issues were usually made with the assistance of the central bank, with the division of tasks between the Ministry of Finance and the MNB. The State Securities Issue Office was established for the organization and conduct of the issue of government securities with a maturity of over one year, with effect from 1 April 1993 under the supervision of the Ministry.

The change in the way budget deficit financing was made, the increase in the value and number of government securities issues justified the establishment of an organizational framework for public debt management. Being aware of the fact that the continuous, large budget deficit would continue to be financed by the issuance of government securities, in its Decision No 3067/1993 the government authorized the Minister of Finance to establish the State Securities Issue Office (ÁÉKSZI) in order to manage this task more effectively. The Office was established with a few staff and it worked for two years. Then, in May 1995, its Charter was amended and the State Debt Management Centre (ÁKK) started operating under the supervision of the Ministry of Finance as part of the Treasury.[35] The purpose of setting up

[33] "Report on the financial-economic control…" 1-11.
[34] Ibid.
[35] On 1 April 1996, the ÁKK came under the supervision of the President of the Treasury and it took over all domestic debt management activities. At the same time, the decision-making process on strategic and conceptual issues of debt management also changed: the so-called Treasury Council, made up of the heads of the Ministry of Finance, Treasury, ÁKK and the central bank, became responsible for making these

the Centre was to bring together all debt management functions within a single organization, and this function was implemented gradually. The separation of fiscal and monetary functions was an important step, providing the basis for the central bank to effectively withdraw from the financing of public finances (the Maastricht Treaty on European Union prohibits direct central bank financing of the budget - Article 123 of the Treaty on the Functioning of the European Union).

On 1 April 1996, the Debt Management Centre (GDR) was integrated into the Treasury, although it continued to work as a partially independent budgetary body with legal personality. At the same time, the tasks related to the primary and secondary trading of government securities - together with the number of employees - were taken over from the MNB.[36]

On 1 July 1996, network units were established in 18 counties, and then on 30 September, the Minister of Finance approved the Treasury's Organizational and Operational Regulations. Until the end of that year, the Treasury fulfilled the tasks of the MNB on the basis of agreements and through assigning MNB employees to the Treasury. In 1997, the staff and assets of the MNB were handed over. Some of the county branches were jointly operated by the MNB and the Treasury.[37]

Prior to the establishment of the Treasury, treasury functions were performed fragmentarily, for example, the institutions and their ministries themselves, as paying agents, provided accounting, auditing and information, tax administration was carried out and part of the budget information was processed by APEH (Hungarian Tax and Financial Control Administration) and APEH-SZTADI (Institute of Computer Science and Tax Accounting of APEH), VPOP (Hungarian Customs and Financial Guard) assisted in the imposing, collection and accounting of customs and other revenues, MNB helped to manage the budget accounts, while banks, financial institutions, and

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decisions. In 1997, the scope of ÁKK was extended to the management of the central government foreign debt as well. Acting on behalf of the Hungarian State since 1999, it has also been engaged in foreign fund-raising operations. As of 1 March 2001, the ÁKK continued its activities in the form of a joint stock company, however, the Treasury Council ceased to exist, and strategic decisions were subsequently taken by the ÁKK and the Minister of Finance. In 2003, it expanded its activities to maintaining the solvency of the central budget and managing the temporarily free state funds. From 28 August 2006, it continued its activities in the form of a private limited company (Report on the control of securities issues financing the cash needs of the state (central budget deficit), Report No. 303, 1996, 1-28, http://www.akk.hu/object.a271772d-8d63-4068-b573-743f3a374829.ivy.

[36] "Report on the financial-economic control…" 1-28.

[37] Ibid.

ÁFI participated in the management of public funds, and the Ministry of Finance managed the central revolving fund, with some accounting and debt management tasks.[38]

2. Road to the duties of the Treasury today

2.1 Organizational changes

A Treasury that matched expectations had been established by 1 January 1997. By then, the MNB's branch network and their activities had been taken over.[39] The main reason for the creation of the Treasury was to solve the liquidity problems caused by the deficit of the central budget and the out-of-date management of the individual subsystems, and this main objective was achieved, since it reduced the financial demands of public finances from the moment it was created.

Increasing tasks were accompanied by an increasingly larger and more structured internal structure. The range of tasks performed by the Treasury expanded significantly from year to year (especially in 1997-1998), the legal background of which was always the amendment of the old Áht in a given year. These changes did not conceptually affect the place and role of the Treasury and they can be characterized in such a way that the scope of operation of the Treasury was being continuously expanded, both in terms of the relevant institutional group and the more economical and controlled use of budget funds, as well as regarding the analysis and evaluation of processes.[40]

In 2001, the Treasury split into three organizations based on key functions such as budget execution, financial services, and debt management. As of 1 March 2001, the Treasury carried out the tasks set out in section 18/A (1) of Áht jointly with the Public Debt Management Centre (ÁKK Rt.). ÁKK Rt., established by the Minister of Finance, was the legal successor to the Hungarian State Treasury's Debt Management Centre. In practice, it was separated from the Treasury and was a 100% state-owned limited liability company.

On 1 October 2001, the Public Finances Office (ÁHH) was separated from the Treasury to perform "classic" budgetary tasks. It continued to operate as a central government body with national competence, through the Territorial Public Finance Offices (TÁH).

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[38] Overview of the establishment, operation, and development of the Hungarian State Treasury, 1996-2001. Hungarian State Treasury. Budapest, December 2001.
[39] "Report of the Hungarian State Treasury…" 1-28.
[40] Hungarian State Treasury Self-Assessment Report, 6.

From 1 January 2002, the Treasury continued to operate as a one-person, 100% state-owned limited liability company, under the supervision of the Minister of Finance.

In the 2000s, a number of new tasks had to be integrated into the treasury system in connection with the modernization of the financial system. The new structure was justified by the better transparency and controllability of these changes, and the wish to transform the State Treasury into a "semi-marketized" player in order to improve and expand partnerships outside the treasury circle. It was part of the spirit of the early 2000s to "privatize and marketize everything we can", coupled with the "pumping" of private capital into public investments, PPP investments.

With effect from 30 June 2003, by modifying the Áht, the Treasury again fulfilled its functions as a budgetary body with independent legal personality, its national competence being laid down by law. The amendment also defined the structure of the Treasury as carrying out its functions through regional directorates. The amendment of the legislation passed was not only a final farewell to the very short-lived public limited company form, but also to the less-than-two-year-old TÁHs, to which the Treasury became the legal successor. It soon became clear that with the restructuring control was even more difficult to implement. In the case of the Treasury, too, the form of a public limited company brought more problems to be remedied than any change in the form of management.

Government Decree 311/2006 (XII. 23.) on the Hungarian State Treasury, which came into force on 1 January 2007, regulated the operational and organizational framework of the Treasury until 31 October 2007. The provision of the Government Decree, which came into effect on 1 April 2007, reorganized the treasury departments into regional directorates in accordance with the spirit and trend of the period.

As of 1 January 2011, the organization was re-established in a structure based on counties. At the same time, in addition to the new tasks, the existing tasks were also more precisely clarified. In the case of the Treasury, regionalization did not mean the actual liquidation of county directorates, but significant redundancies did occur in the case of some county directorates - most tasks were performed only by one county directorate in a given region. Thus, the reorganization was not smooth, as many county offices were left without trained staff despite the fact that the task was returned to the county level. One of the special features of the county structure was the inability to operate 20 directorates at the same level, and there were several reasons for this, two of which should be highlighted: on the one hand, the different location induced different tasks and quality (e.g., the number of settlements in each county was not the same), on the other hand, human resource capacity

and its quality were different. The regional reorganization highlighted this even more, for years one county directorate had to help the other directorates to perform its tasks properly.

In 2012, the Treasury, on behalf of the Hungarian State, established the KINCSINFO Treasury Informatics Non-profit Limited Liability Company to perform its tasks related to the operation and development of IT systems. The outsourcing of IT tasks was largely due to the fact that it was difficult to provide qualified human resources within the state, without which the operation and development of IT systems would be hampered.

From September 2014, as a result of a change in the legislative approach, instead of the former status of a self-governing and self-managing central budgetary body, it became a central office, which has its own title in the chapter of the Ministry of Finance (of National Economy). The conceptual clarification did not change anything.

On 1 January 2017, the Agriculture and Rural Development Office ceased to exist, the Treasury became its legal successor.[41]

Government Decree 310/2017 (X.31.) on the new Hungarian State Treasury entered into force on 31 October 2017, which defined the basic organizational and operational framework of the significantly expanded organization (MVH and ONYF).

On 1 November 2017, the Central Administration of National Pension Insurance merged into the organization of the Hungarian State Treasury.[42] No legal justification was given for the mergers, Mihály Varga announced the change in the name of reducing bureaucracy and rendering public services more efficient.

2.2 Payment activity

Since the time the Treasury was established, it has been keeping accounts, executing debits and credits to central budget institutions and - on the basis of authorization or by agreement - to other bodies coming within the treasury circle. The management of account activity is done through a stand-alone GIRO and postal connection. The Unified Treasury Account, managed by the MNB, is used for the fulfilment of the Treasury's cash-flow tasks, and the cash-flow of the Treasury's clients outside the Treasury is transacted through

[41] Government Decree 328/2016 (X.28.) on the abolition of the Agricultural and Rural Development Office and amending certain related government decrees.

[42] Act CXXI of 2017 on the amendments to the law necessary for the merger of the General Directorate of National Pension Insurance into the Hungarian State Treasury.

this as well.[43] Treasury account management reflects the characteristics of budget management, and its solutions are tailored to the expectations of budget management. This is ensured by the account management system, which has been available in a constantly evolving form since 1997. The Treasury endeavours to provide its customers with all forms of payment that are also available to credit institution customers in cash transactions. Accordingly, treasury account holders also use the group transfer system and, through this, the group - postal merged - cash payment service was introduced. The Treasury performs cash account management as a free service.[44]

The Treasury is responsible - among others - for the execution of the cash flow of account holders. In accordance with the agreement made with the MNB, the MNB provided commissioned treasury services to the treasury clients in the branches where the cash registers were not operated by the Treasury. At the same time, Treasury accounts - following a preliminary coverage check - fulfilled cash withdrawal requests from employee accounts led by the MNB.[45]

The Treasury provides local governments - as specified in the Budget Act and other legislation - with the transfer of their respective contributions and subsidies, and the fulfilment of the obligations arising from the net financing.

Treasury financing and account management has not only improved the central government budget's liquidity, but also its cash-saving effect, and it has improved the legality of management by minimizing the risk of financial irregularity when verifying payments adjusted to appropriations. Prior to the execution of payment orders, it has to carry out a priority appropriation check, during which it has to examine whether a free budget, within the limits of the appropriations of the budgetary authority, is available to cover the expenditures based on the applications. However, the transition to the Treasury system was not smooth mainly due to the lack of prior customer information and the late adoption of legislation.[46] Furthermore, from a data protection point of view, the Treasury has reached the level of an average commercial banking IT system.

The Treasury's branch network, since 1 November 1996, has been playing a significant role in the retail distribution of government securities, participating in primary trading and uniquely in secondary market pricing made for the general public. The Treasury purchased the Clavis Securities Trading System from World Bank money and has been using it since July 1999 to provide a higher level of service to its customers than ever before.

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[43] "Hungarian State Treasury Self-Assessment Report…" 7.
[44] Ibid.
[45] "Hungarian State Treasury Self-Assessment Report…" 8.
[46] Report of the Hungarian State Treasury…4-6.

In addition to disposing of the Single Treasury Account (KESZ), the Treasury keeps records of budget appropriations, commitments, and changes thereto. It prepares and submits to the Minister of Finance for approval the public debt financing strategies, and in case of approval, it ensures its implementation, registers, and manages the public debt and the loans provided by the state right from its establishment.[47]

From the time of its establishment, at the expense of the central budget - under the conditions specified by law - it has been authorised to provide advance and liquidity loans to the Health Insurance Fund, the Pension Insurance Fund, the segregated state funds, local governments, and from 1997 to the regional development councils too.

In 1997, in addition to the central budget institutions, its account management activities were also extended to treasury customers, institutional groups (prescribed by other legal regulations), as well as to key items of the central budget, national accounts.

Since 1998, the Treasury has been keeping foreign currency accounts for the receipt and financial management of foreign funds received by the Hungarian State and treasury customers based on international agreements. These included accounts for the reception and use of SAPARD and ISPA grants.[48] The Treasury may, subject to the terms and conditions applied by the MNB, charge fees and pay interest, the terms of which are to be laid down in the contract made with the account holder. The Treasury accepts orders for the deposit of excess temporary funds for 1, 3 and 6 months. Account turnover is carried out through the euro account of the Treasury managed by the MNB.[49]

Government Decision 2189/1996 (VII.16.) amending and supplementing Government Decision 2189/1995 (VII.4.) on the reform of the financial system of public finances ordered that the expenditures of the institutions belonging to the Treasury should be paid primarily by bank transfer. Non-transferable (and non-wage) payments had to be made as widely as possible using the "Institutional Card" introduced in 1997, that is, fiscal agencies may use a bank card to reduce their cash purchases. The Treasury Card System was operationally launched in early January 1999, and over time, the range of Treasury card applicants extended to cash account holder customers, and it was ensured that card coverage accounts could be linked to escrow accounts as well.

There are two types of card under the Treasury Card System. One of them is Cirrus/Maestro Institutional Cards, which can only be used domestically for

[47] "Hungarian State Treasury Self-Assessment Report…" 30.01.2003, 3-4.
[48] "Hungarian State Treasury Self-Assessment Report…" 7-8.
[49] Ibid.

purchases, payments for services, and cash withdrawals at an acceptance point marked with one of the emblems on the card. Institutional cards can only be used in an electronic device that accepts them (POS terminal, ATM). They were initially issued for a period of two years, and from March 2001 for a period of three years. Another type is Eurocard/Mastercard VIP silver and gold cards, which can be used both domestically and abroad in electronic and manual - paper-based - accepting devices to pay for purchases, services and to withdraw cash.

According to Government Decision 2189/1996 (VII.16.), the cash flow of the budget had to be reduced. To accomplish this, the salaries of the employees of the central budgetary institutions were transferred directly to a bank account and the budgetary institutions were granted the possibility to pay their open expenses by bank card. The transfer of salaries to a bank account was introduced in Budapest from 1 January 1998, in "county seats and other major cities"[50] from 1 July 1998, while in other places from 1 January 1999. The transfer to a bank account was greatly facilitated by the launch of the group payment transfer system in 1998.[51]

Allowing (advance) framework openings to be disbursed differently from the time-proportionate monthly schedule came under the authority of the Treasury from the Ministry of Finance in 2000, given that the Treasury had up-to-date information to assess them.

Participating in the preparations for the further modernization of the public finance system also became its task from 2000.

Since 2001, the ÁKK joint-stock company has been continuously renewing and registering the forint and foreign currency debts of the budget, conducting auctions and subscriptions, and continuously developing the institutional system of the government securities market.

The aim was to further reduce the cash flow in the budget by opening up the possibility of accepting a bank card in the treasury branch network. With the introduction of this service, cardholders do not need to withdraw, deliver, or deposit cash in the Treasury account for the purchase of securities, but by accepting the credit card, the authorized amount is recognized by OTP Bank and it is credited to the Treasury.

From 2005, the payment of community funds into the accounts of the European Union, the recording of cash movements and the implementation of related reporting tasks are also included.

Since 2003, the Treasury has been performing managerial tasks related to official deposits specified by law.

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[50] Government decree 2189/1996 (VII.16.)

[51] "Hungarian State Treasury Self-Assessment Report…" 6.

From 1 January 2004, it registers the debts of budgetary bodies belonging to the Treasury.

The Treasury's task of providing advance and liquidity loans from its sources at the expense of the central budget - under the conditions specified by law - is extended to the Municipality of Budapest for the payment of the value added tax related to the construction of metro line 4 in Budapest as well as the coverage of royalties within the frames of year closure up to 5 January of the following year.

From 2004, it is responsible for carrying out its tasks relating to contributions to the general budget of the European Union, as set out in a separate piece of legislation.

From 2004, the Treasury may provide interest-free advances and liquidity loans from its sources - under the conditions specified by law - subject to statutory conditions, and free of charge from the European Agricultural Guarantee Fund - as defined by law - as well as market support, interventions and other direct payments, and to the body set up and accredited for the management of subsidies in order to make payments for rural development support financed by the European Agricultural Fund for Rural Development (paying agency) - not including the Operational Program for Agricultural and Rural Development.

At the expense of the Treasury's unified account, the Treasury may grant interest-free advances and liquidity loans to the Agricultural and Rural Development Support Agency from 2005 for the payment of sugar, isoglucose and inulin duty payments to the European Union. From 2006, this is also extended to the possibility to grant loans for the payment of isoglucose and inulin levies.

In 2011, the scope of account management was expanded to the management on behalf of the local government of the current account of the local government and its budgetary bodies, to the management on behalf of the local, regional minority self-government of the current account of the local, regional minority self-government and its budgetary bodies, and to the management on behalf of multi-purpose micro-regional association of the current account of the multi-purpose micro-regional association and its budgetary bodies.

Treasury account management was extended to public bodies as well as some churches from 2014.[52]

[52] Organizational and Operational Regulations of the Hungarian State Treasury (24/2014. (IX.10.) NGM Instruction).

It was not a new task, but the distribution of securities issued by the state became a separately specified task from 2014.[53]

From 2018, the secretariat task of the Liquidity Committee defined in the Áht appeared as a new task.

2.3 Regulatory, control tasks

The institution of the Treasury Commissioner was set up in 1997 to help the budget bodies eliminate accumulated debts and prevent further debts from arising. The Treasury initiates the secondment of a treasury commissioner to institutions with a debt stock specified in the law, as well as coordinates the activities of the commissioners, and operates the Treasury Commissioner's Office.

From 1997, the budgetary authorities are required to notify the Treasury in advance of their procurements covered by the Public Procurement Act, which sets aside the appropriation and makes only a payment against it in accordance with the commitment.

The Treasury has received various authorizations for the liquidation of overdue debts and the prevention of tax and contribution arrears since 1998 in the budget legislation (blocking the opening of the monthly utilization of appropriations, it can take direct action on the transfer).[54]

On 1 April 1999, the Organization for the Administration of Grants and Annuities was partially integrated into the Treasury as a self-governing body and partly as a self-managed budgetary body. Its activities consisted of checking and enforcing state obligations arising from compulsory motor liability insurance prior to 1 July 1991 as well as motor vehicle warranty claims prior to 1 January 1971.

From 2003, the Treasury is in charge of reviewing the regularity of the use and accounting of the resources of local governments and local minority self-governments from central budgetary relations, which have been supplemented by multi-purpose micro-regional associations from 2005.

From 2008, the Treasury is entitled - unless otherwise provided by law, based on section 66 (1) of Act CVI of 2007 on State Property - to make legal representations concerning the enforcement, cancellation and disposition of mortgages registered in favour of the Hungarian State on property owned by another person, and in case of alienation.

[53] Ibid.

[54] "Hungarian State Treasury Self-Assessment Report…" 6.

From 2011, the Treasury is responsible for providing information, disbursement and monitoring of normative support appropriations for human services to non-municipal and non-governmental institutions.

From 2011, the Treasury shall perform the treasury functions related to the operation of the budget (main) supervisory system, the financial execution tasks specified in legal acts by displaying them on the Treasury's website, as well as by providing information upon request, in exchange for management fees related to grant applications or other systems of appropriations.

From 2014, the task of operating a treasury commissioner and a treasury commissioner system was abolished .

From 2015, the Treasury's new responsibilities include reviewing the correctness of the distribution and transfer of tax levied on domestic vehicles by local governments and participating in the duties related to the authorization of debt-creating transactions[55].

From 2015, new types of treasury control tasks are defined in the Áht for local and minority governments, as well as associations, regional development councils and the budgetary bodies they manage.[56] The quasi-audit activity, the previous mandatory municipal audit has been abolished.

2.4 Management of programs, appropriations, and applications

It has been involved in this task since the founding of the Treasury.[57] Within the framework of the support system based on tenders, the Treasury, since its foundation, utilized its existing expertise and technical preparedness to carry out activities previously performed on a statutory basis and, subsequently, as a service by the State Development Institute. Within this framework, it participates in the operation of regional development, other development and pre-accession funds, other European Union funds, and agricultural investment supports deployed by tenders (from the preparation of the decision, through the disbursement, to the checking and handling of the fulfilment of obligations), and it also participates in the disbursement of supports and targeted supports after the decision of the Parliament as well as in the preparation, implementation and control of certain tender support schemes financed from the central budget (authorized by the Ministry of the Interior, the Ministry of Agriculture, the Ministry of Defence, the Ministry of

[55] Organizational and Operational Regulations of the Hungarian State Treasury (27/2014. (XII.12.) NGM Instruction).
[56] Ibid.
[57] Organizational and Operational Regulations of the Hungarian State Treasury, 1996.

the Environment and Regional Development and the Public Foundation for War Victims and Their Families).

The Treasury participates in the tendering system for support appropriations on the basis of a legal mandate and an agency agreement with the department responsible for the use of the appropriation. The specific tasks related to each targeted appropriation are different, but the task of running the tendering system covers the whole process. This includes receiving applications, preparing a decision, and then concluding a tender and/or funding agreement, and subsequently their funding (directly or with the involvement of a financial institution), receivables management, control (ex-ante, in-process, ex-post and final), preparation of reports, analyses.

From 1997, program funding has become its new task within a defined circle of chapter-managed appropriations. These appropriations can only be used for the purpose specified in the Budget Act - similarly to central investments - following rigorous compliance checks supported by program documents.

In 1998, the start of the establishment of the National Support Monitoring System (OTMR) for the monitoring and recording of projects funded from the budget based on tenders and involving EU funds facilitated the transformation of the system of subsidies provided from the central budget in compliance with EU requirements[58]. The relevant data base had already been uploaded by 2002, and one of the important functions of the system prevailed during the use of budgetary resources and the disbursement of grants, it displayed if a grantee had not paid his public dues for more than 60 days, at which time the payment of the grant could be suspended.

The Central Finance and Contracting Unit, a unit dedicated to the implementation of the PHARE program, was set up in 1999 as an independent institution belonging to the Treasury and it performed the tendering, contracting, registration and other financial administrative tasks of the PHARE institution development programs. The National Fund started operating within the organization of the Treasury, which was responsible for monitoring and accounting tasks ensuring compliance with rules of support-application, cash-flow, conciliation, procurement, and financial rules in connection with EU pre-accession instruments.

From 2000, the Treasury's role in the implementation of tender support appropriations belonging to different ministries became even more complete, and it provided even more target appropriations with increasing tasks.

The Treasury became the fund manager of the Miklós Wesselényi Flood and Inland Waters Protection Fund established in 2003, and as such it was

[58] "Hungarian State Treasury Self-Assessment Report…" 5.

responsible for the conclusion and ongoing maintenance of contracts of compensation, the preparation and submission of the Fund's budget proposal, accounts, and final accounts, and the management of the Fund's resources.

From 2003, the Treasury has been responsible for the activities of the Public Foundation for War Victims and Their Families and for the compensation of persons deprived of their lives and freedom for political reasons. The Treasury performs the tasks related to the management of the Public Foundation for War Victims and Their Families on the basis of an agency contract: it manages and invests the funds provided by the budget for the operation of the Public Foundation. It manages the Military Disability Office. It prepares contracts and amendments to be concluded with organizations and institutions involved in the care of war victims. It supervises the quality of services financed by the Foundation at social institutions and ensures the functioning of the Board of Trustees. It prepares the annual balance sheet, public benefit report, and fulfils other reporting obligations. The Treasury enforces the decision of the Central Bureau of Compensation regarding the lump sum compensation for loss of life. It creates a report on the utilization of the amount provided by the budget. It provides compensation for those deprived of their life and freedom (Government Decree 31/2003 (III.27.).

The Treasury, in the context of activities relating to farmers' loan agreements: in connection with the loan agreements concluded under FVM Decree 84/2003 (VII. 22.) of the Minister for Agriculture and Rural Development to compensate farmers affected by frost damage and drought, the Treasury carries out the compliance check of contract modification requests, as the Hungarian State provided a comprehensive guarantee for these loans. In addition, it provides the same service in connection with the preferential loan agreements for the agricultural raw material suppliers of Hajdú-Bét and Parmalat Hungária Plc.

In 2005, several tasks were assigned to the Treasury, including legal verification of bank claims related to housing supports, and verification of numerical correctness as well as registration and control tasks relating to housing supports and guarantees provided by the state, so that the entitled persons can use the given form of subsidy only in accordance with the legal requirements, and multiple unauthorized use can be avoided. The payment of state subsidies and home savings bank payments are monitored through the involvement of credit institutions. The Treasury became responsible for keeping a record of guarantees and loans granted by the State and for the provision of data relating to them.

The Treasury carries out audits (interim, ex-post, final) to fulfil the obligations undertaken in the grant agreement. In 2005, it performed financing and control tasks related to 29 grant appropriations[59].

For four operational programs (GVOP, KIOP, ROP, AVOP), it performs tasks from 2005 defined by law: account management, cash flow, control and OTMR operations related tasks. In the case of HEFOP, the Treasury is an intermediary organization, in the framework of which it performs financial implementation and related control tasks.

From 2008, the Treasury performs the tasks prescribed by law related to the social support of the population for piped gas consumption and district heat consumption.

Also from 2008, in connection with the New Hungary Development Plan, it performs tasks relating to the statutory accounting obligations of managing authorities and intermediate bodies in relation to the implementation of EU grants, the operational activities of the intermediate bodies and the on-the-spot inspection of beneficiaries.[60]

From 2009, the Treasury performs statutory tasks related to youth start-up support, as well as tasks related to the determination of targeted interest rate subsidies and the payment of statutory annuities and allowances from the central budget, as required by the law on student loans and the Student Loan

[59] Rural Development Targeted Appropriation (VFC), Rural Development Targeted Appropriation (VFC LEADER), Budget Support Management of Agri-economic purposes (MEA), Environmental Protection Fund Targeted Appropriation (KAC), Regional Economic Development Targeted Appropriation (REGÉC), Economic Development Targeted Appropriation (GFC), Investment Promotion Targeted Appropriation (BÖC), Balaton Sewage and Sewerage System Management (BALATON), Tourism Targeted Appropriation (TC), IT, Telecommunication Development and Frequency Management Targeted Appropriation (ITFFC), Enterprise Zones Assistance Targeted Appropriation (VÖTC), Micro Regional Support Fund (KITA), Small and Medium Sized Business Investment Loan Program 1996-1999 (KKC), Targeted Decentralized Assistance (CÉDE), Regional Development Targeted Appropriation (TFC), Developmental Aid for Territorial Equalization (TEKI), Territorial and Regional Development Targeted Appropriation (TRFC), Expenditure on Social Crime Prevention Targeted Appropriation (OBMB), Tender Preparation Fund (PEA II), Supporting Lake Velence - Vértes Regional Development Council, Tisza Lake Regional Development Council, Municipal Waste Public Service Development (TEHU), Municipal Solid Paved Public Roads Support (TEUT), National Civil Fund (NCA), Human Resources Development Operational Program (HEFOP).

[60] Amendment of the Charter of the Hungarian State Treasury, 6 June 2008.

Centre. It operates the treasury's monitoring system within the limits set by law.[61]

From 2011, it performs the tasks of paying and certifying authority for the receipt of grants from EU funds and other international grants, as defined in a separate legal act, as well as tasks assigned to the National Fund.

From 2014, new tasks include the financial control of budget subsidies for the employment of disabled workers, the control of the scope of beneficiaries related to the accounting of campaign costs for the election of parliamentarians, recording of resignations, concluding agreements with beneficiaries, providing treasury card issuing, provision of support, clearance of accounts and monitoring repayments. [62]

From 2014, other new tasks included disbursement, accounting, and control of the accounting of fathers' additional leave entitlements in the case of facilities that are not in charge of family support payments, in addition, state guarantee and interest subsidy tasks related to the program of payment for the use of motorways, highways and main roads, as well as the professional manager tasks relating to the loss adjustment appropriation. [63]

In 2015, with the change in the "gas price support" system, the Treasury's tasks changed from providing social support for residential gas consumption and district heating consumption to setting a discount for large family households related to the universal gas market service.

In connection with the European Union funds, the activities of the Treasury are expanded from 2014, and its previous control and accounting tasks are supplemented with co-operation tasks.[64]

In 2015, some of the housing support tasks are integrated into Government Offices, just like the mortgage right registered in favour of the Hungarian state, making legal representations regarding the enforcement, deletion or disposition of the restraint on alienation and encumbrance, and the task of setting the price discount for large family households related to the universal service in the gas market is also handed over to Government Offices.[65]

From 2016, due to the termination of the Miklós Wesselényi Flood and Inland Waters Protection Fund, the role of the Treasury regarding the Fund

[61] Amendment of the Charter of the Hungarian State Treasury, 29 May 2009.
[62] Organizational and Operational Regulations of the Hungarian State Treasury (24/2014 (IX.10.) NGM Instruction).
[63] Ibid.
[64] Organizational and Operational Regulations of the Hungarian State Treasury (27/2014 (XII.12.) NGM Instruction).
[65] Organizational and Operational Regulations of the Hungarian State Treasury (8/2015 (III.26.) NGM Instruction).

changes; after its termination, it performs its rights and obligations under the remaining indemnity agreements in force.

From 2017, as an old-new task, the Treasury is once again in charge of overseeing the operation of credit institutions in connection with the provision of housing subsidies and continues to perform statutory tasks relating to home savings and national home building communities. The Treasury's task on housing allowances for employees at institutions belonging to the Treasury is laid down specifically by legislation.

On 1 January 2017, the Agriculture and Rural Development Office ceased to exist, the Treasury became its legal successor, and in this connection the Treasury took over some of its functions as well: paying agency activities under the Common Agricultural Policy (KAP); its support function for agriculture and rural development, agricultural damage mitigation functions and the coordinating tasks of the Member State ISAMM (Agricultural Management and Monitoring Information System). In connection with its agricultural and rural development tasks, the Treasury is responsible for the operation and development of the Integrated Administration and Control System (IIER). Within this system, it operates the Unified Agricultural Customer Information System, the Agricultural Parcel Identification System (MePAR) as well as the accounting and control systems related to the activity. In the context of rural development, further functions of the registry have been defined: the national geoinformatics register of vineyards, the interventional storage register, the system of recording small amounts (de minimis) of aids for agriculture and fisheries, the register of agricultural property rights, milk quota registration system, monitoring data recording system, agricultural risk management database, Agricultural and Environmental Information System, Complex Agricultural Risk Management System.

From June 2018, other new tasks were assigned to the Treasury, such as support for the first successful language exam and the fee for the first advanced level graduation exam in a foreign language as well as statutory tasks related to subsidies for basic knowledge of transport and exam fees (management of appropriations, disbursement, receipt of requests for assistance, processing, etc.).

As of December 2018, the Treasury's work has been expanded by two major tasks, on the one hand, it decides on the award of grants in connection with certain tenders under the annual development program of the Economic Development and Innovation Operational Program, it checks that applications are in compliance with the law before awarding grants and making payments, it performs duties related to the authorization and execution of payments as well as accounting, control of the use of grants, in addition, it performs tasks relating to the obligation to collect and provide data and the recovery of

unlawful aids - required by separate legislation - and tasks relating to appeals against decisions on the award and use of grants.[66]

The Hungarian State Treasury has been designated as the managing body of the Hungarian Village Program announced in 2019.[67]

From July 2019, two new tasks are added to the activities of the Treasury, on the one hand, the tasks related to the registration, disbursement, provision of data, monitoring, settlement, repayment related to baby support and, on the other hand, managing and financing tasks in connection with the car purchase support for large families.[68]

From 2021, it takes part in the tasks of managing and financing the home renovation support of families raising children.

2.5 Activities supporting the operation of public finances

From 1997, by establishing a double-entry bookkeeping and reporting system for the central budget, the Treasury reports on the execution of the budget, the financing of the deficit, the evolution of receivables and liabilities, and changes in the financial position within the framework of public accounting.[69]

As a result of the change in the supervision of social security funds, the management of the appropriations of the social security funds and their budgetary bodies as well as the monitoring of their budgets are essentially done in the same way as in the case of the central chapters. [70]

Based on Government Decision 2064/2000 (III.29.), fragmented tasks, which form an integral part of budget management, have been integrated into the State Treasury, such as family support services provided by the OEP and/or NYUFIG, centralized payroll accounting by TÁKISZ, and tasks related to APEH-SZTADI including closing accounts, reports, financial information services.

The Public Finance Office (ÁHH), which was separated in 2001, performs tasks related to the registration of appropriations and commitments, audit-related tasks, as well as the accounting of the salaries of public service

[66] Subsection (2a) of Section 9 of Government Decree 368/2011 (XII. 31.) on the implementation of the Act on Public Finances.

[67] Government Decision 1669/2018 (XII. 10.) on the implementation of measures related to certain program elements of the Hungarian Village Program and their necessary support in 2019.

[68] Government Decree 44/2019 (III. 12.) on baby support, Government Decree 45/2019 (III. 12.) on the provision of vehicle support for large families.

[69] "Hungarian State Treasury Self-Assessment Report…" 4-5.

[70] http://www.allamkincstar.gov.hu/kincstar/rolunk (downloaded: 20.01.2014)

employees and, from 2002, the accounting of salaries of central administration employees in addition to local government employees.

The Organization for the Administration of Grants and Annuities continued to operate as a self-sufficient budgetary body with its own rules of organization and operation. At the same time, it merged with the Public Finance Office, thus expanding its activities to recording budgetary appropriations and commitments, their changes, their fulfilment, as well as the administrative, accounting, information collection and provision, centralized payroll accounting and related tax and contribution accounting tasks. This includes family and disability benefits funded from the central budget, establishment, payment, and local check of personal allowances for the blind, reporting, disbursement, and monitoring of normative support appropriations for human services to non-governmental institutions.

From 2003, the Treasury performs the duties arising from the financial relationship between the central budget and local governments including processing, recording, and reporting local tax information, keeping records of registrations[71]. It also carries out monitoring activities with regard to public foundations belonging to the central subsystem of public finances and the Funds, as well as those established by Parliament and the Government.

The scope of keeping registers has been expanded since 2007: The Treasury keeps a register of budgetary bodies and legal persons applying the rules concerning the management of budgetary bodies to be registered on the basis of the provisions of a separate law.

In addition to the identification and financing of all family support and disability benefits financed from the central budget, as well as the provision of data, the Treasury has been performing administrative tasks related to family benefits in the European Union since 2008.

In the course of its tasks related to family support and disability benefits, energy consumption subsidies and housing subsidies, the Treasury keeps a unified social register of the entitlements and benefits granted to individuals or as of right from 2009 onwards.

From 2011 onwards, the Treasury prepares a quarterly summary report on the long-term commitments submitted by the chapters, with the content

[71] The budgetary authority shall have legal personality and shall be established by entry in the register. Other entities that operate under the management system of budgetary bodies, such as regional development councils and multi-purpose micro-regional associations, are also subject to the register. The entry in the register shall authentically certify the information contained therein and the existence and modification of registered rights and facts. The register shall contain the registration number of the budgetary authority, its powers, its legal form, its chapter classification, its supervisory body as well as its geographical location and activities.

specified in legislation, which is published on its website within 60 days after the relevant quarter.

In the case of treasury members, it performs, for a fee, the duties of safekeeping and management of compensation coupons from 2011. Under the authority of the Minister responsible for public finances - as a guarantor - it issues the necessary declarations to modify the loan agreements in certain loan schemes. It sends electronic proof of fees and expenses paid in connection with business and other company matters. Based on the Government Decree on Construction Activities, it performs the duties of manager of construction funds from 2011.[72]

From June 2012, register keeping is public and authentic.

From 2012, in addition to identifying and financing family support and disability benefits funded from the central budget, it is no longer the reporting agent and controller of the paying agencies, but rather supervises them professionally. In addition to its activities related to the public finance information system, the Treasury also carries out data processing.

From 2014, the obligation to prepare and publish a summary statement of long-term commitments of the chapters is abolished. [73]

From 2014, the basic tasks of the Treasury include the operation of the deduction system relating to budget subsidies provided to beneficiaries outside the national budget. [74]

It keeps unified social welfare records to register the already paid family allowances and disability benefits and keeps a family support account for the amount of family allowances in kind per capital city and county government office in connection with its control functions regarding housing grants, and from 2014, it keeps records not only in connection with its audit tasks.[75]

From 2014, its task to publish the necessary aids and supplements concerning its obligation relating to the provision of public finance data on its website is laid down specifically.[76]

From March 2015, the Treasury is no longer required to keep a record of its commitments relating to budgetary appropriations. With the integration into the Government Office of the responsibilities of determining and

[72] Organizational and Operational Regulations of the Hungarian State Treasury (2/2011 (I.14.) NGM Instruction).

[73] Organizational and Operational Regulations of the Hungarian State Treasury (24/2014 (IX.10.) NGM Instruction).

[74] Ibid.

[75] Organizational and Operational Regulations of the Hungarian State Treasury (27/2014 (XII.12.) NGM Instruction).

[76] Organizational and Operational Regulations of the Hungarian State Treasury (24/2014 (IX.10.) NGM Instruction).

financing family support and disability benefits, the professional supervision of paying agencies, the administration of family benefits in the European Union and the management of a unified social registry, these duties of the Treasury cease to exist. [77]

From March 2015, only one new task appears: the operational tasks of the municipal ASP - Application Service Providing.[78]

From December 2018, instead of the local government and the budgetary body established by it, the national minority local government and the budgetary body established by it, as well as the local government association and the budgetary body established by it, the Treasury may perform certain tasks on the basis of an agreement, such as budget planning, implementation of modifications, transfer and use of appropriations (hereinafter: management), ensuring compliance with financing, data provision and reporting obligations compliance with financial and accounting rules.[79]

2.6 Receivables management

When the Treasury was founded, in the field of claims management, the Claims Management Department handled claims arising from tender supports. In terms of their sources, they included: claims related to agricultural investment supports (MEA), claims concerning supports related to the Regional Development Targeted Appropriation (TEFA), claims concerning supports related to the Environmental Fund Targeted Appropriation (KAC) and claims concerning supports related to the Economic Development Targeted Appropriation (GFC). The Domestic Claims Management Department deals primarily with the management of government claims arising from a variety of titles, but in all cases against domestic debtors. This unit department monitors bankruptcy, liquidation, dissolution, restructuring, and termination of all beneficiaries receiving support. The Foreign Claims Management Department performs tasks related to the settlement of foreign claims arising from government loans to countries formerly using ruble and dollar-based accounting and it also performs tasks related to the operation of the Public Foundation for War Victims and Their Families. At the time of establishment of the Treasury, it only fulfilled tasks related to the claims of the Republic of Hungary against Russia laid down in a separate agreement

[77] Organizational and Operational Regulations of the Hungarian State Treasury (8/2015 (III.26.) NGM Instruction).
[78] Ibid.
[79] Subsection (2a) of Section 9 of Government Decree 368/2011 (XII. 31.) on the implementation of the Act on Public Finances.

drafted by the Ministry of Finance, and this activity only expanded in later years to include handling claims against other countries as well. From the time of the conclusion of the contracts, the Treasury has been performing and will continue to perform the tasks related to the settlement of claims.

On the basis of contracts with the applicant companies, the Treasury has been handling and will handle claims arising from the foregoing claims to be settled through the supply of goods, including claims against Russia, Bulgaria, and Vietnam among the countries with ruble-based accounting as well as those against Algeria and Nigeria among the countries with dollar-based accounting.

The Treasury performs the tasks related to the management of tender claims, domestic and foreign claims on the basis of legislation, commissioning agreements, other agreements, or individual requests. It keeps up-to-date receivables, processes changes related to new contracts and contract modifications, monitors the fulfilment of any payment obligation, and takes the necessary measures to collect the receivables. It performs the duties of a creditor in the interest of the client. The Treasury manages the following upon individual request, commission or by law: claims arising from government loans and basic grants, claims arising from irrigation subsidies, claims arising from re-lent loans taken out from international financial institutions and foreign financial institutions, claims guaranteed by Post Office Bank and claims related to subordinated debt bonds.

The Treasury performs planning and financing tasks related to the implementation of the budgets of the social security funds (Labour Market Fund, Central Nuclear Financial Fund, Miklós Wesselényi Flood and Inland Waters Protection Fund, Innovation Fund for Research and Technology, Homeland Fund, National Cultural Fund) and the earmarked public funds.

From 2007, the Treasury fulfils statutory duties in respect of sureties, guarantees, counter-guarantees and loans granted by the State, the State's international financial accounts, its financial commitments with multi-annual impact, registration of the State's claims, fulfilment of obligations, handling of claims, repayment of repayable subsidies, as well as recording and documenting foreign receivables, keeping accounts of receivables and preparing a quarterly summary statement of these.

From June 2018, other new tasks were assigned to the Treasury, such as the statutory claims management tasks related to health insurance cash benefits, accident sickness benefits and statutory claims management tasks related to travel expenses.

2.7 Pension insurance

On 1 November 2017, the Central Administration of National Pension Insurance merged into the organization of the Hungarian State Treasury based on Act CXXI of 2017 on the changes to the law required for the merging of the Central Administration of National Pension Insurance into the Hungarian State Treasury.

Figure 2: Organizational structure of the Hungarian State Treasury[80]

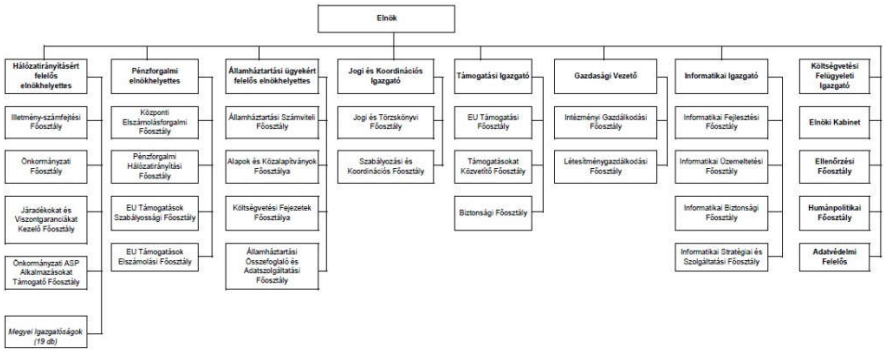
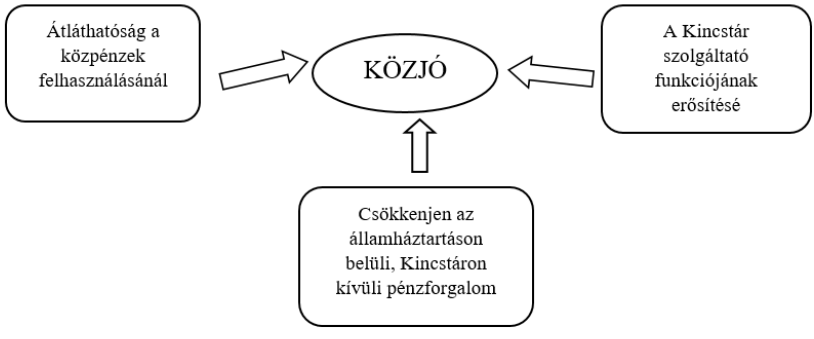


Figure 3: Vision of the Treasury[81]

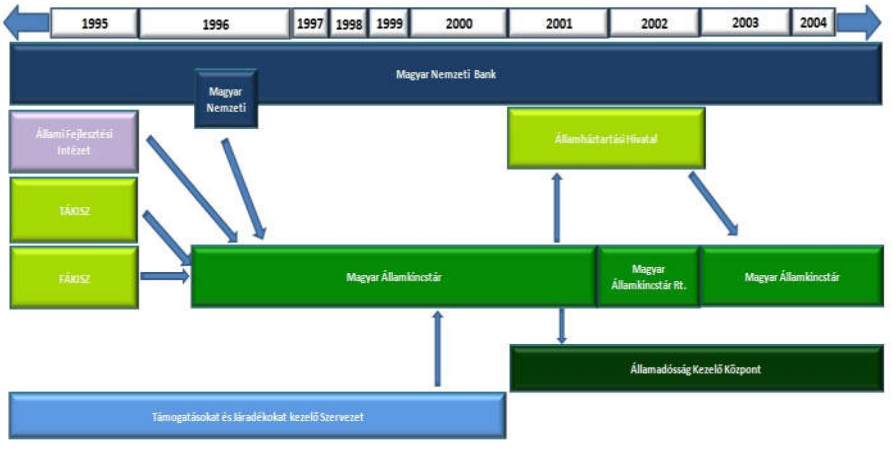


[80] http://www.allamkincstar.gov.hu/files/A%20Kincst%C3%A1rr%C3%B3l/Kincst%C3%A1r%20k%C3%B6zpont/szervezeti_%C3%A1bra_f%C5%91oszt%C3%A1lyokig.pdf (downloaded: 31.01.2017)

[81] Csaba Gárdos, "A kincstári rendszer létrejötte, fejlődése, bővítési stratégiák, lépések a szubszidiaritás irányába," Prosperitas II., no. 1 (2015): 81-97.

In its proposal on the strategy of the Modern Treasury (2014-2018), which was adopted by the Minister of National Economy in 2014, the Treasury identified five main development target areas: cash flow, grants and central payroll, public finance tasks, facility management tasks, and communication related tasks. Its other objectives included service-oriented task management, the development of internal support systems, the extension of the treasury account management and, in connection with this, the development of the account management system as an information and service centre with its information databases supporting the efficient operation of public finances. It supports the modern treasury concept with five large IT systems: Central Payroll System (KIRA), Treasury Account Management System (KSZR), National Support System (OTR), Municipal ASP (Application Service Provider) and IFMIS (Integrated Financial Management Information System) system and data warehouse.

Figure 4: Evolution of organizations performing treasury functions since the change of regime[82]



3. Summary

"Money is the most serious thing in modern societies. There is one more serious thing in democratic societies: public money"[83] The Treasury plays a significant role in the domestic use and registration of these two things, with

[82] own editing
[83] Csaba László, *Tépett vitorlák* (Budapest: Aula Kiadó, 1994), 13.

its task related to the execution of the budget, the conduct of public finance operations, and its financial service activities. In terms of scale, it conducts nearly a quarter of domestic cash transactions, which amount to several hundred billion forints per day. The ability to provide liquidity management, liquidity and advance loans is almost inevitable to accomplish this task.

Closely related to this task is its registration, administrative and accounting function, within the framework of which it collects, provides and forecasts financial and accounting information. It provides data and information for economic operators and, in particular, for the public finance system, which they need to make their decisions.

"Since payments from public funds can only be made by legal authorization, the Treasury ensures that public funds are used for what the authorization is for. The Treasury's mission is to pay out public funds and to control these payments".[84] It also improves the reliability of the data provided through multiple levels and different types of controls.

It has a significant role in accounting for nearly nine hundred thousand employees in the public sector, as well as in the related tax and contribution accounting and reporting, and in participating in the disbursement, administration, and recovery of domestic and European Union subsidies.

"Thus, the Treasury is a participant and supervisor of public money spending. Its task is to track the way public funds are made to prevent unauthorized payments."[85] For in-process control, it is sufficient to examine only 20 percent of the batches, which can cover 80 percent of the risks and it may lead to profits and savings simply because of the sense of threat.[86]

The size of the Treasury's organization and the number of its tasks have now reached monumental proportions. The changing world of the present age does not allow the institution's development and transformation to stop here, many aspects should be taken into consideration during the transformation. On the one hand, technological and technical changes, challenges, and on the other hand, the changing behavioural habits and needs of economic actors foresee improvements and changes in the case of the Treasury as well.

Thirdly, as we are now an integral part of the European Union and have many ties to countries and organizations outside the Union, it is in our best interest to take into account and apply EU and international trends and practices in the development of public finances. Not only in the EU but everywhere in the world, globalization has brought to life the need for

[84] http://www.allamkincstar.gov.hu/kincstar/rolunk
[85] Ibid.
[86] Csaba Gárdos, "A kincstári rendszer létrejötte, fejlődése, bővítési stratégiák, lépések a szubszidiaritás irányába," 81-97.

standardization. Standardization should cover workflows on the one hand as well as records and information on the other hand.

In addition to the vertical extension of tasks, by which I mean the deployment of new competences, the horizontal extension of competencies, the increase of the volume of existing tasks, is also an opportunity for development. Examples of vertical expansion include trading of other debt or equity securities, while the examples of horizontal expansion include account management for public companies.

Between Judicial Notice and Public Policy: The Israeli Experience and a General Model

ZAMIR, AVI

ABSTRACT *There are cases in which the Court uses the doctrine of "judicial notice" and determines both a factual finding and a conclusion out of this finding, without having the parties provide evidence regarding the question. This paper will examine how the Israeli Supreme Court uses the doctrine of judicial notice in its decisions. I will refer to the areas in which the justices use this doctrine and ask a few questions. Can we identify consistency in the way it is used? Do justices mention the source on which they base their decision? Do the parties get the opportunity to relate to the judicially noted fact in advance by presenting their evidence (to support or counteract it)? Do justices, while using the doctrine, distinguish between civil and criminal cases, and does complexity count? The article will present the principle of evidence-based decision-making. In the next chapter, I will present the doctrine of judicial notice and relate it to the debate regarding whether the parties should be informed and involved beforehand in cases using the doctrine. I will conclude and discuss the findings of a case study examining the Israeli Supreme Court case law using judicial notice in different areas of the law. Then, I will offer a hybrid structured model. The requirement to notify the parties regarding the use of judicial notice will depend on the type of case, the type of the judicially noticed facts, and the degree of their certainty.*

KEYWORDS *Judicial Notice; fact-finding; judicial discretion; due process*

1. Public Policy and Evidence-Based Decision-Making

Public policy deals with the authoritative distribution of values within society, namely, public policy deals with actual and abstract values, values representing beliefs, ideologies, and social aspirations. Appropriate decision-making procedures constitute one of the goals of society, the government, and the legal system.

A developing branch in public policy deals with evidence-based policy, which helps decision makers learn "what really works" to reach optimal results.[1]

The assertion that it is possible - and desirable - to divert policymaking from the ideological-political realm to the professional-factual realm has gained popularity in recent years.[2] It was also argued that a process of systematic monitoring, meta-analysis, or any other structural evidence-based process is essential for developing policy; it also manifests the critical principle of learning from past failures and achievements.[3]

In his own private life, an individual has the privilege of making irrational, even impulsive, or capricious decisions that are not based on any facts or evidential basis. Governmental bodies do not enjoy that privilege. A reasonable administrative authority should not reach any decision unless it is based on facts. Discretion represents the freedom to choose between different options, but this freedom is not absolute. Reaching administrative decisions based on hunches, rumors, or ones meant to reach a certain outcome with no connection to reality is arbitrary and even corrupt. Any decision, or policy, must be based on factual foundations. Since the factual foundation is crucial in the design of the outcome, there is an additional significance in how those facts, or evidence, are being collected. The first stage in any administrative process is that of collecting the relevant data.[4] Even if it was properly reasoned and justified, an administrative decision that does not follow the actual factual situation is pointless and defective.[5]

The Israeli Supreme Court has stressed that the administrative authority must act reasonably when collecting the data required in making a decision, considering the nature of the authority, the nature of the decision, and the circumstances. The rational behind this rule is simple and clear: if a decision is based, even partially, on wrong facts, there is the concern that had the

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[1] Brian W. Head, "Three Lenses of Evidence-Based Policy,"*Australian Journal of Public Administration* 67 (2008): 1.

[2] Wayne Parsons, "From Muddling Through to Muddling Up Evidence Based Policy Making and the Modernisation of British Government," *Public Policy and Administration* 17, no. 3 (2002): 43.

[3] Ray Pawson, "Evidence-based Policy: The Promise of 'Realist Synthesis'," *Evaluation* 8 (2002): 340.

[4] H.C. 297/82 *Berger v. Minister of Interior*, P.D. 37(3) 29, 49 (1983). In this case Justice Barak stressed the importance of facts to adjudication: "As we deal with legal precedent we sometimes tend to neglect the facts of life, but without the determination of facts, the law is meaningless, and he who controls the facts imposes his will on the law." (Ibid. 36).

[5] Dafna Barak Erez, *Administrative Law*, vol. 1 (2010) 439 (Hebrew).

decision-makers been aware of the actual facts, they would have reached a different decision. It would sometimes be a simple case requiring complicated data collection; other cases may require a more substantive inquiry. Sometimes, the decision-maker may need to ask for an expert opinion.[6]

Justice Barak says that the traditional, classic role of judges (mainly in non-jury cases or systems) is in determining what the facts are and then applying the law appropriately to those facts. This is true of any administrative decision-making, and of adjudication in particular. Judges routinely use their discretion. Judicial discretion is the power to choose between several legitimate options, at three different levels: fact-finding, applying existing norms and setting new norms.[7]

Barak stresses another essential element of decision-making: that is the duty to give reasons and justify one's decision. "The duty to give reasons is essential. Anyone who has had any experience in writing knows that. It is one thing to have an idea that overcomes your thought. It is completely different from taking that idea through an intellectual process of finding ways to support it while being aware of its consequences. Many are the ideas where the need to explain or justify them had led to their cessation, as they only had that shallow attraction, one that could not be intellectually based. The duty to give reasons to one's decisions is one of the most important challenges that any judge, who uses his or her discretion, must accomplish."[8] Indeed, the requirement of providing reasoning serves several goals, among them are the prevention of arbitrary decisions; providing a basis for examining the decision by the appellate authority; providing means for lower tribunals to understand the decision, and the aspiration for justice to be seen by all, and not only be done.[9]

This paper is positioned both within public policy and legal decision-making and within the theory of evidence law. In that context, I should note that there are two conflicting theories as to the theoretical design of evidence law in the Anglo-American legal systems (as well as in the Israeli legal system). The first approach is called "free proof," It is appropriate to give the Court broad discretion in making decisions regarding the approval of evidence, determining facts, and reaching conclusions. The second approach is the "rules-based system," It is desirable to limit judicial discretion in

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[6] For an elaborated discussion of this matter, see: Yitzhak Zamir, *The Administrative Authority*, no. 2 (1996): 734, 771 (Hebrew). Raanan Har Zahav, *Israeli Administrative Law* (1996): 147, 156 (Hebrew).

[7] Aharon Barak, *Judicial Discretion* (1987) (Hebrew).

[8] Ibid. 46.

[9] C. A. 3337/12 *Liverpool Assets and Investments Ltd. v. Idan Provizor Holdings Ltd*. (23.4.2013).

accepting evidence and determining facts (mainly through presenting a set of rules concerning, for example, admissibility of evidence, privilege, and more). Such limiting rules include, among other things, rules that define the nature of conclusion-making or legal proof regarding factual questions. For example, a rule that prefers proof that is based on direct evidence rather than circumstantial evidence; a rule that puts the burden of proof on one party or the other under different circumstances; and concerning the subject of this paper, a rule that allows judges the use of judicial notice, based on judges' personal knowledge, rather than basing their decisions on evidence that was presented to them during the trial.[10]

2. What is Judicial Notice?

In legal proceedings, decisions are made based on evidence. An adversarial procedure, at least in its pure form, is characterized by putting in the parties' hands the freedom to determine the scope of the dispute and the duty to collect and present evidence to support their arguments. In other words, the judge is assigned a passive role (especially with comparison to the continental system), and the parties choose what evidence they want to bring before the Court. At the same time, courts in most legal systems had traditionally used the doctrine of Judicial Notice.[11] Judicial notice is a tool that allows the Court to see a particular fact as being proved and rely on it as such when making a decision, without the need to hear evidence regarding that fact. The doctrine originates from a perception, accepted already in the Middle Ages, according to which judges, as learned and educated people, are knowledgeable in many fields.

Already in the 13th century, the argument was made that obvious things need not be proved. And still, the first investigation into the boundaries of judicial notice was conducted only in Bentham's work on evidence, published at the beginning of the 19th century.[12] Bentham does not use the term' judicial notice.' Still, in describing the legal procedure at that time, he explains that

[10] For an elaborated discussion of this matter, see: Talia Fisher, "Theoretical Perspectives on Evidence Law," *Eyonei Mishpat* (*Tel Aviv University Law Review*) 39 (2016): 107 (Hebrew).

[11] In its common, popular use, the term "to take notice of" means noticing or mentioning something. In its legal use, the meaning of the term, similar to that of the legal term "giving notice" is accepting on yourself the knowledge of a certain fact. The meaning of "judicial notice" however, seems to come from earlier ancient English, when the word "notice" was used to mean "knowledge," or the legal term "conusance."

[12] Jeremy Bentham, *Rationale of Judicial Evidence* (London: Hunt and Clark, 1827), 256-257.

each party was allowed to ask the judges to presume a particular fact or topic "notoriously true" as proven even when evidence was not presented.

In 1890, Thayer had published one of the most iconic and comprehensive articles on the topic of judicial notice.[13] In that work, he had explained the origins of the term judicial notice: it is, as mentioned above, a term parallel to judicial knowledge, "indicating the recognition without proof of something as existing or as being true."[14] Under this category are things related to basic human logic, human experience, and in fact, things that "everybody knows." In his, article Thayer has presented several examples from rulings from earlier centuries. Still, he also stressed that judicial notice may apply to a wide spectrum of complicated matters to define in advance.[15] Thayer suggested in this paper that the doctrine of judicial notice does not necessarily belong within the law of evidence but relates, instead, to the definition of the judicial role. Still, he avoids any categorization or guidelines regarding the use of the doctrine. The variety and endless number of topics that may be included under judicial notice, and the fact that these topics will always be changing – with time, place, and culture – have led to the opinion that any attempt at defining them would be useless.[16] Strahorn also thought that judicial notice is an elusive and indefinable concept.[17] In Canada, Drummond had argued that judicial notice is a confusing part of the law: a doctrine that moves between saying something obvious and not saying anything at all. Drummond additionally argued that the term "facts that everybody knows" is not even linguistically valid since it confuses "fact" with "assumption" as well as "knowing" with "understanding".[18]

At least two central difficulties with the doctrine of judicial notice arise from the above: first, a conflict between judicial notice and evidence-based decision-making, and second, internal contradictions within the doctrine itself. In this paper, I seek to map and characterize the actual use of the doctrine, given the lack of any systematic knowledge as to its use in practice. I believe

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[13] James B. Thayer, "Judicial Notice and the Law of Evidence," *Harvard Law Review* 7 (1890): 285.
[14] Ibid.
[15] Ibid. 304-305.
[16] Arthur John Keeffe, Willian B. Landis and Robert B. Shaad, "Sense and Nonsense About Judicial Notice," *Stanford Law Review* 2, no. 4 (1950): 664.
[17] John S. Strahorn Jr., "The Process of Judicial Notice," *Virginia Law Review* 14 (1928): 544. This paper deals mainly with the distinction between the role of judges and the role of jurors.
[18] Susan G. Drummond, "Judicial Notice: The Very Texture of Legal Reasoning," *Canadian Journal of Law and Society/Revue Canadienne Droit et Société* 15 (2000): 1.

that the ambiguousness that surrounds the doctrine of judicial notice calls for systematic identification of its uses as a necessary step in enhancing our understanding of the doctrine to be able to provide guidelines and better construct the way judges may use it.

3. Categories of Judicial Notice

The literature relates to three possible types of judicial notice. The first is when any reasonable person within the community undoubtedly knows the facts in question, and therefore there is no need to obtain that knowledge from an evidential source. The second is when the facts are not necessarily known to the reasonably knowledgeable person, but anyone will agree that they can be easily verified using available and reliable sources. The third category of judicial notice discussed in the literature relates to "law" or "rules" that apply in a particular jurisdiction and need not be proved.[19] This paper deals with the first two categories, which relate to "facts," and not with the third category, which relates to "law."[20]

The first category relates to the most natural situation in which to use judicial notice. When the facts at stake are so well known to any reasonable person within the community, there would be no gain or advantage in requiring them to be proved. Such are facts that are beyond reasonable dispute. A reasonable person, in that regard, does not mean any person. Within the literature and English case law, we can find the use of terms such as "most men" or "what well-informed persons generally know." Such terms necessarily extend the number of facts that belong in the category of common knowledge.[21] A fact, therefore, will be considered "common knowledge" when the Court assumes that everyone knows it and therefore there is no need to prove it.

This distinction is relevant both with regard to professional judges and with regard to jurors. In Canada, it has been suggested that, especially in criminal procedures, judges should not use even personal knowledge they had gained during their judicial work, or through professional training. At the same time,

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[19] This categorization is mentioned, e.g., in: C. A. 5577/08 *Hapoalim Bank Ltd. v. Psagot Galil Golan Ltd.* (28.10.2008).

[20] In Israeli law this category is governed by Rule 57b of the Evidence Ordinance (1971): "Any rule is to be considered common knowledge that does not need to be proved, unless it is otherwise ordered." In the United States this category appears in Rule 201(b) of the Federal Rules of Evidence.

[21] One could indicate both differences and similarities between the terms "common knowledge," and "common sense." Such comparison, though, goes beyond the scope of this work.

it is a common claim that while it might be difficult for judges to apply this, the personal knowledge of a judge (as distinguished from common knowledge) should not serve as a basis for judicial notice meant to justify factual findings or legal rulings.[22]

Besides the more natural and acknowledged use of judicial notice – common knowledge – another distinguished category has developed: using judicial notice concerning a fact that is not generally known, but the truthfulness of which can be examined through reliable and easily accessible information. Under this category are most of the facts, theories, and conclusions acknowledged by experts in science, history, technology, geography, statistics, and other professional fields. In other words, the liberal use of the doctrine of judicial notice has led to its being used concerning common knowledge and facts that are part of universal human knowledge, as was accustomed in the early years of the doctrine. Today, in its current configuration, judicial notice may also be used concerning facts that are not debatable in a way that they could easily be affirmed.

With regard to facts from that second group, there are questions as to the type of sources of information that judges use, the sources that judges see as reliable, and in particular, in our age of information, as to judges' perception of the internet, and information that can be located online.[23] For example, the literature has discussed whether and to what extent it is legitimate to use studies from the field of political science to apply the principle of equality[24] or rely on assumptions from the fields of social science and behavioral psychology in adjudicating family or community-related matters.[25] The literature has also pointed out the use judges make of judicial notice with regard to various scientific facts. The scientific field could be especially problematic with respect to the sources of information and because scientific truths are often controversial and may even change with time.[26]

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[22] David M. Paciocco, "Judicial Notice in Criminal Cases: Potential and Pitfalls," *Criminal Law Quarterly* 40 (1997): 35.

[23] Jeffrey Bellin and Andrew Guthrie Ferguson, "Trial by Google: Judicial Notice in the Information Age," *Northwestern University Law Review* 108 (2014): 1137.

[24] Graham Mayeda, "Taking Notice of Equality: Judicial Notice and Expert Evidence in Trials Involving Equality Seeking Groups," *Journal of Law and Equality* 6, no. 2 (2009): 201.

[25] Gail S. Perry and Gary B. Melton, "Precedential Value of Judicial Notice of Social Facts," *Journal of Family Law* 22 (1984): 633.; Claire L'Heureux-Dubé, "Re-examining the Doctrine of Judicial Notice in the Family Law Context," *Ottawa Law Review* 26 (1994): 551.

[26] Christopher Onstott, "Judicial Notice and the Law's 'Scientific' Search for Truth," *Akron Law Review* 40 (2007): 465.

In Israel, the first scholarly article to deal with judicial notice was published by Harnon more than forty years ago.[27] Harnon repeated the accepted categorization in English literature. Judicial notice extends to three main categories – one that relates to the law[28] and two that relate to facts. The objective of that article was relatively modest: to draw attention to the doctrine of judicial notice, to clarify the distinction between personal knowledge and common knowledge, and to detail the different views in the English literature regarding allowing the parties to bring contradicting evidence with regard to judicially noted facts. Twenty years later, Justice Yaacov Maltz published a short article on the doctrine.[29] His article focused mainly on stressing the advantage in knowledge of professional judicial instances, the distinction between personal and general knowledge and gave a few examples.

In a paper that was not dealing directly with judicial notice, Doron Menashe wrote that judicial notice relates to a complex of beliefs of people with at least an average level of education. A judicial belief that is not within that complex should be related to personal knowledge. According to the Court, when a fact is considered within judicial notice, it is justified to apply it to the parties. On the other hand, it is not justified to apply private knowledge directly to disputable facts. However, it could still be used in determining questions of witnesses' reliability or strength of evidence. This is as part of the general license to examine evidence-based life experience and common sense.[30]

A relatively long and exhaustive chapter on the development of the doctrine in English law was included in a book by Amnon Carmi on law and health published in 2003.[31] The review in that book was meant to explain the use of judicial notice regarding medical or paramedical knowledge in legal procedures.

This paper deals with the first two categories relating to facts.

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[27] Eliyahu Harnon, "Using Judicial Notice – When and How?" 4 *Eyonei Mishpat* (1974): 5 (Hebrew).

[28] See section 57b of the Israeli Law (1971). I should note, that foreign law is usually referred to as a fact that needs to be proved; on the contrary, local Israeli law, and even religious law that the court is not necessarily familiar with, resides under section 57b. In that regard, see, for example: C. A. 436/01 *Rachab v. Rachab*, P.D. 58 (6) 913 (2004).

[29] Yaacov Maltz, "Judicial Notice," *Hamishpat* 2 (1995): 223 (Hebrew).

[30] Doron Menashe, "Factual Discretion, the Freedom of Proof and a Thesis Concerning Judicial Professionalism," *Hapraklit* 43 (1997): 83,86 (Hebrew).

[31] Arnon Karmi, *Law and Health* (2003), 555,627 (Hebrew).

4. Should the parties have the opportunity to make arguments?

The English literature has been debating whether the parties should be informed in advance when a judge uses judicial notice and whether they should have the opportunity to make arguments in that regard. This has been called the "Morgan- Wigmore controversy." Morgan has argued that the parties should not be allowed to bring evidence that contradicts judicially noticed facts and that the parties should not try to falsify truths that are so clear that they could not be debatable.[32] This position resonates with Morgan's more general perception. It is only appropriate to apply judicial notice when the truth in question is such that it cannot be debatable among reasonable people and is not refutable. Wigmore and Thayer, on the other hand, claim that judicial notice may be used not only concerning irrefutable facts but also to facts of lesser certainty. According to Thayer, then, judicial notice may be either conclusive or refutable. With regard to the latter, he accepts the possibility to oblige the Court to inform the parties when intending to use judicial notice and provide them with a reasonable opportunity to present relevant information as to the appropriateness of the doctrine to the specific matter at hand.

McNaughton also explains the above controversy.[33] According to him, there are two perceptions regarding the conclusiveness of judicial notice. In other words - given that it is appropriate to use the doctrine in a particular case, should the party against which the doctrine was applied get the opportunity to try and undermine the Court's ruling by bringing evidence? Wigmore thought that this was possible, while Morgan felt that it was not. McNaughton explains that the root of these different views lies in their differing definition of the boundaries of judicial notice and whether it relates to facts that are not entirely indisputable. Roberts suggested that the controversy might be rooted in different perceptions as to the role of judges: those who believe that a rigid set of rules should bind judges will be in Morgan's camp.

On the other hand, those who believe that judges are practical and should be given power and discretion will be in Wigmore's camp.[34] Roberts additionally argued that since the doctrine keeps changing with time, it is challenging to adopt a comprehensive theory that could stand independently

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[32] Edmund M. Morgan, "Judicial Notice," *Harv. L. Rev*. 57 (1944): 269.
[33] John T. McNaughton, "Judicial Notice-Excerpts Relating to the Morgan-Wigmore Controversy," *Vanderbilt Law Review* 14 (1961): 779.
[34] E. F. Roberts, "Preliminary Notes Toward a Study of Judicial Notice," *Cornell Law Review* 52 (1967): 210.

and permanently. Nokes, also referring to the controversy, argued that judicial notice should be used with care.[35] Davis stressed that in non-jury trials, the process is governed by judges' common sense, and it is, therefore, necessary to guarantee that the parties are fairly treated.[36] At the same time, and as part of his more general approach suggesting to increase the use of the doctrine and making its guiding rules more flexible, Davis believes that there is no point in making a sweeping rule allowing the parties to present arguments before the doctrine is used. He therefore strongly criticized legislative proposals that included such a rule.[37]

Eldridge, on the other hand, stressed that the justification of the doctrine lies in considerations of efficiency. However, he still supported Rule 201 of the American Federal Rules of Evidence, allowing the parties to present their argument prior to the use of judicial notice.[38]

With regard to judicial notice, and in relation to the theory of evidence law, it was recently suggested that it would be appropriate to adopt a "participative model" (under which the parties have an opportunity to present their argument regarding the judicially noticed facts) to replace the "irrefutable model" (under which judicial notice may be presumed without any argument or evidence presented by the parties). The adoption of such a participatory model, leaving it to the Court's discretion to choose when to apply it, will minimize the risk of judicial error, the argument continues.[39]

5. Justifying Judicial Notice

Over the years, several justifications have been provided with regard to the doctrine of judicial notice. These different justifications also impact the above-mentioned debate regarding the parties' input on judicially noticed facts. In the past, judicial notice used to be based on the assumption that judges "know everything." Today, the justification for the doctrine is mainly one of cost-benefit. McCormick argued years ago already that the traditional adversarial procedure, based on the collection of evidence by the Court, consumes excessive amounts of energy, time, and money; managing court proceedings in the traditional way may indeed increase the accuracy of court decisions, but

[35] G. D. Nokes, "The Limits of Judicial Notice", *Law Quarterly Review* 74 (1958): 59.
[36] Kenneth Culp Davis, "Judicial Notice," *Columbia Law Review* 55, no. 7 (1955): 945.
[37] Referring specifically to The American Law Institute and The Commissioners on Uniform State laws.
[38] John Rolfe Eldridge, "Judicial Notice," *Arkansas Law Review* 27 (1973): 171.
[39] Doron Menashe, "A New Paradigm for Understanding Judicial Notice and Its Implications in the Modern Digital Era," *Elon Law Review* 9 (2017): 267.

only insignificantly when compared with the required investment of resources. This view explains the expansion of the doctrine beyond facts known to everyone to facts that the Court can easily verify on its own.[40] At the same time, and especially with the expansion of the doctrine, it is essential to be careful not to make a ruling based on incorrect information. Clearly, courts, at times, may misapply the doctrine, either overuse it or fail to use it when it is appropriate.[41] Orfield suggested increasing the use of the doctrine, specifically in federal criminal cases, as they last the longest and require tremendous resources.[42] In his paper mentioned above, Davis' approach was even more liberal: he argued that we should encourage judges to use the doctrine, just as any person uses the knowledge he has acquired throughout his life, a knowledge that is partly factual and not necessarily indisputable.[43]

The practical justification fits well with the economic approach to law, which has gained more and more dominance in the last decades. In 1999 Posner published the first comprehensive work applying the economic approach to law to the field of evidence law.[44] Fisher and Stein explained that evidence is actually a commodity: collecting evidence costs a lot. This is true both of scientific evidence and expert testimony. In addition to financial costs, the search for truth may involve other costs as well, such as the emotional pain that may be involved in testifying before the Court. In any event, evidential issues, such as the burden of proof, carry a significant economic aspect. Fisher and Stein indicate that the traditional theory of evidence perceives the search for truth as the sole purpose of evidence law. Increasing accuracy is necessary for reaching just outcomes. Fisher and Stein claim that the traditional view is lacking in that it fails to consider the cost involved in the search for truth. According to the alternative approach to evidence law, the cost minimization model, the role of evidence law is to guarantee the efficiency of the judicial process by minimizing the combined sum of the social cost incurred by judicial error and the social cost of preventing judicial error.[45]

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[40] Charles T. McCormick, "Judicial Notice," *Vanderbilt Law Review* 5 (1952): 296.
[41] George R. Currie, "Appellate Courts Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation," *Wisconsin Law Review* 39 (1960).
[42] Lester B. Orfield, "Judicial Notice in Federal Criminal Procedure", *For. L. Rev*. 31 (1963): 503.
[43] Davis, *supra* note 4136.
[44] Richard A. Posner, "An Economic Approach to the Law of Evidence," *Stan. L. Rev*. 51 (1999): 1477.
[45] Talia Fisher and Alex Stein, "Evidence Law," in *An Economic Approach to the Law*, ed. Uriel Procaccia (2012): 1103 (Hebrew).

6. Judicial Notice in Israeli Supreme Court Case Law

I will now turn to present the findings of my study that reviewed all decisions of the Israeli Supreme Court that used the terms "judicial notice" and "common knowledge" and that were given from the year of 1948 (when the State of Israel was established) until 2017. About 200 such cases were found through searching a digital database that includes all decisions of Israeli courts. Obviously, these terms appear thousands of times in the case-law of lower courts in Israel since these courts use judicial notice quite regularly. I have decided to focus only on those cases that have reached the Supreme Court (sitting mainly as appellate Court), both for practical reasons (given the large number of cases in the lower courts) and given the vast implications of Supreme Court case law and precedent. Once the cases have been located, I have divided them according to the areas, and the cases are presented here based on this division. Within each area, they are presented chronologically. All decisions that are presented here have mentioned judicial notice. When I write that judicial notice was used, it means that the Court made a ruling with regard to a particular fact, without hearing evidence on that fact; when I write that judicial notice was not used, it means that the Court determined that a particular fact is not considered common knowledge, could not be judicially noted and needs to be proved by the parties.

7. Summary of Findings

The following table summarizes the findings detailed above, of 200 court rulings specifically mentioning judicial notice, with respect to whether the Court decided to apply judicial notice or not.

Area	*Judicial Notice Used*	*Judicial Notice Not Used*	*Total*
History, Geography and State Authorities	19 68%	9 32%	28
Life Experience and Day-to-Day Life	40 85%	7 15%	47
Economy, Economics, Trade and Labor	50 63%	29 37%`	79
Medical and Scientific Knowledge	13 65%	7 35%	20
Other Professional and Social Areas	15 58%	11 42%	26
Total	137 69%	63 31%	200 100%

The data shows a strong leaning towards using the doctrine of judicial notice (in 69% of the examined cases), not only in the first two areas, which seem more suitable for judicial notice, but also in areas and questions that seem more "professional." The degree of use indeed changes from one area to the other, but the tendency in all areas is towards applying judicial notice. Given that this is the situation, the importance of the doctrine's regulated, systematized, and rational use is evident. Yet, the review of cases reveals that the use of the doctrine by the Supreme Court does not fit these qualities:

- In a relatively small number of cases, the Court discusses the principled and general issues relating to the application of judicial notice;
- The application of the doctrine is inconsistent; at times, it seems almost accidental, and there are contradicting rulings on similar questions;
- In most of the cases in which judges applied judicial notice, they did not specify the source of information and did not mention whether the fact judicially noted was fundamental or peripheral;
- The parties did not receive an opportunity to relate to the judicially noted fact beforehand, by way of presenting their evidence;

- In the application of the doctrine, we find no distinction between criminal and civil cases or between complicated and relatively simple cases.

Going back to the literature that was reviewed in previous chapters, it is clear that the current situation of using the doctrine as revealed here comes under the principles of evidence-based decision-making and of basing judicial rulings on actual facts, rejects the idea of involving the parties before making decisions based on facts that were not proved, and therefore erodes the utilitarian justifications for using the doctrine of judicial notice in the first place. Is there a way to correct these failures in judicial decision-making or, at least, minimize the inherent risks of such use of judicial notice?

8. Policy Recommendation: Regulating the Use of Judicial Notice through the Construction of Judicial Discretion

The findings revealed here require, I would argue, adopting a new, different, and active policy with regard to the application of judicial notice. We have seen that the way the doctrine is currently applied does not allow the parties, nor the legal system or the public, a way to follow the process of judicial fact-finding and the use of judicial discretion in fact-finding. Such random application of judicial notice raises the risk of mistakes, since judges use the doctrine not according to clear parameters, in an unstructured manner, and without satisfying reasoning. When the doctrine is used in criminal cases and against the defendant, one could claim it detriments due process rights. Such a situation provides judges with a "license" to execute their preferences regarding allocating risks in a trial or be inconsistent in their rulings. I believe that individual, specific judicial discretion should also be guided by structuring general rules; such a framework for applying judicial discretion will minimize the risk that judges will allocate the risk of making a mistake according to their own will.

Fisher described it well: "Litigants have a right that the Court will use procedures that would minimize the risk of factual mistakes that might harm their material rights. A judicial system that consistently fails in fact-finding will be inefficient, incur high costs on the parties and society in general, send wrong messages to the public, fail in its regulation of social behavior, harm litigants' rights, and will eventually lose its moral and political legitimacy. It is therefore that the epistemic function plays a central role in the law of evidence and the theory of evidence law."[46]

[46] Talia Fisher, "A Theoretical View on Evidence Law," *Eyonei Mishpat* 39 (2016): 107,116 (Hebrew).

This approach corresponds to Stein's theory of evidence. In a founding article from 1996,[47] Stein argued that the process of judicial fact-finding must be regulated in an overarching way. According to Stein, it is accepted that uncertainty is one of the characteristics of the legal process of fact-finding; judicial decisions in that area cannot be made without exposing one of the parties to the risk of a mistake; the allocation of that risk includes preferences, and these should not be left for the judges to make, but rather, the allocation of risk must be regulated while taking into account the parties' rights. In his book, published a decade later,[48] Stein does not deny the importance of utilitarianism. Still, he refers to maximizing the accuracy of fact-finding, decreasing litigation costs, and reducing the general cost of factual mistakes and the cost of avoiding mistakes. In other words, Stein argues that the process of fact-finding should be cost-effective, meaning that the Court must reduce to a minimum the overall cost of mistakes and of avoiding errors. In his eyes, the balance should be determined based on as straightforward as possible rules, ones that are based on fundamental normative values, including reasoning, logic, and adjudicating without bias.

I am taking on this challenge here, suggesting to equip judges with some tools to use the doctrine of judicial notice. These tools aim to structure judicial discretion in that regard while maintaining judicial authority to use discretion in any case. This structuring will be done in the following manner: when a judge finds that a particular fact is "common knowledge," meaning that it could be judicially noted, the Court will ask itself three questions:

a) Is the case involved "important" or "significant" (namely, a criminal case or a civil case with unique significance)?

b) Is the fact in question central or peripheral to the decision?

c) Does the Court feel highly certain about the truthfulness of the relevant fact, or is there any doubt about its truthfulness?

Different situations, determined according to these three questions, will require different actions out of the two following possibilities: the first option is to avoid using judicial notice altogether, or, at least, ask the parties for their input before using judicial notice. The second track would be to use judicial notice without asking the parties for their input (i.e. in the same manner that the courts use it today). Choosing the appropriate path would also be based on the degree of damage caused to the parties by the wrong use of judicial notice. The following table presents the suitable track for each different situation:

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[47] Alex Stein, "The Refoundation of Evidence Law," *Can. J. L. Juris* 9 (1996): 279.

[48] Alex Stein, *Foundations of Evidence Law* (Oxford: Oxford University Press, 2005).

	Central Fact	*Peripheral Fact*
High certainty	Important case -> Hearing the parties in advance and deciding only with the parties' acceptance. Usual case -> Using the doctrine without the parties' input.	Important case -> Using the doctrine without the parties' input. Usual case -> Using the doctrine without the parties' input.
Low certainty	Important case -> Avoiding judicial notice Usual case -> Hearing the parties in advance and deciding only with the parties' acceptance.	Important case -> Hearing the parties in advance and deciding only with the parties' acceptance. Usual case -> Using the doctrine without the parties' input.

An additional and significant aspect of this new method for the application of judicial notice would be that in any instance where the Court decides to use the doctrine, it will state clearly that it is doing so. In case that its knowledge is based on a particular source, that source will be specified in the decision.

9. Concluding Words

I have opened this paper by explaining that it may happen, in a judicial process, that courts will determine facts and will rely on them for the purpose of making a judicial decision without hearing evidence regarding these facts or having them otherwise proved. This doctrine has been known as "judicial notice." The reliance on judicial notice may lead to inconsistent and, at times, even wrong decisions, as opposed to the accepted desire to assure a due process that is evidence-based. In this study, I have examined the ways in which the Israeli Supreme Court used and applied the doctrine of judicial notice over a period of seventy years. I have mapped the use of the doctrine by reviewing the body of case-law of the Israeli Supreme Court and examined whether there is any consistency and a methodology in said uses. I have examined 200 cases decided by the Supreme Court from the establishment of the State of Israel until 2017, which are practically all the decisions that specifically included the words "judicial notice" or "common knowledge" regarding any facts. I have indicated several findings growing out of this review: first, only in a relatively small number of cases does the Court address

or discuss the general issue of the doctrine of judicial notice; second, the use of the doctrine is inconsistent; at times, it seems even accidental and leads to contradicting rulings on similar questions; third, in most cases in which judges used judicial notice, they did not specify the source of their knowledge, and also did not indicate whether the fact that was judicially noticed was a central fact or a peripheral one, whether the case was complicated or straightforward, or whether there was a high or low degree of certainty with regard to the truthfulness of the judicially noted fact; fourth, in the cases in which judicial notice was used, the parties did not receive an opportunity to relate to the judicially noted fact in advance and were not allowed to bring evidence to contradict it. Based on these findings, I have put forward a framework for regulating the use of the doctrine by structuring judicial discretion, i.e., by creating guidelines for how to use the doctrine. These guidelines are based on a mechanism that will distinguish between types of issues and types of facts.

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