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CONTENT

A Comparative Analysis of 'The Law of Consumer Protection' between the English and Pakistani Law

HASSAN, AMNA

ABSTRACT *In the words of Henry J. Heinz, "Protect the consumer by owing the product all the way from the soil to the table".*[1] *This paper contributes to a comparative analysis of the laws related to the consumer protection provided in the English and Pakistani Laws. In the beginning, it opens up with a brief introduction by stressing upon the need for consumer protection across the globe in general, with a specific orientation towards the situation of existing consumer protection laws in the aforementioned countries. Gradually, it provides an insight into the background of consumer laws since their adoption till to date in both countries. As Britain ruled Pakistan for a long period of time, therefore, both share some common ground from the historical aspect. Using this as the proverbial measuring stick, the paper then seeks to identify the various kinds of legislative Acts and Ordinances in force since the first, yet common piece of legislation – the Sales of Goods Act*[2] *– to the present laws in practice in both the nations. The search does not end here, it continues to explore the existence of regulatory frameworks related to the consumer protection legislation in practice. Additionally, an outlook into the future of consumer protection laws is also provided in the paper with regard to the Brexit for the UK and Pakistan in general. In the end, the paper concludes with a case-study analysis of the consumer laws in both countries to throw light on the applicability of such laws in their own social contexts.*

KEYWORDS *consumer protection, comparative analysis, English and Pakistani Law, legislative acts, regulatory frameworks, future; case-study analysis*

[1] Henry J. Heinz Quotes, *BrainyMedia Inc,* (2018) accessed October 18, 2018 http://www.brainyquote.com/quotes/henry_j_heinz_600614

[2] The Sales of Goods Act of United Kingdom, 1893.

1. Introduction

The idea of consumer protection comprises of laws and various organizations that are created to design a mechanism for the protection of consumer rights, fair competition in trade, and a flow of right information in the market. Such laws are usually designed for countries having strong enforcement regulation in their territories to abstain from corruption, fraud or malpractices in the businesses that try to take undue advantage over their competitors. The laws related to consumer protection aim at granting the consumer with maximum support by the government of a country against all sorts of unfair or unjust practices in market place. For instance, the businesses or organizations may be asked to disclose the entire and accurate information related to a product by a government, especially in areas of public health and safety concerns like food. In addition, such countries may provide for some other incremental protection measures for the consumers as they deem fit to ensure a safe haven in the market.

Generally speaking, a consumer may be defined as a person who obtains certain goods, commodities or services for personal usage or to acquire the ownership, instead of resale or other indirect purposes.[3] Say for example, a person purchases a Telenor SIM card for internet services that will account to his personal usage. The idea of consumer protection laws bringsforth the idea of consumer rights associated with them. Consumer rights allow the consumers to come up with better opportunities in market, that is, by creating organizations that increase consumer rights awareness and seeking help by filing complaints against any unfair practices in businesses. Some of the leading organizations that work for the consumer protection include government and non-governmental organizations such as the Office of the Ombudsman,[4] Consumer Rights Protection of Pakistan (CRCP), and Federal Trade Commission, USA etc.

Notwithstanding, the interests of consumers can be additionally protected through a competitive atmosphere in the marketplace, which can have a direct and/or indirect impact upon consumers, thus justifying a co-existence of the competition and consumer laws.[5] In England (the UK), attempts to protect the consumer from the unjust practices of businesses have been on the go since their first law on consumer protection law in 1893. Till to date, the UK has

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[3] Lauren Krohn, *Consumer Protection and the Law: A Dictionary*, (Santa Barbara: Abc-Clio Incorporated, 1995) 51.

[4] The Punjab Office of the Ombudsman Act, 1997 (X of 1997).

[5] Katalin J. Cseres, *Competition Law and Consumer Protection*, *Vol. 49* (The Netherlands: Kluwer Law International, 2005)

passed numerous laws abiding by consumer protection and the situation seems to favor consumers in the best possible way, both in letter and spirit. On the contrary, the situation in Pakistan is gloomy and murky. Though several attempts have been made in the past and present times to cater the need for a consolidated consumer protection law in the country, there exists no uniform law to date. The consumer protection laws are region specific and lack enforcement, which account for the worse condition of the consumers in Pakistan.

2. Background: Development of consumer protection legislation

It is a matter of fact that the consumers are part and parcel of both the government and business organizations, as they are accountable for setting up the trends in the economy of a country. Because of the idea of protecting consumers from malpractices of the businesses, the UK applied the principles of Law of Contract in the beginning.[6] According to the Contract Law,[7] any consumer who bought any defective product could file a suit in the court of law to claim indemnity for the breach of contract, whether express or implied. As the time passed, this Contract Law began to fall short of the needs to protect the consumers. Therefore, the UK introduced first law on consumer protection called as, "*The Sale of Goods Act, 1893"* to meet the need of protecting the consumers in the UK. This law reflected the enactment of the principles of common law that applied to contracts related to the sale of goods. Some implied terms and conditions were added into all the contracts for the sale of goods through this Act, such as the fitness and quality of the products.[8] If such conditions were not met, the consumer was given a wide array of remedies against such breach depending upon the severity of the case.

As we all know, the British ruled the subcontinent and established their control (well known as "*British Raj*") for a long period ranging from 1858 to 1947.[9] Therefore, Pakistan was to share the laws of British including the

[6] Sir Gordon Borrie, *The Development of Consumer Law and Policy—Bold Spirits and Timorous Souls* (London: The Hamlyn Trust, 1984)
[7] The Law of Contract, 1872.
[8] Roger LeRoy Miller, Gaylord A. Jentz, *Business Law Today: Comprehensive: Text and Cases, Ninth Edition* (Boston: Cengage Learning, 2011) 445.
[9] Hamid Khan, *Constitutional and Political History of Pakistan*, *Second Edition* (Oxford, Oxford University Press, 2009)

consumer protection laws until her independence in 1947.[10] Once Pakistan emerged as an independent state in the eyes of the world in 1947, she enacted numerous laws[11] and formulated several organizations to advance consumer interests and protection. However, as aforementioned, Pakistan lacks a homogeneous legislation at centre that could assure safeguards to her consumers. This shows that consumer protection is more a matter of provincial concern rather than a federal issue,[12] unlike in the UK and most other countries of the world. Every province holds a different number of consumer courts with Punjab having 11 consumer courts in all while there is a dismal situation in other provinces.[13] To conclude in a few words, it can be said that the issue of consumer protection has not gained any fruitful attention by any successive governments thus contributing to the adverse consumer conditions.

3. Consumer Protection Legislation

Despite the already in force "*Sales of Goods Act, 1893*", the UK witnessed an increase in the momentum of consumer activism in the late 1960's. In the years (1970-1980's), the UK consolidated her contractual laws related to buying goods and commodities by passing several Acts of consumer protection in the Parliament of domineering character, which consists of the following:

- The Consumer *Credit Act 1974,*[14]which regulates the credit and hiring agreements of the consumers;
- The *Unfair* Contract *Terms Act 1977*[15] in order to suppress the unlimited usage of exclusion clauses under contracts;
- The *Sale of* Goods *Act 1979*[16] aimed at integrating the *Sale of Goods Act 1893* as well as to provide for certain implied rights to consumers,

[10] Asif Khan, Maseeh Ullah and Asmat Ullah, *Consumers Protection in Pakistan* (Islamabad:International Islamic University, Department of Law, 2017)
[11] Supra 9.
[12] Syeda Saima Shabbir, "Disparity in Consumer Protection Laws in Pakistan," *Pakistan Law Journal XLI*, (2013)
[13] Sarmad Ali, "Absence of consumer protection laws," accessed 10 May, 2018, https://dailytimes.com.pk/75801/absence-of-consumer-protection-laws/
[14] Royston Miles Goode, Consumer Credit. United Kingdom Comparative Law Series, (Leyden/Boston: Springer, 1978)
[15] Richard Lawson, *Exclusion Clauses and Unfair Contract Terms, Tenth Edition* (London: Sweet & Maxwell, 2011)
[16] Michael G. Bridge, *The Sale of Goods*, (Oxford, Oxford University Press, 1998) 272.

for example, the sellers must sell the products as mentioned and represent good quality; and

- The *Supply of Goods and Services Act 1982*[17] to demand traders to facilitate standardized goods and services.

It was in the 1980's that a mass scale denationalization and deregulation of the business markets in the UK kicked off.[18] It was believed by the Conservative Party (in power) of the UK that competition was the best policy to safeguard consumer protection, as it was in favor of state representing the consumer, rather the consumer himself as an individual party.[19] Simply, it was against an extended consumer protection regulation. Although the Conservative Government contributed to the enforcement of consumer law during 1979-1997, they were largely given effect due to the need to implement directives of the European Parliament. Being a member of the European Union (EU) at that time, it was compulsory for the UK to do so as per required by the EU. Otherwise it could have strained the relationship of the UK with other EU members.

However, the year 1997 witnessed an enhanced inclination of the Labour Government (then in power) towards the function of consumer policy in response to the momentum of globalization. It sought to enforce efficient policies and provided for greater empowerment of the consumer in the UK in a move to take the UK businesses to a next level of competition. This move shifted the UK towards an "*international benchmarking*" in order to help her form a governing system which would be the best in the world.

A comparative study approach was adopted by the UK government in 2003[20] to review the numerous consumer regulation systems in other Member States of the European Union and Organization for Economic Co-operation and Development (OECD). This detailed study had led to the revelation that "fair trade" was among the best and commonly regulated practices in consumer protection sphere. But the UK was unaware of the fact and lacked any such practice in her system due to no existence of any such legal provision. Therefore, a very basic consumer law called "*The Consumer Protection from*

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[17] Great Britain, Supply of Goods and Services Act 1982, London-UK, H.M. Stationery Office, 1982.

[18] Dr. Muhammad Akbar Khan, "The Origin and Development of Consumer Protection Laws in the United Kingdom," *Journal of Asian and African Social Science and Humanities*, *Vol. 3(3),* (2017): 38-52.

[19] Chris Wrigley, *British Trade Unions Since 1933*, *Vol. 46* (Cambridge: Cambridge University Press, 2002), 73.

[20] Michael A. Crew and David Parker, *International Handbook on Economic Regulation* (Cheltenham, Edward Elgar Publishing, 2006)

Unfair Trading Regulations 2008 (CPRs)"[21] was promulgated on 26 May 2008 by the UK aimed at establishing a general sense of obligation upon everyone to avoid unfair trade practices in the regime.

The Department for Business, Innovation and Skills (BIS) of the UK is primarily tasked with the duty of formulating and regulating consumer policies. BIS was established on 5 June 2009 and is obliged to design consumer policies and view their efficiencies, check on businesses and their relations, legislate the business law, realize the impact of competition, regulate the employments, and so on. It is the duty of BIS to draft the various laws and standards related to consumer policies in the UK to prevent her valuable consumers and enterprises from unfair practices.[22]

Recently in 2015, the UK Parliament had enacted another consumer protection law known as the *Consumer Rights Act, 2015*. This Act provides a context to merge the fundamental rights of consumers in one place which would protect all contracts made for the purchase of goods, hiring of services, buying digital content and regulating unfair conditions in contracts. Additionally, this Act serves as a safeguard for all types of consumers against anti-competitive attitude in the marketplace by filing complaint in the Competition Appeal Tribunal (CAT). If a person does not conform to the regulations of the Act, he/she could be penalized by the regulator for a maximum penalty as described under the Act. The Act also states the powers of the regulators to probe the imminent violators of the consumer law as mentioned under Schedule 5, and elucidates upon the fact that some standards of trading may be implemented within the regional administrative limits. The civil courts and other governmental regulators are empowered under the Act to take the most appropriate actions as they deem fit in the interest of the consumers while tackling situations of grave breaches of consumer protection law. Furthermore, the Act introduces certain modifications to the selection of judges presiding in the hearings of the CAT and obliges the agents to make the judges' fees and related information public. Not last but the least, it extends the catalogue of higher education institutes that are necessitated to share schemes for handling the complaints related to them, and comprises of some

[21] Her Majesty's Stationary Office, "Consumer Protection from Unfair Trading Regulations" (2008) accessed October 19, 2018 http://www.legislation.gov.uk/ukdsi/2008/9780110811574/contents

[22] Department for Business, Enterprise and Regulatory Reform, "Code of Practice on Guidance on Regulation," (2008) accessed October 19, 2018 http://www.oft.gov.uk/shared_oft/business_leaflets/cpregs/oft1008.pdf,

conditions in relation to reselling of tickets for recreational, sporting and cultural events.[23]

Contrarily, Pakistan has a different scenario related to the consumer protection laws when compared to the UK. There are four consumer protection laws that are in force in Pakistan, namely the Punjab Consumer Protection Act 2005 (PCPA), Balochistan Consumer Protection Act 2003, Islamabad Consumer Protection Act 1995, Sindh Consumer Protection Ordinance 2004 (now lapsed) and Khyber Pakhtunkhwa Consumer Protection Act 1997. Other territories that fall under the governance of either federal or provincial administrations mainly FATA and PATA still lack any laws related to the protection of consumers. Even worse, some of the said territories have no legal status in the constitution.[24] The aforementioned laws deal with consumer disputes that may arise in the established consumer courts of Pakistan. There is no big difference among the four consumer protection laws, in fact they are quite similar in their legislation as well as enforcement. The only difference lies in the reality that the people of Pakistan lack awareness as to the laws and their rights related to consumer protection. Therefore, it is the consumer who suffers at a greater extent compared to the trader, who possesses more resources and means of communication to meet his ends.[25]

The earlier consumer protection laws reflected no intention towards the welfare of consumers, as they were not willing to give consumer a greater role in the market place. The governments and the businesses wanted to play their monopoly in the sales of goods or services in order to earn maximum profit. For instance, pricing is a well-known issue related with the consumers but the Acts that deal with such issues provide for no express provisions for the role of the consumer. That is to say, consumer participation is held at bay to avoid any jolts to the status quo. It is believed that all this was done in cognizance of the fact that the general public lacked any awareness as to the consumer laws.[26] Accordingly, the issue of setting up of price for a certain product or commodity was done by the Government on behalf of the consumer on one hand, and by the producer or seller on the other hand. It shows that the consumer has lost his/her independent entity and is totally excluded from the

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[23] Denis Barry, Edward Jenkins QC, Daniel Lloyd, Charlene Sumnall and Ben Douglas-Jones, *Blackstone's Guide to the Consumer Rights Act 2015* (Oxford: Oxford University Press, 2016)

[24] The Constitution of Pakistan, 1973.

[25] Ali Qadir, *The State of Consumers in Pakistan: A Foundation Report* (Michigan: University of Michigan, Network for Consumer Protection, 2001)

[26] A. Salman Humayun, *Consumers Versus Corporate Sector: Judicature's Role in Balancing the Equation* (Pakistan: Consumer Rights Commission of Pakistan (CRCP), 2006)

process of active involvement in the pricing policy. One such instance includes the enactment of the Price Control and Prevention of Profiteering and Hoarding Act in 1977 (PCPPHA). Under this Act, the Federal Government was authorized to pass orders to *'provide for regulating the prices, production, movement, transport, supply, distribution, disposal and sale of the essential commodity and for the price to be charged or paid for it at any stage of the transaction therein'*. This is a clear proof as to the negligible participation of the consumer in the issues related to pricing.

For the moment, however imperfect may the present legislation be, there exists a reassurance towards the recent initiation on the consumer legislation and the incorporation of the consumer as an important stakeholder in the marketplace. The evidence can be seen in the multiple consumer legislations enacted at the federal and provincial levels. An example is National Electric Power Regulatory Authority (NEPRA),[27] which acknowledges the consumer as an affected party and therefore gives him/her a legitimate right in the process of fixing the tariff/price of the electricity. NEPRA along with some other Acts and Ordinances, which are passed keeping view to strengthen the consumer laws, are listed below:[28]

- *National Electric Power Regulatory Authority (NEPRA) Act, 1997:* As mentioned above, the said Authority is charged with the duty to regulate the licenses to the companies or entities that are generating, transmitting, and distributing power in the country. It is responsible for the enforcement of electric power regulations, upholding the standards of service delivery, formulating specific terms for obtaining and re-newing the licenses, and fixing the tariff.
- *Pakistan Telecommunication Authority (PTA) Act, 1996:* This Act deals with the issuing of licenses to the companies that provide for the services of telecommunication across the nation. Under this Act, the entire sector of telecommunication is regulated in Pakistan comprising of the formulation of policies for issuing and renewing licenses, drafting conditions for acquiring licenses, and keeping the standards of service provided.
- *Natural Gas Regulatory Authority (NGR) Ordinance, 2000:* This Ordinance basically promotes a fair competition in the market place related to the accessibility, conveyance, and allocation of natural gas

[27] Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (XL of 1997).

[28] Abdus Samad Khan, Ashraf Ali, Muhammad Saleem, Shaista Naznin and Muzammil Shah, "Understanding and Analysis of Consumer Protection Laws in Pakistan," *Journal of Applied Environmental and Biological Sciences 4,* no. 12 (2014) 92-98.

through the provision of licenses to the entities providing for natural gas. It is in charge of controlling their activities, drafting the necessary conditions for obtaining the licenses, and upholding the standards of service, where needed.

- *Pakistan Standards and Quality Control Authority (PSQCA) Act, 1996:* This Act fosters the use of safety signs and standardized quality of products or goods by issuing licenses and certificates in order to maintain uniformity.
- *Pakistan Hotels and Restaurants (PHR) Act, 1976:*[29] Under this Act, the rates and standards of service provided are regulated across all the hotels in Pakistan.
- *Pakistan Penal Code (PPC), 1860:*[30] This Code basically deals with penalizing criminal offenses. But for the purposes of consumer protection, only those sections of the PPC are enforced that deal with any act of contamination or adulteration of the food and drinks.
- *Drugs Act (DA), 1976:* As the name suggests, this Act deals with every detail of drugs that is their sale, purchase, production, delivery, and fixing of price.

4. Regulatory framework for consumer protection

Once a framework in the form of a piece of legislation is provided by the Parliament of a country in a certain area of concern, the next step is to look into the regulatory mechanisms provided therein. The UK has a wide range of consumer protection laws to combat the consumers from the menace of frivolous and corrupt practices in the marketplace. Thus, it is now ideal to monitor what kinds of regulatory framework are provided for the consumers under the UK consumer laws. There are certain bodies specified by the Secretary of State that regulate the consumer protection laws in the UK including the most notable of all the Office of Fair Trading[31] (OFT) and Trading Standards Services (TSS).

It was under the Fair Trading Act of 1973 that such a non-ministerial government Office of Fair Trade came into existence. The complaints related to consumer protection matters are filed before the Director-General of Fair Trade. Once such complaints are filed, it is the duty of the OFT to probe, levy

[29] Hamid Ali, The Pakistan Hotels and Restaurants Act, 1976 and the Rules, 1977, Applicable to All Concerned Through-out Pakistan, Pakistan, Ideal, 1987.
[30] M. Mahmood, *The Pakistan Penal Code, 1860, Edition 3* (Pakistan: Al-Qanoon Publishers, 2009)
[31] U.K. Office of Fair Trading, 2013.

a sanction, or pursue the matter for a lawsuit. Nevertheless, OFT does not allow the consumers to file complaints directly to its office. They are required to make their complaints before the Citizens Advice Consumer Service (CACS, also known as Consumer Direct), where they can seek legal aid. Moreover, the CACS may direct consumers' complaints for investigation before the Trading Standards. Owing to the fact of limitation contained in the Enterprise Act 2002, it is not possible for a single complainant to get any information related to the progress of his/her case. But in a few instances the Consumer Direct also hold the power to forward a lump-sum of complaints to the OFT in order to be treated as a general grievance.[32] Additionally, some consumer groups can also seek the OFT through a supervening complaint and such groups include the Consumers Association or Consumer Focus. It is a very rare sight to see OFT prosecuting the companies as it adopts a quite easy regulation method for them, that is to say, no complaint of the consumers against any company gets published.[33] Though the work related to investigation, tasks, and regulations is traced for the purposes of such complaints. Furthermore, EU directives related to consumer protection are carried out by the OFT.[34] It is the duty of the OFT to implement the EU laws and regulations contained in the Distance Selling Regulations 2000 or Unfair Terms in Consumer Contracts Regulations 1999 in order to protect the consumers in the UK. Despite this, the situation leads to a controversy. While these laws are made to benefit the individual complainant, the OFT can only entertain general complaints, consequently it sends back any individual complaint to the CACS. Besides, the OFT also acts as the UK's legitimate supervisory body related to consumer protection laws and regulations. It does so by allowing the markets to be a safer place for consumers' interests through the establishment of trading standards departments both at domestic and municipal levels.

Generally speaking, every advanced nation seeks to protect the interests of its consumers. Efforts are made to provide a legislative framework for the awareness and effective enforcement of such consumer rights and laws. Even the United Nations (the UN) has provided for detailed road maps to assist

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[32] A. Nigel Parr, Roger J. Finbow and Matthew J. Hughes, *UK Merger Control: Law and Practice*, (U.K., Sweet & Maxwell, 2005) 95.

[33] U.K. Office of Fair Trading, "Consumer enforcement," accessed 20 April 2016, http://www.oft.gov.uk/OFTwork/consumer-enforcement/

[34] Foreign & Commonwealth Office, "EU law and the balance of competences: A short guide and glossary, 2012," accessed 20 April, 2016, https://www.gov.uk/guidance/eu-law-and-the-balance-of-competences-a-short-guide-and-glossary

courts of law on disagreements related to consumer issues across the globe.[35] The consumer laws around the world are very much vivid and erudite, and as such receive their due respect and honor everywhere from both the consumer and manufacturer. But the case in Pakistan is rather depressing. The country lacks any solid guidelines for the courts to decide on issues of consumer protection. The costs of civil litigations with respect to consumer disputes are expensive and the matter takes a quite slow, yet long procedure till its final conclusion. The onerous work load makes it entirely difficult for the courts of session to dispose the consumer complaints in time. The situation soars further with the availability of existing inadequate penalties in the legislation, which results in the ineffective regulation of the consumer laws. Some time ago, some guiding principles were elucidated by a learned judge of the High Court with regard to handling of consumer disputes by the courts. Unfortunately, those guidelines were never followed. Pitifully, there exists no uniform procedure (either civil or criminal) to be adopted in suits relating to consumer courts and the legal community seems to be unaware of the need for adoption of a single, uncontested method of handling such matters.

For instance, every consumer protection Act has its own procedure for handling the consumer definitions and issues. Under the NEPRA Act,[36] a consumer is defined in Section 2 (IV) as a person who purchases or receives electric power for consumption. In Section 39 (1) of the NEPRA, it is stated that 'any interested person' is able to file a complaint, which means that any regular consumer can do so. But the Act falls short of a definitive procedure for awarding compensation to a complainant. There is no explicit method provided to the Authority under the said Act to allocate damages to the affected user or consumer and therefore, this remains the major lacunae in consumer protection provisions of the Act. Unlike the NEPRA Act, The PTA Act[37] has no specific definition of who constitutes the 'user', although there is a mention of 'consumer's interest'. But the elimination of a regular consumer from the meaning of 'user' beats the purpose of protecting consumers' interest. It mentions no proper method either to award compensation to the user complaints, thus it falls under the same category of failure as the NEPRA Act.

Likewise, the NGR Ordinance 2000 throws no light either no the definition of 'interested persons' as mentioned in Section 27. According to this section, a negotiation with 'interested persons' is needed to determine the technical standards. The Ordinance lacks any participation of the consumers in the

[35] The United Nations Guidelines for Consumer Protection 1985.
[36] Supra 27.
[37] Supra 29.

process of setting up prices and determining the technical standards as well. Besides, there exists no detail as to the procedure of complaints and reimbursement in case the consumers suffered from any kind of issue like a loss or damage due to the gratuitous act of the licensees. Yet in another Act - the Pakistan Standards and Quality Control Authority Act- there is no inclusion of the consumer as an essential interested party in the Board. Instead, the Federal Chamber of Commerce and Industry (FCCI) is represented in the Board. In the same way, there is a provision of just one consumer to be represented in the Advisory Council as opposed to the five members from the chambers of commerce and industry. The Act also fails to chalk out any specific method for consumer complaints to be filed and carried out. In an instance of any complaint, the consumer is obliged to knock the doors of the Authority, which shall carry out the probe on its own whims and wishes.

Correspondingly, the Pakistan Hotels and Restaurants Act[38] provides no explicit rights to the consumer to file a complaint before the Controller to initiate investigation. Therefore, if any such complaint is made to the Controller, it is presumed that its fate depends upon the will of the Controller himself. He may decide to entertain and proceed with the complaint or may reject the complaint as a whole, and this leaves a major gap in the Act from a consumer standpoint. Similarly, the Pakistan Penal Code[39] also lacks any mention of a specific procedure to award compensation to the consumers in the case of complaints or loss suffered by them. Same is the case with the Drugs Act, where the procedure to seek compensation for a complaint or damage suffered is unclear. In fact, under the said Act, only the Inspector has the right to initiate the legal proceedings, thereby depriving the consumer of any legal right to sue. This again is a major lacunae in the consumer provisions of the Act. In short, no single Act in Pakistan bears a model for dealing with the consumer disputes in the consumer courts.

5. Future: What next for Consumer Protection?

After the UK decided to vote in a referendum to leave the European Union in 2016,[40] the future of the consumer protection laws seems to be in question. Businesses are cast with doubt as to the policy of the UK with regard to the consumer laws as uncertainty looms over the decision of leaving the EU.

[38] Supra 30.
[39] Supra 31.
[40] Ian R. Lamond and Chelsea Reid, *The 2015 UK General Election and the 2016 EU Referendum: Towards a Democracy of the Spectacle* (Berlin-Germany, Springer, 2017)

However, be as it may be, there is nothing much to be worried about for at least a short period of time. It is yet follow the directives of the EU until the complete Brexit comes into force in March 2019. The current enactment of the Act known as the Consumer Rights Act 2015 (CRA) is a clear indication of the fact that the government of the UK is not willing to make any major amends to the domestic consumer laws. The Act deals with the basic rights and available remedies to the consumers in relation to the provision of goods and services.[41] In short, there are less likely chances for any alteration of the consumer laws as a top agenda for the government of the UK as it has to look into other conceivable issues. As evident from the facts, nothing can be predicted about the future of the existing consumer protection laws in the UK. Therefore, the chances for a serene atmosphere in the marketplace are assured for the businesses and traders of the UK as it exists to date.

On the other hand, the situation in Pakistan is expected to improve from the previous depressing situation. It is hoped that voices for the awareness of the existing consumer protection laws shall be emancipated across the country to enable an ordinary user to exercise his/her rights with consciousness. The leading organization - Consumer Rights Commission of Pakistan (CRCP),[42] 1998– is believed to be the hope for the betterment of consumer laws in Pakistan. This organization bears no support from any huge marketing or business community, as it works on its own as an independent non-governmental organization. It works for non-political agendas and without any profit seeking purpose. Conclusively, the CRCP is an all-embracing first ever body to represent the rights of consumers in its true essence. CRCP has vowed to initiate consumer movement across the nation to facilitate and advance the interests as well rights of the consumers at all levels, be they social or economic. The strong missions of CRCP have motivated the Punjab government to work with CRCP in order to legislate upon issues of consumer protection. Not long ago, a model law was proposed by CRCP for the protection of the consumer across the country and worked out to promote it. Moreover, it is engaged in the procedure of collecting and revising the already existing laws for the consumers in order to propose the best possible modifications for enforcement. There is a series of consumer laws of which the *"Consumer Laws in Pakistan"*[43] is the first one and it contains various

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[41] Taylor Wessing, "UK Consumer Law in the Wake of the EU Referendum," *Oxford Business Law Blog*, accessed 19 October, 2018, https://www.law.ox.ac.uk/business-law-blog/blog/2016/07/uk-consumer-law-wake-eu-referendum

[42] "Consumer Rights Commission of Pakistan," accessed October 19, 2018. http://www.crcp.org.pk/index.htm,

[43] Mohammad Sarwar Khan and Abrar Hafeez, *Consumer Laws in Pakistan* (Islamabad-Pakistan: Consumer Rights Commission of Pakistan, 1991) Part-I.

laws related to the consumer protection. It can be rightly called as a guide into the legislative as well as regulatory mechanisms of the consumer laws in Pakistan.

6. Case-Study Analysis

Under this section, a brief insight is provided as to the applicability of the consumer protection laws in both the countries – the UK and Pakistan. Through the case study analogy, it shall be made vivid how each country treats consumer protection as a serious matter in their territories and the breach of which shall be penalized in the courts of law.

The first case relates to the UK, that is**,** *BSS Group Plc. v Makers (UK) Ltd [2011].*[44] In this case, BSS Group Plc. (BSS) represents the seller while the Makers (UK) Limited (Makers) represent the buyers. Makers required the BSS to provide them with specific kind of adaptor and valves for the purposes of plumbing project to be carried out at some public house near Cambridge. BSS provided the Makers with what they desired but as soon as the renovation work began, it turned out that the adaptors and the valve were blown out. They could not stand more than few hours and damaged causing flood in the basement of that house.

This led to the issue of deciding whether BSS was accountable for the provision of incompatible goods as a violation of "fitness for purpose" clause contained in the Sale of Goods Act 1979 under Section 14(3). According to this Section, it is made evident that in instances where a purchaser makes it clear, either expressly or impliedly, to the seller about the purpose for which he buys certain goods from him/her, then it becomes an implied duty of the seller to provide such goods as are reasonably fit for the purpose mentioned. However, there does exist an exception to this rule. In cases where a purchaser shows no intent to rely upon the judgment of the seller to foresee the reasonability of such goods for the purpose, the seller is exempt from any liability.

In the initial case, the judge came to the knowledge that the purchasers (Makers) had made their purpose for purchase of those adaptor and valves expressly clear through fax enquiry, written order and quotation. Some particular 'Uponor' system was in use at the property that required the purchase of those valves and adaptor. This system was made known to the BSS, but in spite of all this, BSS provided the wrong type of valves and adaptor. As a result, the incompatibility of the two items led to the flood in the

[44] Michael Bridge, *Benjamin's Sales of Goods*, Eighth Edition (England and Wales: Sweet & Maxwell, 2012) 1-003,11-055.

property. It was found out by the judge that the Makers had counted on the BSS according to the Section 14(3) of the Sales of Goods Act 1979 with regard to the "fitness for purpose" of the goods. As BSS failed to keep up with the implied duty of reasonability of products,[45] they were held liable for the breach of the term under the aforementioned Act.

BSS could not agree to the decision and went to Court of Appeal for challenging the decision of the lower court. But to their disdain, the Court of Appeal also favored the decision of the original judge and dismissed their appeal.[46] According to the Court of Appeal, it was held that the Makers made their purpose of purchase of goods vivid to BSS explicitly by mentioning the type of 'Uponor' system in use at property. It was found that the valves were incompatible with the Uponor adaptors to help seal the Uponor pipe, and thus, failed to fulfil the purpose for which they were used together. It also confirmed the point related to the reliance of Makers on the BSS's skill to judge the "fitness for purpose" clause. The Court stated that where a purchaser makes his/her intention for use of certain goods clear to the seller, then he/she has to abide by the implied condition. He/She cannot defy it unless he/she has a proof to show the purchaser did not rely on the seller's skill or judgment. In short, it can be said that the consumer is provided with ample protection to safeguard his/her interest under the UK legislation.

Now, the second case relates to Pakistan, that is, *Chairman Indus Motors Co. Versus Muhammad Arshad [2012 PLD 264]*.[47] The case represents the practice of consumer protection of recent times in Pakistan. In this case, the Consumer (Muhammad Arshad) bought a new car from the Indus Motors Co. (the Manufacturer). But due to some engineering fault, the gearbox of the car seeped and it was substituted by the Manufacturer. The case was decided in the favor of the Consumer by the Trial Court that asked the Manufacturer to replacethe faulty car with a new car. The Manufacturer was not pleased with the decision of the Trial Court and appealed in the High Court by raising the plea that by doing so the Trial Court had led to an undue enrichment of the Consumer. This was owing to the fact that the new car had a new model that varied with the Consumer's old model car along with its reduced net worth

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[45] Rufus A. Mmadu, "Application of Implied Terms in the Sales of Goods Act to Consumer Transactions in Nigeria: Between Consumers Protection and Safeguarding the Sanctity of Contracts," *Journal of Business Law and Ethics* 29, no. 2 (2014) 63-106.

[46] Russell Kelsall and Elaine Black, *To be (fit for purpose) or not to be (fit for purpose): the Court of Appeal decides the question!* (Cleveland: Squire Sanders Hammonds, 2011)

[47] Qaiser J. Mian, *Consumer Protection Laws* (Lahore-Pakistan: Punjab Judicial Academy, 2012)

because of continuous usage by the Consumer. According to the Manufacturer, the case was to be be treated differently keeping in view these facts.

The High Court found out that the original gearbox was damaged and substituted by the Manufacturer with a local gearbox by way of dealership. This dealership actually contributed to the reduced worth of the vehicle and denied the consumer of his right to get it replaced by a new one. As soon as the Consumer found out that the substituted gearbox was not original as warranted during the purchase, he took his signed customer's satisfaction report to protest and challenged it before the Trial court as breach of warranty.

The Trial Court, after acquainting with the facts of the case, ordered the Manufacturer to replace the old car with the new one. This decision was not acceptable to the Manufacturer and he went for appeal. In the High Court, to the Manufacturers dismay, the appeal was dismissed and he was held accountable for the '*breach of warranty*'[48] under the Punjab Consumer Protection Act 2005, Sections 6 and 8. The Consumer was directed by the High Court to return the defective car to the Manufacturer, in lieu thereof, the Manufacturer would refund the full price of the car to the Consumer. This shows a recent shift of enforcement of consumer protection laws in Pakistan to benefit the consumers from the unjust practices in the marketplace and therefore, applauded!

7. Conclusion

The consumer protection laws are regulated in the world with a view to safeguard the interests of consumers as well as businesses. The provision of standardized goods and services to the consumer by the manufacturer would eventually benefit both. The consumer would benefit from the purchased items while the manufacturer enjoys the profit. By enforcing legislative measures to curb the malpractices and corruption in businesses, the marketplace would become a fair competition zone for the purchase and supply of all sorts of goods and services.

To conclude, all developed countries bear legislation and enforcement mechanisms to keep a check on the consumer laws, including the UK and Pakistan. Although both countries share a common historical background, the situation in Pakistan is worse in terms of enforcement as compared to the UK. Pakistan lacks a uniform legislative Act that could be applied to the entire country as there exist provincial legislative Acts, and this weakens Pakistan's enforcement mechanisms. The consumer courts are left with a void in terms

[48] The Sales of Goods Act, 1930.

of which procedure to follow and thus, the consumer is at stakes. Only recent times have witnessed a change in the Pakistan's Consumer Law by providing the consumer with greater protection through the efforts of consumer protection organizations and the awareness of consumer laws. On the other hand, the UK has a developed system of consumer protection both in letter and spirit, which is expected to run alike even after the Brexit.

Causes and risk factors of school shootings, with a focus on individual factors

KULCSÁR, GABRIELLA

> „Everything has three sides: you can see one, I can see one, and there is one invisible for both of us."[1]

ABSTRACT *The unexpectedness and the brutality of school shootings and other amok attacks, the hardly decipherable reasons behind them highly motivate experts to find explanations. This study attempts to give a general understanding of how we should approach the possible causes of school shooting cases and outlines the web of risk factors that can contribute to the process that leads to commit a school shooting. The paper also offers an overview of the controversial theories regarding the complex link between school shootings (and the broader phenomenon called „amok") and individual psychopatology. Furthermore, the study examines the intriguing connection between suicide and amok, exploring the possible role of a psychological crisis in the etiology of school shooting cases that end by suicide.*

KEYWORDS: *school shootings, amok, homicide-suicide, crisis*

1. Introduction

The unexpectedness and the brutality of school shootings, the hardly decipherable reasons behind it highly motivate experts to find explanations. If we can make sense of an action, it becomes less frightening: this is the only way to ease the feeling of powerlessness. If we understand the reasons, we have a bigger chance to prevent a similar event. However, it is hard to find a single, well-defined reason behind school shootings, not to mention that the more people we ask, let it be a researcher, a witness, the family member of the perpetrator or the perpetrator itself, each one of them will have a different

[1] Chinese proverb

perspective. This is the so called "Rashomon-effect", described by Muschert[2], which received its name after the famous movie "Rashomon" directed by Akira Kurosawa. The four witnesses of a crime provide different and inconsistent description of an incident in the movie, but even at the end, there is no catharsis: the director leaves the audience uncertain about which character told the truth, or if anyone of them was right. Unfortunately, the reality is not much better, as it is well depicted by the Chinese proverb cited above as the motto of this paper. This study attempts to give a general understanding of how we should approach the possible causes of school shooting cases, and outlines the web of risk factors that can contribute to the process that leads to commit a school shooting. The paper also offers an overview of the theories regarding the complex link between school shootings (and the broader phenomenon amok), and individual psychopatology and examines the process that leads to homicide-suicides.

2. No obvious cause but a web of risk factors

According to Antal Ádám, the interdependency of processes and flows is the postmodern characteristics of our era, giving the possibility to interpret effects and counter-effects not only in a linear manner but also in the hardly recognizable web-like dimension of causalities – indicating the impossibility to find the one and only truth that perfectly covers the reality.[3]

This is not an unfamiliar problem: many philosophers have contemplated about the difficultness of finding the truth. Nagarjuna, the buddhist philosopher born around 125 AD, phrases the idea very clearly by affirming that the truth cannot be identified, because each conventional truth has an ultimate truth above if we consider it in a different, wider and more intertwined scheme.[4]

In the light of all this and according to my own research, three assumptions about the causes of school shootings can be formulated:

1) There is *no single recognizable truth* behind the stories.
2) A *complex web of causal factors* is in the background.

[2] Muschert, Glenn W, „Research in School Shootings,", *Sociology Compass*, 2007/1.: 61.

[3] Antal Ádám, „A posztmodernitásról és a posztdemokráciáról," *Közjogi Szemle*, 2012/1.: 2.

[4] Antal Ádám, *Bölcselet, vallás, állami egyházjog* (Budapest-Pécs: Dialóg Campus Kiadó, 2007), 219.

3) The different cases are interconnected with each other in many different ways, but there is *no common subset of underlying causes which can be found behind every school shooting case.*

Therefore – while striving to understand school shootings – we have to be clear with the limits of our possibilities. Although it is not possible to define causes with certainty, looking at school shooting cases, *a web of risk factors can be drawn*, which is an important step to see the possibilites of prevention. This is shown in the following table, where risk factors are linked to the perpetrator and to the environments where the perpetrator spends his/her daily life (See Table 1).

For the proper interpretation of the table it is important to emphasize the followings:

- Not all the risk factors have to be present for a school shooting to happen, but only one factor is never enough.
- Some factors are strongly interconnected and only together will become risk factors (e.g. detailed media coverage about former school shootings and the individual's special interest in these reports, or easy access to guns in a society and the individual's admiration for guns).
- Some factors show two different sides of the same issue (e.g. exclusion by peers, while distrust and difficulties to establish relations on the individual's side).

Table 1.: Risk factors linked to the occurence of school shootings[5]

Context	*Risk factors*
Individual	*Mental states/mental disorders* ▪ personality disorder ▪ depression ▪ psychosis ▪ suicidal crisis ▪ normative developmental crisis in adolescence
	Personal characteristics ▪ rigid, compulsive personality ▪ high expectations towards him/herself and others ▪ low frustration tolerance ▪ distrust towards the external world

[5] Constructed by the author

	▪ conflict avoidant personality ▪ lack of empathy ▪ inadequate abilities to establish relationships ▪ difficulties to express emotions and anger ▪ inadequate competencies to resolve emotional issues ▪ constricted, forceful fantasy
	Masculinity Most of the school shooters have been males. It doesn't mean that the action cannot be performed by a female perpetrator, but the female ratio is only around 4%.[6]
	Leaking ▪ direct or indirect threat, phrased verbally (oral communication, diary, blog, letter, essay, video etc.) ▪ direct or indirect threat, phrased nonverbally (drawings, pictures etc.)
	Negative life events The "tipping point" for the perpetrator is often a traumatically perceived life event which eventually leads him to commit the act (for example dismissal from school).
	Fields of interests ▪ admiration for guns, collecting guns ▪ extreme consumption of agressive media contents (video games, movies, websites, etc.) ▪ interest for earlier school shootings ▪ devotion to extreme ideologies (Social Darwinism, nazi theories, etc.)
Family	*Parent-child relationship* ▪ constricted, rigid relationship dynamics with each other and with the outside world ▪ unstructured roles within the family

[6] Gabriella Kulcsár, *Iskolai ámokfutások* (Pécs, Magyarország: Virágmandula, 2016), 129.

	▪ no secure attachment between mother and child ▪ physically or emotionally missing father ▪ deficient emotional relationship, lack of intimacy ▪ high expectations towards family members ▪ communication deficit ▪ no established ways to discharge hostile feelings ▪ parents hide the worrying signs from themselves ▪ parental discrimination between siblings
	Relationship between siblings ▪ rivalry ▪ lack of emotional intimacy
School/Peers	*School climate* ▪ accomplishment focused school, promoting competition ▪ incompetent approach towards bullying and exclusion ▪ no attention is payed to anxious children, they become "invisible" ▪ lack of community development ▪ weak communication between students and teachers
	Prevention and intervention system in the school ▪ malfunction/lack of reporting network ▪ lack of security systems ▪ lack of emergency plans
	Behaviour of peers ▪ exclusion and bullying in the school ▪ cyberbullying inside and outside of school ▪ weak communication between students and teachers

Social environment	*Media*[7] ▪ the effect of violent media contents enhancing aggressive fantasies (eg. ego-shooter video games, movies) ▪ unmoderated media covers about previous school shootings (helping imitation effect, creating a script for similar situations, enhancing fear of crime and moral panic, etc.)
	Access to guns/Gun control ▪ inadequate legislation (eg. loopholes) ▪ permissive gun legislation

In general terms it can be said that the more indicators and risk factors are detected, the higher the risk of a possible escalation. Nevertheless, *every step should be carefully considered until there is no obvious evidence of the preparation or the attempt of the criminal offense: the importance of the professionally adequate procedure is enormous, whether we think about the following criminal procedure or the possible stigmatization.* It is also important to emphasize that school shootings cannot only be perpetrated by adolescents or young adults, but also by older age groups or the staff of an institution – in the latter cases the phenomenon is defined as workplace shooting.

3. The link between school shootings, psychopathology and psychodynamics

Individual risk factors, such as mental states or mental disorders, personality traits, life events, extreme fields of interests and other characteristics are separately arranged in Table 1 in order to get a proper picture. However, these factors are intertwined in the reality, as we will see in the following research overview.

The mental health of the perpetrator is often questioned after amok episodes. It is only natural to feel that way: one of the essential characteristics

[7] More on the link between media and school shootings in: Kulcsár, Gabriella, „Iskolai ámokfutás és médiaerőszak: dilemmák és vélemények," In *Egy jobb világot hátrahagyni...: Tanulmányok Korinek László professzor tiszteletére.*, ed. Finszter, Géza, László Kőhalmi, Zsuzsanna Végh, (Pécs, Magyarország: PTE-ÁJK, Büntetőjogi Tanszék, 2016), 432-439.

of school shootings is that there is no visible and understandable explication behind it, so most of the people think that the only "explanation" can be the perpetrator itself. Only his broken mind can provide the irrational motivation for the action. This interpretation is especially tempting, because it is less fearful than thinking that the action is committed by an average, everyday person who is not much different from us. Besides, even criminal defense lawyers often follow the strategy to refer to schizophrenia or other psychotic condition of the perpetrator.

Researchers also looked into the link between perpetration and psychopathology. Some of the researchers analyzed amok attacks in general, others specifically focused on school shootings.

Exploring the causes of amok attacks Lothar Adler first examined motives revealed by criminal investigations in such cases. He observed that they covered different aspects of life, usually financial, family or relationship problems, sometimes serious, but other times apparently superficial difficulties. The unexceptional nature of these problems led Adler to the conclusion that these are not the ultimate causes of amok, other factors have to be revealed as well. According to him, mental disorders are important features, assumed to be present in 68% of the perpetrators. Nevertheless, he emphasizes that even mental disorders are unable to provide satisfactory explanation for the amok attacks, and are rather responsible for the special characteristics of the crime. In the cases examined by Adler, paranoid psychotic perpetrators attacked strangers in particular, and although they were aware that they can die during the event, perpetrators did not try to die by suicide themselves. Perpetrators suffering from depression typically attacked their family members, and a high percentage of them attempted suicide thereafter (Adler classifies intrafamiliar multiple homicides as amok attacks). Paranoid psychopaths build the third group, who are especially dangerous because of the paralell disintegration of their self and their object-relations, resulting in the explosion of their narcissistic anger. Adler states that homicidal-suicidal criminal acts are almost always related to impulse control problems, which in turn are connected to disruptions in serotonin levels. Altogether amok episodes are associated with psycho-genetical factors.[8]

Peter Langman analyzed ten school shootings in his research, and similarly to Adler tried to categorize the attackers according to their mental disorders.[9] In his theory perpetrators can be divided into three groups: the first is the group

[8] Lothar Adler, *Amok - eine Studie* (München: Verlag Michael Farin, 2000), 105-106. Cited by: Faust, Benjamin, *School shooting. Jugendliche Amokläufer zwischen Anpassung und Exklusion* (Wetzlar: Psychosozial Verlag, 2010) 21-22.

[9] Peter Langman, *Amok im Kopf. Warum Schüler töten* (Weinheim und Basel: Beltz Verlag, 2009), 54-210.

of psychopaths, but according to the author this is the most unusual case, only two persons are listed here, Andrew Golden and Eric Harris. Their characteristics are: sadistic features, the ability to deceive others, narcissistic traits – they regard themselves as persons above the law, giving disproportionate reactions to narcissistic damages and offences, problems with aggression control, explosive outbursts of anger, admiration of guns. The second group in Langman's theory is the group of psychotics: the perpetrators suffering from schizophrenia and schizotypal personality disorder are enlisted here, such as Dylan Klebold, Micheal Carneal, Andrew Wurst, Kipland Kinkel and Seung-Hui Cho. Their main characteristics are as follows: paranoid way of thinking, delusions of grandeur in some cases, hallucinations in some cases, deficiency or lack of social relations, suicidal ideation and depressive thoughts. Finally, the third group consists of traumatized attackers: Mitchell Johnson, Evan Ramsey and Jeffrey Weise. These perpetrators share the history of physical, emotional and, in some cases sexual abuse.

The perspective of Jens Hoffmann is completely contrasting to Langman's theory. He claims that in case of amok attacks the psychopathological conditions of the perpetrator hardly ever can be regarded as primer or singular determinants. The author explicitly regards the assumption that severe psychiatric disorders are responsible for amok attacks as improbable. According to Hoffmann, in Langman's psychopathological framework, the following phenomena cannot be explained:

- restrictive measures applied by authorities during the history led to the decline in these offences (an alteration observed in the Colonial India),
- in the overwhelming majority of the cases perpetrators are men,
- the occurrence of the imitation effect.[10] (It has been observed that amok events have a sequential pattern within ten days, sometimes even in very different locations of the world, which proves the evidence of a cross-border imitation effect.11)

Hans-Peter Waldrich also criticizes Langman for attributing school shootings only to the mental disorders and loss of reason of the perpetrators – he suggests that this reasoning is cannot bring us closer to the causes behind

[10] Jens Hoffman, „Amok – ein neuer Blick auf ein altes Phänomen", In *Polizei&Psychologie. Kongressband der Tagung „Polizei&Psychologie" am 18. und 19. März 2003*, ed. C. Lorei (Fankfurt am Main, 2003), 402. Cited by: Karl Weilbach, *Amok. „Es sieht so aus, als würde ich der Wolf sein." Eine kriminologische Einzelfallstudie zur Amoktat von Zug (CH),* (Frankfurt: Verlag für Polizeiwissenschaft, 2009), 23.

[11] Armin Schmidtke, et al., „Imitation von Amok und Amok-Suizid", In *Terroristen-Suizide und Amok. Suizidologie Band 13.*, ed. M. – Wedler, H-L. Wolfersdorf (Regensburg, 2002) Cited by: Amok Weilbach, 23.

these events.[12] Waldrich expresses the opinion that school shootings have to be treated as social phenomena, especially because we have been able to define them only since 1974: mental disorders are unlikely to be the exclusive reason behind. The author drives the attention to the fact that each monocausal explanation provides a false perspective: comprehensive explanation can be drawn only by revealing both psychological, pedagogical, social and economical factors. Waldrich even offers a solution: the transformation of the schools. School atmosphere and culture is easier to change than families or media, so realistically, this is the only setting where direct prevention can take place.[13]

Waldrich says *the process leading to school shootings* follow more or less an established *pattern* which looks like the following. The offender, who is usually a boy, seldom a girl, becomes more and more isolated months or years before the crime actually happens. He/she does not receive positive affection in his/her family, but the expectations toward him/her are high. A more successful sibling can even aggregate the circumstances. His/her friendships are not very close either, he/she does not have many persons to trust. Hardships of puberty serve both as a cause and a reason in exacerbating the situation. In most cases the adolescent does not stand out either with positive, or with negative features, his/her teachers and peers often do not truly realize his/her presence. Mostly he/she retires into his/her own room, escaping into the virtual reality. Not having real experiences, video games, sexual and aggressive web contents serve as a substitute satisfaction. Although many times these children express their inner world through their appearance or by re-designing their rooms more and more apparently, their environment interpret the dark colours and the aggressive nonverbal signs as the natural consequences of adolescence. Otherwise many of the later attackers express their frustration verbally in the form of blogs or diaries, reporting the accumulation of resentment, but these often do not come to the notice of the parents. Neither does the growing interest towards guns, which often involves passing beyond guns in computer games, acquiring and accumulating real ones. Having few feedbacks from the outside world, the attacker takes refugee in the world of fantasies, and indulges in self-pity and hatred towards others. Fantasies become increasingly realistic, and finally a plan takes shape, bringing feasibly close the desire to have the control over everybody, be the master of life and death, and take revenge for the imagined or real injustices he/she suffered. In this phase the smallest trigger, the "last drop" is enough to

[12] Hans-Peter Waldrich, *In blinder Wut. Amoklauf und Schule,* (Köln: PapyRossa Verlag, 2010), 7.
[13] Waldrich, *In blinder Wut*, 8-10.

make the teenager carry out what he/she has been planning for so long. Normally he/she executes the crime mercilessly, without flinching, in a moment when there are a lot of people in the school, and the number of potential victims is the highest. He/she usually commits suicide by the time the police arrive, he/she provokes to be shot by the police (suicide by cop), or surrenders.[14]

The *suicidal element* can be observed in Waldrich's description of the process, but the idea that suicide and amok are two phenomena sharing a common root appeared already in the 1930's. John Cooper, a professor of anthropology from Washington studied the resemblances between suicide and amok in his writing which dates back to 1934. His objective was to prove that amok was a syndrome independent from cultures. Cooper believed that neither racial, nor ethnical or environmental factors played important roles in the pathogenesis of mental disorders, therefore the etiology of amok was not different in the so called "primitive" and the industrialized societies. Cooper assumed that amok attacks in primitive tribes were actually indirect forms of suicide, because in the areas where these tribes lived, suicide was more uncommon and less accepted by the society than in industrially more developed countries. According to Cooper the same psychosocial factors which led a European/Caucasian to suicide would lead a Malaysian to run amok.[15]

The same opinion is held by Eng K. Tan and John E. Carr: they share the view that in the Malay culture virtue and good reputation (honour) are of crucial importance. It is socially expected to be reserved and friendly, and avoid expressing negative emotions. Hence psychosocial crises threatening one's reputation leave sometimes the only opportunity to run amok, a socially accepted way of emotional ventilation which offers to retrieve one's honour, even if at a cost of one's own life.[16] Thomas Knecht has arrived to the same conclusion studying Malay culture. Especially young Malaysians lack the appropriate measures to canalize frustration and anger.[17]

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[14] Waldrich, *In blinder Wut*, 11-15.

[15] John Cooper, „Mental disease situations is certain cultures: a new field for research," *Journal of Abnormal&Social Psychology*, 1934/29.: 10-17. Cited by: Manuel L Saint Martin, „Running amok: A modern perspective on a culture-bound syndrome," *Primary Care Companion to The Journal of Clinical Psychiatry*, 1999/1.: 68.

[16] John E. Carr and Eng K. Tan, „In search of true amok: Amok as viewed within the Malay culture," *American Journal of Psychiatry*, 1976/133.: 1295-1299.

[17] Thomas Knecht, „Amok – Transkulturelle Beobachtung über eine Extremform menschlicher Aggression," *Kriminalistik*, 10. Jg. 52. 1998: 683. Cited by: Robert

However, Manuel L. Saint Martin points out that the theory of Cooper is somewhat contradicted by the fact that amok events became more numerous in the twentieth century in western countries, where suicide is not forbidden. According to Saint Martin, amok is always a possible outcome of not diagnosed or not efficiently treated distinctive psychiatrical conditions, and especially for this reason – and if risk factors are appropriately evaluated – *prevention is possible, just like in cases of suicides.* He believes that the first step of prevention must be the recognition of people who are predisposed to run amok by their psychiatrical condition or psychosocial stress factors.[18] Family doctors and general medical practitioners have a distinguished role in recognizing individuals at risk, because at risk population often ask help from them. Turning to psychiatrists is less typical, having fear from stigmatization, or the possible diagnosis of a mental disorder.[19] Saint Martin lists the most important risk factors of amok and suicides which he believes show the resemblances of the perils behind the two phenomena (See Table 2). By assessing risk factors, it is important, however, to consider what the patient himself tells about his/her life story, and to complete this with his/her healthcare data, or the informations provided by family members or people knowing the patient well (friends, colleagues). The second step of prevention is to treat the distorted mental condition of the patient. Apart from the occasionally necessary medical treatment, starting psychotherapy and activating a supporting social network is very important. The indispensability to hospitalize the patient might come up as well.[20]

Table 2: Risk factors of suicides and rampages according to Saint Martin[21]

Risk factors of rampages/school shootings	*Risk factors of suicide*
History of violent behavior and/or threats	Male gender, age above 45
Prior suicide attempts	Prior suicide attempts

Brumme, *Amok: Amokläufe Jugendlicher an ihren Bildungseinrichtungen,* (Norderstedt: Grin Verlag, 2007), 9.

[18] Saint Martin, „Running amok," 68.

[19] E. H. Rand, „Choosing an antidepressant to treat depression," *American Family Physician*, 1991/43: 847-854. Cited by: Saint Martin, „Running amok," 68.

[20] Saint Martin, „Running amok," 69.

[21] Saint Martin, „Running amok," 69.

Significant interpersonal stress, eg. loss of loved one, stress, employment problems (such as sudden job loss, termination, or employee conflicts)	Personal loss within the preceding 6 months, eg. death, financial problems
Paranoid, antisocial, narcissistic or borderline personality traits or disorder	Cluster B personality disorder, eg. narcisisstic or borderline
History of psychosis and violent behavior during a mood disorder	Depressive symptoms, psychosis
Psychotic disorder with persecutory themes and history of acting on them	Alcoholism and substance abuse
Delusional (paranoid) disorder	Lack of a social support system
Psychotic disorder with violent command hallucinations	

During my research studying cases, my observations were similar to Saint Martin's: many parallels can be observed between the processes leading to school shootings and suicides. One of the remarkable similarities between the two phenomena is the observed characteristic that both before suicides and amok attacks the individuals usually give a signal to the outside world about their intentions. In case of suicides this phenomenon is called *"cry for help"*, in case of school shootings researchers speak about *"leaking"*. "Cry for help" was described by *Edwin S. Shneidman* and *Norman Farberow*, who reported in their book (published in 1961) that according to the examined farewell letters all the people who died by suicide informed their surroundings about their plans in some way, leaving a possibility for intervention. Such a signal can take various forms, from direct messages to vague references, but the suicide attempt itself can be regarded as a cry for help as well. These signs are the manifestations of ambivalence.[22] The person who is about to attempt suicide does not know how to proceed, but still has a desire to be derailed, to have something changed, because who attempts suicide doesn't want to die,

[22] Antoon A.Leenaars, „Edwin S. Shneidman on Suicide," *Suicidology Online*, 2010/1: 8.

but wants to live differently.[23] He/she just does not see any option to do so. The same ambivalence can be observed in individuals preparing to run amok, many of whom also give signals about their plans by chance remarks, web entries, videos, drawings or school essays: this is the so called „leaking".

Ambivalent communication, which is characteristic of both of the phenomena, drives us to the conclusion that the mental state behind them must be similar. Suicidology had established long ago that *suicides are always preceded by a crisis*. According to the theory developed by Gerald Caplan, a *crisis* is a state: "provoked when a person faces an obstacle (hazard) to important life goals that is for a time insurmountable through the utilization of customary methods of problem solving (coping behavior). A period of disorganization ensues, a period of upset (crisis) during which many different abortive attempts at solution are made. Eventually some kind of adaptation is achieved which may or may not be in the best interest of that person or his fellows."[24] In other words a psychological crisis evolves if a person: has no other chance but to face dangerous situation(s), these situations or their proximity become an increasingly more important psychological problem, the person is unable to solve or to avoid these situations, or to escape from them, and he is especially unable to do it with his usual problem solving skills or the potential psychological energies he can mobilize.[25] A crisis, also called accidental crisis, can be the result of an external trauma or an important life event.

There is another type of crisis which is called developmental crisis described by Erikson. In Erikson's framework a developmental crisis is a normative feature of the psychosocial development.[26] *Gerald F. Jacobson* uses the term *crisis matrix* for certain periods or situations in life, when individuals are in a "precarious state of equilibrium, vulnerable to a number of hazards, each of which may trigger a crisis".[27] According to Jacobson,

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[23] József Csürke, Viktor Vörös, Péter Osváth and Amaryl Árkovits, „A lélektani krízis elméleti háttere," In *Mindennapi kríziseink. A lélektani krízis és krízisintervenció kézikönyve*, ed. József Csürke, Viktor Vörös, Péter Osváth and Amaryl Árkovits (Pécs: Oriold és Társai Kiadó, 2009), 18-19.

[24] Gerald Caplan, *An Approach to Community Mental Health,* (New York: Grune & Stratton, 1961), 18. Cited by Gerald F. Jacobson, "Crisis Theory", *New Directions for Mental Health Services*, No. 6 (1980): 2. (Parenthetical material inserted to the definition by G. F. Jacobson)

[25] Csürke et al., „A lélektani krízis,"10-13.

[26] Erik H. Erikson, *The Life Cycle Completed: A review. Extended Version with New Chapters on the Ninth Stage of Development by Joan M. Erikson* (New York: W.W. Norton & Company, Inc., 1998), 64.

[27] Jacobson, "Crisis Theory," 9.

developmental crisis, as described by Erikson, is a period of increased vulnerability, and therefore constitutes a crisis matrix.[28] In these periods there is a greater chance for the emerge of a crisis in Caplan's sense, and the risk for a maladaptive outcome is higher, because this state can overload the individual's coping capacity.[29]

My assumption – namely that in several school shooting cases the perpetrator was going through a psychological crisis – is supported by my observation that *the majority of amok attacks happen in the course of a developmental crisis*: school shootings normally during the adolescent identity crisis, while adult amok attacks during the mid-life crisis. In case of individuals who run amok, frustrating factors are almost always present (such as bullying, problems in private life or at work). These factors might not be unbearable for an external observer, but drive the person who is already vulnerable towards the state of desintegration. The problem is that this state of mind comes to light only by the above mentioned ambivalent communication, which is often misinterpreted, or not even recognized by the environment. Hence the saying that *communication of a crisis is the crisis of the communication in itself* (Erikson 1998). And that is why people are so puzzled after suicides or school shooting events: they seem to be "crimes without any reason" as *László Korinek* put it,[30] although the attacker has been suffering from existential dilemmas and desperation for a long time already.

As a conclusion of these statements follows the idea that perhaps a condition similar to the *presuicidal syndrome*[31], described by *Erwin Ringel* in association with suicides, can be present in cases of amok attacks as well: which could be called „*preamok syndrome*". From the three elements of the precuicidal syndrome one, called *constriction*, can be clearly observed in people prior to run amok. Constriction may be situational or dynamic, of human relations or of values. The main difference between amok and suicide can be found in the second element of the syndrom: *inhibited aggression turned toward the self*. In cases of amok *inhibited aggression becomes hetero-aggression* instead of auto-aggression in the moment of the offence. What is interesting and thought-provoking is that it is inhibited up to the moment of the attack. School shooters or other amok offenders are never those who stand

[28] Jacobson, "Crisis Theory," 8-9.

[29] Csürke et al., "A lélektani krízis," 13.

[30] László Korinek, „Az erőszakos bűnözés oksági összefüggései," In *Tiszteletkötet Sárkány István 65. Születésnapjára*, ed. Németh, Zsolt, (Budapest: Rendőrtiszti Főiskola, 2010), 100-102.

[31] Erwin Ringel, „A preszuicidális szindróma (öngyilkosság előtti tünetcsoport) tünettana," In *A deviáns viselkedés szociológiája*, ed. Rudolf Andorka, Béla Buda and László Cseh-Szombathy (Budapest: Gondolat, 1974), 367-380.

out from the others because of their aggressive behaviour – on the contrary, they are regarded as ones who would never be able to carry out such an action. School shooters are even referred to as the *"invisible kids".* And here I would emphasize another very important point: *amok attacks are frequently concluded by suicide* or suicide by cop, or it turns out that the perpetrator has a history of attempted suicides. This proves that constriction and inhibited aggression turned toward the self are present in case of individuals who run amok. But what can be the explanation for not being satisfied by killing only themselves? Here comes the third element of the presuicidal syndrome: *suicidal fantasies*. We know that in suicidal fantasies heteroaggressive components can also be present, moreover suicides generally are addressed to a particular person trying to evoke his/her remorse. *Homicidal fantasies* in cases of individuals who run amok become reality. They are not satisfied by evoking remorse: they want to innihilate the object of their anger. *The intensity and direction of their fantasies are determined and boosted by their scope of interests,* which due to the cumulative inner tensions often materializes in consuming aggressive media contents, admiration towards guns, interest in former amok events and radical ideologies. All of these are solitary activities, forcing the individual increasingly deeper in the process of constriction.

Of course the theory of a preamok syndrom is very hard to prove since a lot of the offenders die in the course of the act and the ones who stay alive are not easy to approach. The only way is to analyze left-behind documents, videos and the statements of witnesses, therefore – as I stated in the introduction – we have to make peace with the idea that we will never be able to find out the whole truth.

4. Conclusions

Though opinions are far from being consistent regarding the link between amok and individual psychopathology and psychodynamics, the careful assumption can be formulated that only a small fraction of perpetrators run amok in a psychotic state of mind, completely having lost their connection with the reality. *In most of the cases the accountability of the perpetrators is only slightly limited.*

Trying to approach the mental state of individuals who run amok along diagnostical categories it can be said that most of them suffer from personality disorder, often in its mixed narcissistic-paranoid-antisocial form. In the majority of the attackers the symptoms of depression are decisive as well, and

can be significantly responsible for the *combined appearance of aggressive and auto-aggressive tendencies* which is observed in two thirds of the cases.[32]

This leads us to the question of the psychodynamics behind amok attacks and their special form, school shootings. Based on the studied individual cases *it appears that some amok attacks and suicides are strongly interconnected.* Most of the school shooters are vulnerable individuals, going through an accidental crisis while being in the state of a developmental crisis inherent to adolescence. This juncture results in a deep identity crisis that drives the individual towards a final breakdown. A decisive component of this process is the *failure of communication* hindering the possibility to ask for (or receive) help on all levels of the attacker's life.

My current opinion is that a crisis process leading to the attack can only be presumed in cases where the homicidal and the suicidal intentions are both apparently present. However, I have found in all of the examined cases of school shootings that the troubles in communication between the individual and the outside world have played a crucial role in the escalation of the process.

[32] Kulcsár, *Iskolai ámokfutások,* 136.

The Role of Data as Potential Entry Barriers

MANIA, BRANKA

ABSTRACT *Many economists have dealt with the issue of so-called entry barriers however there was controversy on the meaning of the term 'barrier to entry'. Despite the fact that a variety of definitions have been presented in the literature, the problem is that the approaches face criticism, either because they do not seem to be theoretically sound or because they are not applicable to all cases or all industries. The other challenge is that while legal aspects shall be considered when entry barriers are examined, economic and legal definitions are not; moreover, legal definitions tend to be too vague and they vary across jurisdictions. This text aims at presenting relevant opinions on and possible typologies of entry barriers and it also aims at adding new aspects to the discussion on entry barriers by presenting the idea of (proprietary) data being potential entry barriers, as some authors argue that data protection is the new antitrust.*

KEYWORDS *data management, entry barriers, data protection.*

1. Economic definitions of entry barriers

The economic analysis of entry barriers has been subject to remarkable controversies, in particular with regard to 'vertical issues',[1] and the most relevant (in the sense of well-known) economic definitions, models and concepts of entry barriers based on the ideas of Bain, Baumol, Demsetz, Dixit, Ferguson or Gilbert, Stigler, von Weizsäcker and others that will briefly be presented in this paper. They all discuss the circumstances, which create difficulties and/or disadvantages for competitors who wish to enter a new market and compete with incumbents. Bain[2] published several articles in which he introduced the limit-price model of entry deterrence. He defined entry barriers as the advantage of established sellers in an industry over

[1] David Harbord and Tom Hoehn "Barriers to Entry and Exit in European Competition Policy," *International Review of Law and Economics 1994, vol. 14, no. 4* (1994): 411-435.

[2] Joe S. Bain, *Barriers to New Competition* (Cambridge: Harvard University Press, 1956)

potential entrant sellers, which is reflected in the extent to which established sellers can persistently raise their prices above competitive levels without attracting new firms to enter the industry. The explanation behind this theory is that incumbents may wish to set prices at a lower level than the one that would actually maximize industry profit to prevent competitors from entry to the market. Bain was one of the first authors to stress a variety of further factors, which are now well-established when it comes to discussing entry barriers, like (absolute) cost advantages, access to resources, product differentiation and economies of scale or innovation. Bain thus set the fundamentals[3] to the issue of entry barriers and many authors acknowledge that his approach was useful to identify barriers to entry empirically, however his definition of entry barriers was also criticized. Carlton[4] emphasizes that Bain's concept is not theoretically sound and that it is wrong in certain industries, explaining that the effect of a structural industry factor on the equilibrium price will vary enormously across industries. As a result, a barrier in one industry may simply have no effect on price in another.

Moreover, Heger and Kraft[5] comment that in the absence of sunk costs, entry is not impeded and every firm presently active in the industry is disciplined by potential entry. Therefore, prices will be close to average costs. The problem is that in most industries a part of the costs will always be sunk. Stigler[6] believes that a barrier to entry depends on cost advantages incumbents enjoy in comparison to entrants by saying that a cost of producing (at some or every rate of output) must be borne by firms which seek to enter an industry but is not borne by firms already in the industry. According to this theory, a barrier to entry is given if the entrant's long-term costs after entry are higher than expenditures incumbents had to pay. This definition is narrower than Bain's definition, and it rejects Bain's thought that capital and economies of scale are barriers to entry. The problem with this theory is that time and dynamics factors are not considered: Carlton[7] explains that such concepts fail

[3] Bain, among others, is representing the so-called 'Harvard school' of industrial organization, while other authors like e. g. Stigler, Bork and Posner are representing the so-called 'Chicago school'.

[4] Dennis W. Carlton, "Barriers to Entry. Working Paper 11645," *National Bureau of Economic Research* (2005), accessed 10 May 2018, http://www.nber.org/papers/w11645

[5] Diana Heger and Kornelius Kraft, "Barriers to Entry and Profitability" (2008) accessed 10 May, 2018,
ftp://ftp.zew.de/pub/zew-docs/dp/dp08071.pdf.

[6] George Stigler, *The Organization of Industry* (Chicago: University of Chicago Press, 1968)

[7] Carlton, "Barriers to Entry. Working Paper 11645"

to incorporate a time dimension and that they are in need of additional embellishment to be useful in antitrust or regulatory proceedings.

Ferguson[8] defines entry barriers as factors that make entry unprofitable while permitting established firms to set prices above marginal cost, and to earn monopoly return persistently. He explains that pricing above marginal cost is not sufficient in the long run, because incumbents can only earn (above-normal) profits if prices exceed (average) costs. Fisher[9] proposed yet another definition: A barrier to entry is anything that prevents entry when entry is socially beneficial. Fisher's view is based on Bain's and Ferguson's definition, since he presented the idea that entry barriers only exist if incumbents earn such (unnecessarily) high profits that society would be better off if they were 'competed away'. In an attempt to determine whether this is the case, Fisher focuses on whether potential entrants make a calculation that is different from the one that society would want them to make in order to decide whether to enter a market. According to this theory, capital requirements are not considered entry barriers regardless of how large they might be. Dixit,[10] like other authors, works with asymmetries and suggests, if costs are sunk indeed, they are no longer a portion of the opportunity costs of production: incumbents will require a lower return on costs to stay in an industry than will be required to enter.

Another normative definition comes from von Weizsäcker:[11] A barrier to entry is a cost of producing that must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry and that implies a distortion in the allocation of resources from the social point of view. Von Weizsäcker argues that a cost differential is only an entry barrier if it reduces welfare. This definition is based on Stigler's views insofar as it relates to differential costs between incumbents and entrants rather than focusing on the incumbents' profits.

Alike Stigler, Demsetz[12] pinpoints (a)symmetry as the key factor for entry barriers: Demsetz clarifies that if an incumbent invests a certain amount, this amount will only be considered to be a barrier to entry if a comparative entrant

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[8] James M. Ferguson, *Advertising and Competition: Theory, Measurement, Fact* (Cambridge: Ballinger Publishing, 1974)

[9] Franklin M. Fisher, "Diagnosing Monopoly," *Quarterly Review of Economics and Business 19, no. 2* (1979) 7-33.

[10] Avinash Dixit, "A Model of Duopoly Suggesting a Theory of Entry Barriers," *Bell Journal of Economics 10, no. 1* (1979): 1-19.

[11] Carl C. von Weizsäcker, "A Welfare Analysis of Barriers to Entry," *Bell Journal of Economics 11, no. 2* (1980) 399-420.

[12] Harold Demsetz, "Barriers to Entry," *The American Economic Review 72, no. 1* (1982) 47-57.

company is in the position to invest the same amount. As long as entrant and incumbent are on equal footing to bid for customers, there is no reason to expect the winner to earn supra-competitive returns. Demsetz' work provided a foundation for Baumol et al.[13] who believe that the nature of cost structure determines entry barriers and that costless entry and exit leave all firms in a symmetric position. First, unlike Bain, Stigler and Ferguson who compared incumbents (insiders) and entrants (outsiders), Baumol examined factors that equally apply to any competitors by examining legal requirements for market entry. Second, Baumol's other main point of contention with previous definitions of entry barriers is that they do not consider the possibility that a barrier to entry may actually enhance social welfare. He argues that even though a negative connotation seems to be generally attached to the term 'barrier to entry', the presumption that a barrier to entry necessarily reduces welfare is wrong: For example, by preserving monopoly profits, patents could be deemed as a way to encourage research and development of new products.

As regards product differentiation and advertising, Shaked and Sutton[14] provided an interesting analysis (game), and their work included advertising aspects. Even though it is obvious that companies will attempt to increase the perceived difference or quality advantage of their products by the use of advertising, with the intention to increase consumers' loyalty and in this way also to deter entry, it can also be argued that advertising informs consumers about the existence and the characteristics of new products, and therefore actually eases entry.[15]

Gilbert[16] emphasizes first-mover advantages and defines entry barriers as a rent to incumbency, i.e. it is the additional profit that a firm can earn as a sole consequence of being established in the industry. Gilbert shares Demsetz's view that absolute cost advantages, which are important in Bain's analysis, are not usually barriers to entry. He argues that they represent normal economic rent on particular scarce assets or resources like reputation or goodwill. Harbord and Hoehn[17] agree on this view insofar as proper economic accounting of the value or opportunity costs of scarce resources is fundamental

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[13] William J. Baumol, John C. Panzar and Robert D. Willig, *Contestable Markets and the Theory of Industry Structure* (New York: Harcourt College, 1982)

[14] Avner Shaked and John Sutton, "Relaxing Price Competition Through Product Differentiation," *Review of Economic Studies*, *vol. 49, no. 1* (1982): 3-13.

[15] Heger and Kraft, "Barriers to Entry and Profitability"

[16] Richard J. Gilbert, "Preemptive competition," in *New Developments in the Analysis of Market Structure*, ed. Joseph E. Stiglitz and Frank G. Mathewson (London: Palgrave Macmillan, 1986)

[17] Harbord and Hoehn, "Barriers to Entry and Exit in European Competition Policy," 411-435.

to an evaluation of barriers to entry. However, they also stress that from the point of view of competition authorities, it is the impairment of economic efficiency that is of primary importance. Carlton and Perloff[18] believe that a barrier to entry is anything that prevents an entrepreneur from instantaneously creating a new firm in a market. A long-run barrier to entry is a cost that must be incurred by a new entrant that incumbents do not (or have not had to) bear. This definition is interesting insofar as it seems to be the first definition to include a time dimension.

2. Legal definitions of entry barriers

Harbord and Hoehn[19] emphasize the difficulties which arise from the issue that despite the fact that much discussion has taken place ever since the first thoughts and models on entry barriers have been introduced back in the 1940s and 1950s, the approach to dealing with questions of entry has tended to remain vague. and a classification of entry barriers is needed that is amenable for use by competition authorities. Hedberg[20] dealt with barriers to entry in the EU legal order, stating that barriers to entry in its widest sense can be said to consist of factors that prevent or hinder companies from entering a specific market – a definition that can be found the European Commission's[21] glossary of terms used in competition policy. He believes that the scope and magnitude of potential entry must be sufficiently large to be considered as a constraint on an incumbent, whereas entry to a niche market only is not considered to have a deterring effect on incumbents' behavior. Hedberg moreover quotes the Commission's[22] merger guidelines, which describe entry barriers as legal and technical advantages, access to essential facilities, natural resources, innovation and R&D as well as incumbents' established position on the

[18] Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization* (New York, 1994)
[19] Harbord and Hoehn, "Barriers to Entry and Exit in European Competition Policy," 411-435.
[20] Axel Hedberg, "Competition Analysis of Barriers to Entry Theory in Relation to Innovation and R&D in the EU Legal Order," (Master Thesis, Lund University, 2011)
[21] "European Commission: Glossary of terms used in EU competition policy Antitrust and control of concentrations," (2002) accessed 10 May, 2018, http://ec.europa.eu/translation/spanish/documents/glossary_competition_archived_en.pdf.
[22] "European Commission: Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings," accessed 10 May, 2018, http://ec.europa.eu/competition/mergers/legislation/draft_nonhorizontal_mergers.pdf

market. Incumbents' market position is translated into consumer loyalty and other factors relating to its reputation. According to these guidelines, entry must be likely, timely and sufficient[23] to be considered as a competitive constraint on incumbents. As for the time factor, entry is considered timely if it takes place within two years. As for likeliness, the before-mentioned paper identifies a variety of factors, which are important in terms of entry (again: sunk costs, incumbents' prospect, expected evolution of the market, post-entry profitability, (long-term) supply agreements, etc.).

The main problem with the above approach is that the scope of what a barrier constitutes is very wide; therefore, it can be summarized that Harbord and Hoehn[24] were right when they said that many definitions of entry barriers tend to be vague. The other important problem is that depending on the definition employed, the willingness for authorities to interfere in the competitive process will be either far-reaching or negligible.[25] Another factor that Hedberg[26] outlines is that while economic competition is an objective, the purpose of competition law is to produce economic welfare, the argument being that competition brings welfare to a state by allocating as efficient as possible resources and production, which leads to cost efficiency, low prices and innovation. A general (final) argument is that depending on the jurisdiction in question, legal definitions (and their application: case law) may always vary and therefore, legal and economic definitions will never really be the same.

3. Typology of entry barriers

Having had a look at what literature typically believes entry barriers are, the following section introduces the most common classifications of entry barriers that have been introduced so far (non-exhaustive). It is important to note that the categories below can overlap and that a market may or may not contain all of the below-mentioned barriers. In addition, barriers to entry and expansion may obviously change over time. Porter[27] identified six major

[23] This expression is also used in the Commission's 2004 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings.

[24] Harbord and Hoehn, "Barriers to Entry and Exit in European Competition Policy," 411-435.

[25] Hedberg, "Competition Analysis of Barriers to Entry Theory in Relation to Innovation and R&D in the EU Legal Order,"

[26] *Ibid.*

[27] Michael E. Porter, *Competitive Strategy: Techniques for Analyzing Industries and Competitors,* (New York: Free Press 1980)

sources of barriers to market entry, which are widely accepted: access to channels of distribution, capital requirements, product differentiation, switching costs, government policy and economies of scale. The Office of Fair Trading[28] classifies entry barriers in four broad categories: economies of scale, strategic advantages, intrinsic or structural advantages and absolute advantages for incumbents, which can include legal or technical advantages as well. Harbord and Hoehn[29] classify entry barriers in a slightly different way, as follows: entry impediments, predatory behavior, absolute cost advantages and strategic first mover advantages as well as vertical integration and refusal to supply. The authors refer to the so-called new industrial organization economics, which identify the following factors as the most fundamental entry barriers: sunk costs, nature of post-entry competition and strategic interaction between entrants and incumbents.

The following classification by Aaker[30] is focusing on barriers that prevent competitors from entering and becoming serious customer options, stressing that the following are factors that discourage competition: Scale, execution, investment, brand networks, exemplar status, ongoing innovation, proprietary technology, customer involvement, branded differentiators as well as brand equity and loyalty and finally, self-expressive benefits. Karakaya[31] summarizes his research and findings on the question on how to determine barriers and reveals the following factors that are relevant to barriers: government policy, economies of scale, access to distribution channels, capital requirements to enter a market, absolute cost advantages enjoyed by the incumbent, customers' cost of switching and product differentiation and the degree of firm concentration.

In summary, it can be said that entry barriers can be grouped into three basic types: Strategic barriers such as pricing policies, marketing or product differentiation, structural barriers arising from scale, vertical integration or control over resources as well as statutory barriers, which are provided **by** law. If the latter are summarized as 'legal factors for competition', their typical examples are: patents, copyrights, antitrust laws, tariffs and taxes, competition

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[28] Office of Fair Trading: "Review of Barriers to Entry, Expansion and Exit in Retail Banking, accessed 10 May, 2018, http://webarchive.nationalarchives.gov.uk/20140402142426/http:/www.oft.gov.uk/shared_oft/personal-current-accounts/oft1282.

[29] Harbord and Hoehn, "Barriers to Entry and Exit in European Competition Policy," 411-435.

[30] David Aaker: "Twelve Ways to Create Barriers to Competitors," accessed 10 May, 2018, https://hbr.org/2011/05/twelve-ways-to-create-barriers

[31] Fahri Karakaya, "Barriers to Entry in Industrial Markets," *The Journal of Business and Industrial Marketing 17, no. 5* (2002) 379-388.

laws, certification needs, government policies, environmental standards, exclusive/binding contracts, intellectual property rights, labor market regulations, licenses/permitting requirements[32] and data protection issues. Even though they are also 'legal tools' in terms of deterrence/fighting competition, and company agreements however are also recognized as strategic barriers to entry,[33] and in this regard, there is also a research on 'non-compete agreements'.[34]

4. Barriers to exit

The picture of entry barriers would not be complete without having a look at so-called barriers to exit:[35] it is recognized that exit barriers are typically factors, which 'keep a company where it is', and therefore (high) fixed costs – Gilbert[36] refers to these as 'exit costs' – as well as specialist equipment and special skills tend to be an impediment to leaving the industry.[37] Carlton[38] moreover quotes Sutton's work who demonstrates that industries where competition is very 'vigorous' will be more highly concentrated than industries where competition is not as vigorous. Industrial rivalry can thus be predicted as intense rivalry, which applies to industries which are easy to enter but difficult to exit, limited rivalry that applies to industries which are difficult to enter and easy to exit and moderate rivalry: This applies for example to industries that are difficult to enter and difficult to exit.[39]

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[32] Nigel Cory, "Cross-Border Data Flows: Where Are the Barriers, and What Do They Cost?," accessed 10 May, 2018, https://itif.org/publications/2017/05/01/cross-border-data-flows-where-are-barriers-and-what-do-they-cost, accessed 10 May, 2018.
[33] Matthew Bennett, "Barriers to Entry," *Charles River Associates*, 2013. accessed 10 May, 2018, https://www.law.ox.ac.uk/sites/files/oxlaw/aamatthew_bennett_cra_2013.pdf.
[34] Matt Marx and Lee Fleming, "Non-compete Agreements: Barriers to Entry … and Exit?," accessed 10 May, 2018, http://www.nber.org/chapters/c12452.pdf
[35] Heger and Kraft, "Barriers to Entry and Profitability"
[36] Gilbert, "Preemptive Competition"
[37] Don Hofstrand, "Barriers to Entry and Exit, Iowa State University File C5-200," accessed 10 May, 2018, https://www.extension.iastate.edu/agdm/wholefarm/pdf/c5-200.pdf
[38] Carlton: "Barriers to Entry. Working Paper 11645"
[39] Don Hofstrand, "Barriers to entry and exit, …"

5. New aspects: (access to proprietary) data and data protection

Keeping in mind that a variety of definitions, models and views on entry barriers exist, and knowing that economics and competition law as such, as well as economic and legal definitions of entry barriers are not the same, this section turns to one of the before-mentioned 'legal factors for competition' in order to examine the question of entry barriers from a new perspective. This new perspective arises out of developments like digitalization and access to (proprietary) data and regulations on data protection, and that is why some authors started discussing whether privacy and/or proprietary data could be considered as the 'new antitrust'. To start with the facts:

The European Commission cleared Facebook's acquisition of WhatsApp. Similarly, Google's acquisition of DoubleClick also did not cause serious competition concerns. The Commission argued that even after such a transaction, consumers would continue to have a wide choice of alternative consumer communications apps and that despite the significant amount of data held, Internet user data were not within one particular company's exclusive control. In line with these mergers, EU's former antitrust chief Margarethe Vestager explained that large amounts of data did not automatically confer great power and that she believed that data that went out of date quickly or that were easily replicable by competitors would not have a significant impact on a company's ability to build a strong market position.[40]

However, this may perhaps not be true for all (competition or data protection) authorities and may be outdated: Already in March 2015, the German competition authority (Bundeskartellamt) held its 17th International Conference on Competition. In one of the panel discussions, representatives of the US Federal Trade Commission and the UK Competition and Markets Authority debated the issue of "big data, media and competition - new rules for the digital economy",[41] which shows how important the issue of big data became from a competition perspective. The debate on stricter regulation of

[40]Osborne Clarke, "Is "Big Data" a threat or benefit to competition?," accessed 10 May, 2018, http://www.osborneclarke.com/connected-insights/blog/big-data-threat-or-benefit-competition/.

[41] "17th International Conference on Competition from 25 - 27 March 2015 in Berlin," accessed 10 May, 2018, http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/25_03_2015_IKK.html;jsessionid=F4DE6AD35A8810654BBDD2380061F973.1_cid387?nn=3591568, accessed 10 May, 2018.

overpowering digital companies intensified lately,[42] as some German EU politicians started to think about a break-up of IT corporations if certain conditions are met, which was a reaction many criticize as exaggerated or even absurd.

The fact that the Facebook share collapsed[43] as the "Cambridge Analytica case" showed, there is a direct economic impact if a company faces privacy violations, and it also shows the dimension of data mining and the importance of big data analytics, since this case was not simply about tailored marketing, but data were also relevant for a political campaign.[44] Facebook is both an example for market power and an example of high fines that could be imposed: The Wall Street Journal estimated that in Europe, the latest incidents within the framework of the data breach of millions of users could cost far more than a billion Euros.[45] As for data protection authorities, the issue is of such importance that competition authorities in Germany and France conducted a study in 2016 on the role of big data and competition law. The study[46] looked at ways to assess market power and potential anti-competitive effects within the context of big data.

There is controversy in the scientific literature on whether or not proprietary data can be considered as barriers to entry. Varian[47] explains that the concept of 'data barriers to entry' dates back at least to 2007, and he also claims that data alone are useless and there is a need to turn data into information, knowledge and action. Kucharczyk[48] acknowledges that data are

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[42] German politicians are even thinking about a break-up of powerful IT corporations ('digital monopolies'), accessed 10 May, 2018, https://www.golem.de/news/digitale-monopole-politiker-wollen-it-konzerne-zerschlagen-1810-136879.html

[43] CNBC, "Facebook shares slump amid continued fallout from Cambridge Analytica scandal," accessed 10 May, 2018, https://www.cnbc.com/2018/03/19/facebook-shares-fall-over-fallout-from-cambridge-analytica-scandal.html.

[44] Daily Mail, "Mark Zuckerberg loses $5 billion after Facebook shares plummet nearly seven percent as the company faces calls around the world to testify over the Cambridge Analytica data scandal," accessed 10 May, 2018, https://www.dailymail.co.uk/news/article-5519009/Facebook-stocks-plummet-Cambridge-Analytica-data-reports.html.

[45] The Wall Street Journal, "Facebook Faces Potential $1.63 Billion Fine in Europe Over Data Breach," accessed 10 May, 2018, https://www.wsj.com/articles/facebook-faces-potential-1-63-billion-fine-in-europe-over-data-breach-1538330906

[46] http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf, accessed 10 May, 2018.

[47] "Hal Varian: Is there a Data Barrier to Entry? Lear Conference, 2015," accessed 10 May, 2018, http://www.cresse.info/uploadfiles/2015_pl7_pr1.pdf.

[48] Jakob Kucharczyk, "Competition Authorities and Regulators should not worry too much about Data as a Barrier to Entry into Digital Markets," accessed 10 May, 2018,

the lifeblood of the digital economy, and that advances in the speed of data analysis and quantity of data available today brought new attention to their use. Nevertheless, at the same time he argues that those, who claim that access to data may lead to or constitute obstacles, fail to take into account the disruptive nature of Internet businesses that quickly allow a start up to topple even the most entrenched incumbents and that data are not needed for a set up of a business, because products themselves are more important than supports provided to them. He therefore concludes that innovation in online services in order to attract sophisticated users is the only viable strategy to be successful. Kucharczyk finally claims that it is no wonder that competition authorities have not been active so far, because competition law is concerned with anticompetitive conduct causing consumer harm, which is not equal to an entry barrier.

At a legal level, some new aspects have been added to the discussion: In October 2018, the Trump administration filed a lawsuit against the state of California on a new law imposing net neutrality protections.[49] Previously, the Federal Communications Commission repealed rules preventing internet companies from exercising more control over what people watch and see online, and California's law seeks to reinstate those rules. Net neutrality is of high relevance as it aims at enabling that all traffic going through a network is treated equally, independent of content, application, service, device, source or target.[50] By ensuring that technical intermediaries do not discriminate on this basis, it ensures an open, competitive and neutral Internet to the benefit of Internet users and service providers. The EU also worked on the topic of net neutrality by issuing a corresponding guideline[51] and furthermore, the EU introduced new rules on ancillary copyright laws: This issue is about whether

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http://www.project-disco.org/european-union/050715-competition-authorities-and-regulators-should-not-worry-too-much-about-data-as-a-barrier-to-entry-into-digital-markets/#.WzYBV4oyVLM.

[49] https://www.news.com.au/finance/business/breaking-news/california-signs-tough-net-neutrality-bill/news-story/edeab96fd9eed15f17ecf35fd6b66eaf, accessed 10 May, 2018.

[50] Ana Olmos and Jorge Castro, "Report on Net Neutraliy within the EU – Country Fact Sheets," accessed 10 May, 2018, http://openforumacademy.org/library/ofa-research/OFA%20Net%20Neutrality%20in%20the%20EU%20-%20Country%20Factsheets%2020130905.pdf

[51] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union

Internet giants like Google, Facebook and YouTube should be allowed to earn money with third-party content, and whether they should give the authors their fair share of revenue.[52] On the one hand, it can be argued that this way, magazines and newspapers would get the same legal protection that applies to films and music. On the other hand, this initiative is much criticized, as it might significantly change the Internet, because this way, the Internet might get filtered "*until it is busted*",[53] the Internet's sharing culture could be replaced by censorship, and it is also unclear, whether such an approach violates fundamental rights like the freedom of information, media and the freedom of economic activity.

Another argument is, that in view of already existing technical measures, the question arises as to whether an ancillary copyright is really needed. The German Association of the Internet Industry claims[54] that at a technical level, publishers have complete control over how their content is displayed. According to the standard protocol for the exclusion of robots, the robots.txt file is read first on a website, and this file is used to determine whether and which contents of a website are captured by a single or different search engine, meaning that publishers do have control over whether and how their content appears in search engine results. A few years ago, traditional media companies instituted so-called "paywalls", i.e. digital locks that limit access to online articles with varying degrees of logistical and financial success in a struggle to adjust their profit models to the Internet economy.[55] It is questionable whether fighting for business and profit models at a technical level can be successful. As regards protective techniques, it is in most cases only a question of time when and how such technical security measures might be circumvented,[56] and it is also questionable if such initiatives can have an

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[52] A brief overview over pros and contras can be found at https://global.handelsblatt.com/politics/eu-copyright-internet-sharing-reform-936682,

[53] Oliver Süme, „Internet wird kaputt gefiltert. See "*Statement by the Chairman of the Management Board of the German Association of the Internet Industry,"* accessed 10 May, 2018, https://www.eco.de/presse/eco-kommentiert-entscheidung-zum-eu-urheberrecht-internet-wird-kaputt-gefiltert/

[54] "German Association of the Internet Industry (Verband der Internetwirtschaft e.V) whitepaper, 2014," accessed 10 May, 2018, https://www.eco.de/wp-content/blogs.dir/20140626_positionspapier_leistungsschutzrecht_final.pdf

[55] Theresa M. Troupson, "Yes, it is Illegal to Cheat a Paywall – Access Rights and the DMCA's Anticircumvention Provision," *New York University Law Review 90,* (2015) 326-360.

[56] Heba Hasan, "Seven Ways to Get Around the Paywalls Of WSJ, NYT and More," accessed 10 May, 2018, https://www.techtimes.com/articles/38718/20150310/7-

impact in practice. After Germany set up a corresponding national law back in 2013, Google gave publishers the choice of agreeing to their content being displayed on Google News free of charge or being removed from its news lists. The publishers backed down and agreed to Google's terms, as they feared to lose the reach they got by having their news on the search engine.[57] Even though the use of content is not the same as the use of data, this is still a perfect example of market power as hardly many other companies would have been in the position to argue in the way Google did in this case.

Radinsky[58] explains that nowadays companies are building their IP not solely on technology, but rather on proprietary data and their derivates, and therefore data become the barriers to market entry and thus prevent new competitors from entering. She furthermore claims that the search market is a perfect example of data as unfair barriers to entry: *"Google revolutionized the search market in 1996 when it introduced a search-engine algorithm based on the concept of website importance – the famous PageRank algorithm. But search algorithms have significantly evolved since then, and today, most of the modern search engines are based on machine learning algorithms combining thousands of factors – only one of which is the PageRank of a website. Today, the most prominent factors are historical search query logs and their corresponding search result clicks. Studies show that the historical search improves search results up to 31%. In effect, today's search engines cannot reach high-quality results without this historical user behavior. This creates a reality in which new players, even those with better algorithms, cannot enter the market and compete with the established players, with their deep records of previous user behavior. The new entrants are almost certainly doomed to fail. This is the exact challenge Microsoft faced when it decided to enter the search market years after Google*."

Radinsky's above claim in which she explains that the dynamics she describes is not limited to Internet search is very credible, because data nowadays are of importance to every industry, and the term 'Industry 4.0' is about the fourth industrial revolution, which among several other factors, is also based on data processing and data quality. A recent proceeding suggests

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ways-to-get-around-the-paywalls-of-wall-street-journal-new-york-times-and-more.htm,

[57] Handelsblatt, "EU copyright decision could change the internet's sharing culture," accessed 10 May, 2018, https://global.handelsblatt.com/politics/eu-copyright-internet-sharing-reform-936682

[58] Kira Radinsky, "Data Monopolists Like Google are Threatening the Economy," accessed 10 May, 2018, https://hbr.org/2015/03/data-monopolists-like-google-are-threatening-the-economy.

that Kucharczyk[59] might be wrong as the New York Times reported that Facebook faced a German antitrust investigation.[60] The German competition authority opened an investigation into whether the company abused its dominant position in social networking. The move puts Facebook alongside other United States technology companies, which have also faced antitrust investigations into their activities. Even though the German investigation scrutinized Facebook's digital practices, it remains unclear whether or not other European policy makers including the European Commission will also open antitrust inquiries into the social network.

Liebermann[61] discussed technology barriers to entry a long time ago, and the issue thus is not as new as it might seem at first sight. However, what is new in the sense of unforeseeable is a phenomenon like big data and the emergence of data monopolists like Google or Facebook, which is yet another aspect that sounds familiar as much of the decade-long debate that relates to entry barriers started with monopoly. Tene[62] believes that privacy has become the boundary and a limiting principle for the balance between the tremendous benefits and formidable risks of a dizzying array of technological innovations, and he explains that the U.S. Federal Trade Commission was established to defend both consumers and competitors from concentrations of market power. Over the past century, raw materials and means of production have changed: Yesterday's oil, steel and railroads are today's personal information, collected in massive toves from our every online interaction and fueling the surging Internet economy. Tene thus concludes that the role antitrust played in the wake of the industrial revolution is being captured by privacy in the digital age. Mahnke[63] is convinced that the fact that big data can be antitrust-relevant barriers to entry has been well established. Finally, it would not be the first time when legal reactions follow technical developments, as this has actually

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[59] Jakob Kucharczyk, "Competition Authorities and Regulators should not worry too much about Data as a Barrier to Entry into Digital Markets," accessed 10 May, 2018, http://www.project-disco.org/european-union/050715-competition-authorities-and-regulators-should-not-worry-too-much-about-data-as-a-barrier-to-entry-into-digital-markets/#.WzYBV4oyVLM

[60] The New York Times, "Facebook Faces German Antitrust Investigation," accessed 10 May, 2018, http://www.nytimes.com/2016/03/03/business/international/facebook-faces-german-antitrust-investigation.html?_r=0

[61] Marvin Liebermann, "The Learning Curve, Technology Barriers to Entry and Competitive Survival in the Chemical Industry," *Strategic Management Journal, vol. 10, no. 5,* (1989): 431-447.

[62] Omer Tene, "Privacy Is the New Antitrust: Launching the FTC Casebook," accessed 10 May, 2018, https://iapp.org/news/a/will-eus-next-antitrust-battle-be-data-mining

[63] Robert Mahnke, "Big Data as a Barrier to Entry," accessed 10 May, 2018. https://www.competitionpolicyinternational.com/big-data-as-a-barrier-to-entry

always been the case, and consumer protection laws in various areas are perfect proofs of this fact. Be it for consumer credits or property loans, doorstep selling or distance selling, regulations governing price, consumption or health information, energy labeling or transparency with regard to e-commerce and privacy – the list of corresponding EU regulations is quite long.

6. Conclusion

It is difficult to apply definitions which are decades old in order to examine entry barriers in times when approaches such as, for example, price limits are hardly applicable because from a (naïve) user perspective, 'no real price' is paid in many online business models. It is also not easy to say, whether the idea of privacy being the new antitrust is rather of strategic or of statutory nature[64] or to distinguish, whether it shall be considered mainly as an issue, which is related to first mover advantages or if is rather about customers' cost of switching, which, in certain instances like social media platforms, should probably be interpreted as choice of switching. The above statements by Tene,[65] Mahnke[66] and Radinsky[67] suggest that (personal/proprietary) data can be considered as entry barriers. Competition and consumer/data protection challenges remain constant over time, it is the raw material in question that has been replaced in modern times, and it is thus consequent to say that data in the digital age is just the same as steel in the industrial era. The recent case of the German competition authority confirmed that once data became the basis of a dominant business model, data protection and consumer protection[68] and competition laws are applicable. The fact that various (data protection/consumer protection/competition) authorities in different countries with different underlying legal settings initiated proceedings or even fined some "data giants"[69] underlines that market power, which is based on massive

[64] Some claim that there might be good reasons why, for example, Facebook have their EU headquarters in Ireland and not elsewhere. See, https://planit.legal/blog/warum-twitter-nicht-in-irisches-datenschutzrecht-fluechten-kann/, accessed 10 May, 2018.
[65] Omer Tene, "Privacy Is the New Antitrust: Launching the FTC Casebook"
[66] Robert Mahnke, "Big Data as a Barrier to Entry"
[67] Kira Radinsky, "Data Monopolists Like Google Are Threatening the Economy"
[68] Some time ago, Facebook had to pay a 100,000 Euro fine based on its terms and conditions for users: https://www.datenschutzbeauftragter-info.de/facebook-bundeskartellamt-leitet-verfahren-ein/, accessed 10 May, 2018.
[69] Not necessarily only Google or Facebook: According to an announcement in late September 2018, Uber agreed to pay a fine of $ 148 million in fines for its data breach in 2016 that affected 600,000 drivers in the US and 57 million customers worldwide.

data collection and processing should be screened with regard to potential abuse of such a dominant position – just like the case would be in any other market scenario with a similar distribution of power. One of the key questions which arises in a lot of the discussions is whether data and privacy can be considered as the new antitrust. It can be answered with the example of the so-called "Safari workaround",[70] namely why was Google tracking users? If the company makes billions from advertising knowledge, obviously this is the competitive advantage the company wants to keep. It is hard to believe that tech giants would invest in multi-million-dollar-projects[71] that are free of charge if revenue would not come from a different source (at a later point in time) and that is, in many cases personal (user) or proprietary (e. g. algorithm) data. Data nowadays are the reason for many company's strategic advantage and the grounds for many company's market value and shall therefore not be underestimated in terms of competition with regard to entry barriers. Yet another challenge lies within the distinction between (mere) additional compliance requirements versus legal obstacles that might be considered entry barriers, for example the need for local storage of data that various countries introduced.

Source: https://thenextweb.com/security/2018/09/27/uber-148-million-fine-2016-data-breach/, accessed 10 May, 2018.

[70] It is interesting that, surprisingly, a US, not an EU member state authority imposed one of the highest fines so far: the "Safari workaround" cost Google more than 40 million US-Dollars. It was fined by the U.S. Federal Trade Commission, because the company was secretly tracking users. Source: https://www.bbc.com/news/technology-32083188, accessed 10 May, 2018.

[71] For example Google's balloon-powered high-speed Internet service known as 'project loon' or Google's library project.

Cyberterrorism – How real is the threat?[1]

MEZEI, KITTI

ABSTRACT *The idea that terrorists could cause massive loss of life, worldwide economic chaos and devastating environmental damage by hacking into critical infrastructure systems has captured the public imagination. Air traffic control systems, nuclear power stations, hospitals and stock markets are all viable targets for cyber-terrorists wanting to wreak havoc and destruction. Counter-terrorism investigations in Europe have shown that the use of the Internet is an integral component in any terrorist plot. Terrorist groups are resorting to encryption and anonymising tools in order to keep their identities hidden while they communicate, plan attacks, purchase illegal materials and perform financial transactions.*

The possibility of an act of cyberterrorism against critical national infrastructure requires serious attention from legislators. There is no concrete legal definition of cyberterrorism internationally. A wide range of possible cyberattack scenarios exists - including acts of hacktivism against websites - and it is not clear which of these scenarios would fall within definitions of terrorism under domestic law. While terrorists continue to use the Internet mostly for communication, propaganda and information sharing purposes, their capabilities to launch cyberattacks remain limited.

KEYWORDS *cyberterrorism, hacktivism, critical infrastructure, terrorist propaganda, financing terrorism*

1. Political cybercrimes

Following the 9/11 terror attacks in 2001, media coverage of terrorism has escalated significantly along with the ensuing 'war on terror'. In a world that is increasingly globalised and dependent on information systems, terrorist groups can both target critical infrastructures, communication services and promote their causes.

[1] SUPPORTED BY THE ÚNKP-17-3-I NEW NATIONAL EXCELLENCE PROGRAM OF THE MINISTRY OF HUMAN CAPACITIES

Political cybercrimes refer to cyberattacks committed by individuals, groups and countries in furtherance of some political goal or agenda. The perpetrators engage in hacking, malware distribution, distributed denial of service attacks (so-called DDoS attacks[2]), among other cybercrimes. Their targets and modus operandi, motives and intent must be examined in order to determine the type of the cyber threat, although they may be similar in nature, so it is difficult to distinguish the following terms from each other: hacktivism, cyberwarfare and cyberterrorism.[3]

1.1 Hacktivism

Defining hacktivism is difficult. The word itself is a combination of "hacking" and "activism". Hacktivism is believed as a social or political activist plan that is carried out by breaking into information systems and wreaking havoc on a secured system. A hacktivist is one type of cyber vigilante, uses cyberspace to gain access or excess access to information systems in furtherance of a political goal. The hacktivists use an Internet-enabled strategy to exercise civil disobedience and their aim is to achieve social or political change without causing serious harms. It is regarded as a virtual protest and may involve the following actions: website defacement, information theft, website parodies, DDoS attacks, virtual sit-ins and virtual sabotage like email bombs. The most well-known and active hacktivist group is Anonymous, who has launched several attacks in defence of freedom of speech or information (e.g. in case of WikiLeaks). They have claimed responsibility for several attacks against corporate, financial, religious and government websites.[4] To sum it up, hacktivism is a political protest using virtual methods and the perpetrators do not seek to cause great financial harm or injure people, therefore it should not be qualified as an act of cyberterrorism.

[2] A distributed denial-of-service (DDoS) is a type of computer attack that uses a number of hosts to overwhelm a server, causing a website to experience a complete system crash. Justin Stoltzfus, „Distributed Denial of Service (DDoS)," accessed March 19, 2018,
https://www.techopedia.com/definition/10261/distributed-denial-of-service-ddos

[3] Marie-Helen Maras, *Cybercriminology,* (New York: Oxford University Press, 2017) 378.

[4] Alisdair A. Gillespie, *Cybercrime – Key issues and debates*, (New York: Routledge Taylor & Francis Group, 2016) 99-100.

1.2 Cyberwarfare

One of the most significant developments regarding cybercrime is the involvement of states as perpetrators. Such activities have different functions like cyberespionage and surveillance, and other various forms of damage to the adversary's critical infrastructures.

Cyberwarfare refers to massively coordinated cyber-assaults on a government by another. It is the action by a nation-state or state-sponsored individuals or entity to attack another state's information systems – especially critical infrastructures - for the purposes of causing damage or disruption. Such attacks are especially dangerous since they may jeopardize the whole country's undisturbed operation and cause serious social and economic harms. For example, launching DDoS attacks might be strategic and tactical, because they contribute to the chaos with their multiplier effect which has been created by the physical attacks of the real world. Brenner defines it as "…the use of military operations by virtual means…to achieve essentially the same ends they pursue through the use of conventional military force: achieving advantages over a competing nation-state or preventing a competing nation-state from achieving advantages over them."[5]

In 2007 and 2008 DDoS attacks took place against Estonia and Georgia when they had tensions with Russia. In the first case, Estonian authorities moved a memorial Soviet statute, which triggered Russia's opposition. The first coordinated DDoS attacks targeted Estonian websites and were used to overwhelm Estonian servers. Among the targets were government sites, including Parliament's webpage, websites of political parties, the country's largest banks, and the country's most prominent news and telecommunications outlets and most of the services were not available for hours. The second case happened during the Russia-Georgia conflict in 2008. Georgia had a military intervention in South Ossetia, which was followed by an attack by the Russian military forces, while parallel DDoS attacks took down Georgia's networks, cutting off government communications and defacing government websites. They attacked also Georgian banks, transportation companies, and private telecommunications providers. Russia had denied involvement in the cyberattacks. The cyberwarfare may be used as complementary to the conventional military operations.[6]

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[5] Susan W. Brenner, *Cyber threats: The emerging fault lines of the nation state,* (Oxford: Oxford University Press, 2009) 65.

[6] Thomas J. Holt, Adam M. Bossler and Kathryn C. Seigfried-Spellar, *Cybercrime and digital forensics: An introduction*, (New York: Routledge, 2018) 411-415.

After the first waves of cyber operations by states, NATO Cooperative Cyber Defence Centre of Excellence called an international group of legal scholars and practitioners to draft a manual on how international law – particularly the jus ad bellum and international humanitarian law - applies to cyber conflicts and cyberwarfare. However, the result of the discussion, the so-called Tallinn Manual, is only an academic but non-binding document.[7]
It is not unusual that countries have cyber military commands like the Pentagon established the US Cyber Command (USCYBERCOM) in 2009 in order to manage the defence of US cyberspace and protect critical infrastructures against cyberattacks.[8] China also has a cyber- military unit called PLA Unit 61398, which has been alleged to be a source of several Chinese cyberattacks.[9]

The third case occurred in 2010 when the Stuxnet worm was the first malware which led to real physical damage in the Iranian Natanz uranium enrichment facility by controlling the computer system and made run the centrifuges beyond their capacity level. It is believed that the United States and Israel was behind the planned attack and their governments created the highly malicious code in order to slow down the Iran nuclear programme for years. However, it has never been proved and none of them have admitted that they are responsible for the attack. Other similar malware with unique effect were available like Duqu, Gauss and Flamer. Stuxnet is a good example for the potential of cyberwarfare since it caused a significant damage in a country's critical infrastructure and as a result managed to stop its nuclear plan.[10] After Stuxnet, according to the Unites States' government Iran launched DDoS attacks against the American bank system as a retribution for the previous attacks and economic sanctions.[11]

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[7] See Schmitt, Michael N. and Vihul, Liis (eds.), *Tallinn Manual 2.0 on the international law applicable to cyber operations* (Cambridge: Cambridge University Press, 2017)

[8] Berki Gábor, "Kiberháborúk, kiberkonfliktusok," in: *Műhelytanulmányok - A virtuális tér geopolitikája,* ed. László Dornfeld, Arthur Keleti, Miklós Barsy, Józsefné Kilin, Gábor Berki and István Pintér (Budapest: Geopolitikai Tanács Közhasznú Alapítvány, 2016) 274.

[9] László Dornfeld and Ferenc Sántha, "A terrorizmus és a terrorcselekmény, mint nemzetközi bűncselekmény aktuális kérdései," *Jog, Állam, Politika, 2017/3.* 73–75.

[10] A. Zoltán Nagy, "A kiberháború új dimenziói – a veszélyeztetett állambiztonság (Stuxnet, DuQu, Flame – a Police malware)," *Pécsi Határőr Tudományos Közlemények* XIII., no. 1 (2012) 225–226.

[11] Joseph Menn: „Cyber attacks against banks more severe than most realize," accessed April 12, 2018.
https://www.reuters.com/article/us-cyber-summit-banks/cyber-attacks-against-banks-more-severe-than-most-realize-idUSBRE94G0ZP20130518

1.3 Cyberterrorism

Since the events of 9/11 there has been an increasing attention paid to cyberterrorism, but it is not clear whether cyberterrorism is either a real or credible threat. The term is a conjunction of "cyberspace" and "terrorism". The term is ill-defined, it may have originated in the 1980s when Barry Collins a senior research fellow described it as "the convergence of cyberspace and terrorism". The term unites two significant modern fears: fear of technology and fear of terrorism.[12] Denning suggests that cyberterrorism has been mainly theoretical to date; it is something to watch and take reasonable precautions against. Furnell and Warren emphasise that "from the perspective of someone wishing to cause damage, there is now the capability to undermine and disable a society without a single shot being fired or missile being launched." This, they add, "enables simultaneous attacks at multiple nodes worldwide without requiring a large terrorist infrastructure necessary to mount equivalent attacks using traditional methods."[13]

Undoubtedly, cyberspace as a new environment may be attractive for terrorist groups since Internet has a global nature, which allows them to commit crimes without physical presence. Anonymity is also an important aspect, because it makes the perpetrators untraceable, besides, it also has relatively low operating costs and cyberattacks may be easier to carry out particularly if they have the right technical knowledge and tools, which are available as a service on Darknet criminal markets nowadays.[14] There is a wider selection of available targets and they may have the ability to conduct attacks remotely and the potential for multiple casualties.[15]

According to Clough, cyberterrorism is divided into two categories: in the broader sense where modern technology is used to facilitate the activities of terrorists. Modern technologies may be used to facilitate each stage of terrorist attack, from recruitment and radicalisation, financing and planning through to execution. In the narrower sense, cyberterrorism simply ascribes a motivation for other forms of cybercrime like the use of information systems and other tools to harm or shut down critical infrastructures. Cybercrime and cyberterrorism are not cotermini. Cyberattacks must have a "terrorist"

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[12] Gillespie, *Cybercrime – Key issues and debates*, 107-108.

[13] S. M. Furnell and M. J. Warren, *Computer Hacking and Cyber Terrorism: The Real Threats in the New Millennium? Computers and Security* 18, no. 1 (1999) 28.

[14] Europol, Internet Organised Crime Threat Assessment 2017, (Hague: European Cybercrime Centre (EC3), 2017) 49.

[15] Gabriel Weimann, "Cyberterrorism: How Real is the Threat?" *United States Institute of Peace Special Report 119* (2004) 6.

component in order to be labelled as cyberterrorism.[16] Cybercriminals may have a wide a range of objectives (revenge, adventure, greed - monetary or otherwise) and motivation for personal gain, but cyberterrorists are typically motivated by ideological, extremist or political goals and their attacks are designed to instil mass fear in a population. The hacktivism and cyberwarfare differ from cyberterrorism in the objectives likewise. The stand out problem regardless of the motive is the difficulty in attributing the cyberattack to a specific individual, group or a state.

According to Denning's definition, "cyberterrorism refers to unlawful attacks and threats of attacks against computers, networks and the information stored therein that are carried out to intimidate or coerce a country's government or citizens in furtherance of political or social (religious) objectives. Further, to qualify as cyberterrorism, an attack should result in violence against persons or property, or at least cause enough harm to generate fear. Attacks that lead to death or bodily injuries, explosions, or severe economic losses would set examples. Serious attacks against critical infrastructures could count as acts of cyberterrorism, depending on their impact. Attacks that disrupt nonessential services or that are mainly a costly nuisance would not."[17] Three aspects of Denning's definition must be emphasized: the political and social motivation, serious damage and fear.

On the one hand, attacks against critical infrastructures[18] like public healthcare, banking and finance, transportation systems, information technology and communication that result in serious damage could be considered to be cyberterrorism.[19] On the other hand, cyberattacks against financial institutions and stock exchanges resulting in millions of dollars of damage without the element of social and political motivation should not be labelled as an act of terrorism. For example, an Australian man penetrated the local waste management system and used radio transmissions to alter pump

[16] Jonathan Clough, *Principles of Cybercrime, Second Edition* (New York: Cambridge University Press 2015) 12-15.

[17] Dorothy Denning, "Activism, Hacktivism, and Cyber terrorism: The Internet as a Tool for Influencing Foreign Policy" in *Networks and Netwars: The Future of Terror, Crime, and Militancy,* ed. John Arquilla & David Ronfeldt (Santa Monica: RAND 2000) 29.

[18] According to the 2008/114/EC Directive on the identification and designation of European critical infrastructures: "critical infrastructure means an asset, system or part thereof located in Member States which is essential for the maintenance of vital societal functions, health, safety, security, economic or social well-being of people, and the disruption or destruction of which would have a significant impact in a Member State as a result of the failure to maintain those functions".

[19] Peter Grabosky, *Cybercrime* (Oxford, Oxford University Press, 2016) 48.

station operations. As a result of his action, million litres of sewage caused serious damage, but since he did not do it with the aim of coercing the country, it was not considered as cyberterrorism. In relation to critical infrastructures, the Hungarian Criminal Code does not use the term critical infrastructure, instead works of public concern include public utilities, public transportation operations, electronic communication networks, logistics, financial and IT hubs and operations necessary for the performance of the tasks of universal postal service providers carried out in the public interest, plants producing war materials, military items, energy or basic materials destined for industrial use, but do not cover public healthcare institutions. The critical information infrastructures are important since they are the "information and communications technology systems that are critical infrastructures for themselves or that are essential for the operation of critical infrastructures (telecommunications, computers/software, Internet, satellites, etc.)" The computer systems are called Supervisory Control and Data Acquisition Systems (SCADA) and they are vital to the management and processing of critical infrastructures.[20] The rapid evolution and the interconnectivity of technologies are also cause for concern, largely because of the emergence of the Internet of Things.[21] The IoT has created a multitude of new attack vectors for cybercriminals and terrorists to exploit.

By combining the aspects of political and social motivation with serious damage and fear, Rollins and Wilson use two definitions of cyberterrorism: effects-based cyberterrorism happens when cyberattacks result in effects that are disruptive enough to generate fear comparable to a traditional act of terrorism, while intent-based cyberterrorism occurs when an unlawful or politically motivated cyberattack is done to intimidate or coerce a government or people to further a political objective, or to cause a serious harm or damage.

Terrorists can use modern technology to intimidate and coerce the civilian population and thereby undermine a society's ability to sustain internal order. According to Brenner, conceptually its use for this purpose falls into three categories: weapon of mass destruction; weapon of mass distraction; and weapon of mass disruption. She explains that cyberterrorism involves the intention to demoralize the population either directly or indirectly.

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[20] Thomas J. Holt, Adam M. Bossler and Kathryn C. Seigfried-Spellar, *Cybercrime and digital forensics: An introduction* (New York: Routledge, 2017) 402.

[21] The internet of things (IoT) is a computing concept that describes the idea of everyday physical objects being connected to the internet and being able to identify themselves to other devices. Justin Stoltzfus: Internet of Things (IoT), accessed April 10, 2018,
https://www.techopedia.com/definition/28247/internet-of-things-iot.

As I mentioned before, information systems can be used to achieve physical damage as a weapon of mass destruction. For example, terrorists could trigger explosion at a power plant by overloading or disabling the computer systems. However, Brenner says they would consider such an attack as an act of nuclear terrorism and not cyberterrorism.

The aim of mass distraction is to undermine the civilian population's trust in the government by demolishing their sense of security. The following scenario could happen after a traditional act of terrorism: they break into media's websites and share fake news or use social media for panic-raising. It serves psychological manipulation by terrorists.

The goal of using information systems as a weapon of mass disruption is to undermine the civilian population's faith in the stability and reliability of the critical infrastructure systems. It aims to inflict psychological damage and not systemic.[22]

Most countries have not created a definition for cyberterrorism, instead they use the traditional term of act of terrorism including the cyber related actions. For example, in the United Kingdom, Section 1 of the Terrorism Act 2000 defines terrorism, which "means the use or threat of action where – (a) the action falls within Subsection (2); (b) the use or threat is designed to influence the government or an international, governmental organisation or to intimidate the public or a section of the public; and (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause." In Subsection 2 "action falls within this subsection if it – (a) involves serious violence against a person; (b) involves serious damage to property; (c) endangers a person's life, other than that of the person committing the action; (d) creates a serious risk to the health or safety of the public or a section of the public; or (e) is designed seriously to interfere with or seriously to disrupt an electronic system." In Subsection 3 it is stated that "action" includes action outside the United Kingdom and "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom. The UK definition of terrorism is appropriate for describing the scope of it with regard to cyberattacks and it is drafted broadly. It is possible to apply to the threat of a cyberattack and the actual cyberattack as well as. The term covers actions that are designed to merely influence a government, which means no higher standard of intention is required such as „coercing" or „intimidating". Besides countries' governments, it could be used in the case of cyberattacks against international governmental organisations like United Nations or NATO. There is also no requirement for

[22] Susan W. Brenner: "Cybercrime, Cyberterrorism and Cyberwarfare," *Relations internationales 77, no. 3,* (2006)

the assault to seriously interfere with critical infrastructure, since it is enough to interfere with anything that the courts consider to be an ”electronic system”. The definition also qualifies cyberattacks, as acts of terrorism which are designed to influence oppressive foreign regimes.[23]

The modern definitions of act of terrorism include attacks on electronic systems, too. For instance, the UK legislation encompasses politically motivated acts that are designed to seriously interfere with or disrupt electronic systems and the definition of the Australian federal provisions cover an action,[24] which seriously interferes with, disrupts or destroys and electronic system, which includes, but is not limited to, an information system; or telecommunication system; or a financial system; or a system used for the delivery of essential government services; a system used for, or by, an essential public utility; or a system used for, or by, a transport system.[25]

Section 2331 of the statute of the United States defines terrorism as “(i) committing acts constituting ‘crimes’ under the law of any country (ii) to intimidate or coerce a civilian population, to influence government policy by intimidation or coercion or to affect the conduct of government by mass destruction, assassination or kidnapping.”

Section 314 of the Act of C 2012 on the Hungarian Criminal Code criminalises “any person who commits a violent crime against the persons referred to in Subsection (4) or commits a criminal offense that endangers the public or involves the use of arms in order to: a) coerce a government agency, another State or an international body into doing, not doing or countenancing something; b) intimidate the general public; c) conspire to change or disrupt the constitutional, economic or social order of another State, or to disrupt the operation of an international organization; is guilty of a felony punishable by imprisonment between ten to twenty years or life imprisonment.” For the purposes of Section 314, violent crime against the person, or criminal offense

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[23] Thomas M. Chen, Lee Jarvis and Stuart Macdonald, *Cyberterrorism – Understanding, Assessment, and Response* (New York: Springer, 2014) 6-7.

[24] Under Section 100.0 of the Australian Criminal Code ”terrorist act means an action or threat of action where:
(a) the action falls within subsection (2) and does not fall within subsection (3); and
(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
(c) the action is done or the threat is made with the intention of:
(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
(ii) intimidating the public or a section of the public.”

[25] Clough, *Principles of cybercrime*, 15.

that endangers the public or involves the use of arms shall include: breach of information system or data" (Subsections (1)-(4) of Section 423).[26] Under Section 316, it is also considered to be a crime if any person threatening to commit a terrorist act is guilty of a felony punishable by imprisonment between two to eight years. The Hungarian definition sets out requirements for an action to qualify as "an act of terrorism". It determines particular violent crimes or public endangering ones to be committed with an intention requirement including "coercion" or "intimidation" or "conspiracy". Owing to the amendment of the Hungarian Criminal Code, the acts of terrorism may cover the actual and the threat of cyberterrorism scenarios, although it does not include any harm requirement and attacks against another State that could fall under the legislation.

2. The use of the Internet by terrorists

Terrorism has become a so-called "super delictum", which has more supporting series of offences.[27] There are identified numerous - and sometimes overlapping - categories of use of the Internet by terrorists, which are grouped into two kinds: communicative and instrumental. Communicative use includes propaganda, information dissemination, secure communications, psychological warfare and radicalisation, while instrumental use embraces the online teaching and training of terrorists.[28] The most significant utilisations of Internet by terrorists are the following: propaganda and information dissemination, secure communications and financing terrorism.

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[26] (1) Any person who gains unauthorized entry to an information system compromising or defrauding the integrity of the technical means designed to protect the information system, or overrides or infringes his user privileges is guilty of a misdemeanour punishable by imprisonment not exceeding two years.
(2) Any person who:
a) disrupts the use of the information system unlawfully or by way of breaching his user privileges; or
b) alters or deletes, or renders inaccessible without permission, or by way of breaching his user privileges, data in the information system;
is guilty of a felony punishable by imprisonment not exceeding three years.
(3) The penalty shall be imprisonment between one to five years for a felony if the acts defined in Subsection (2) involve a substantial number of information systems.
(4) The penalty shall be imprisonment between two to eight years if the criminal offense is committed against works of public concern.

[27] Bartkó Róbert, *A terrorizmus elleni küzdelem kriminálpolitikai kérdései* (Győr: Universitas-Győr Nonprofit Kft., 2011) 181.

[28] Gabriel Weimann, *Terrorism in cyberspace – The next generation* (New York: Columbia University Press, 2015) 33.

2.1 Propaganda and information dissemination, secure communications

The promotion of violence and extremist encouraging violent acts are the part of the terrorism-related propaganda. They share photographs, videos, terrorist speeches. Such contents may be distributed by using dedicated websites, targeted virtual chat rooms, forums and social networking platforms. However, there is a new trend that terrorist propaganda is spread primarily through social media, and user-generated content is on the rise.[29] Since encryption and anonymization technologies are freely available online, and different platforms enable terrorists to spread propaganda, they encourage radicalisation while maintaining their anonymity. For example, encrypted social networks – like Telegram[30] - are used for networking, recruitments and dissemination of information among supporters. Islamic State (IS) praised its supporters on Telegram for being part of its propaganda apparatus. However, the IS and al-Qaeda supporters started to move to platforms that have a stronger impact, in particular Twitter and YouTube, to a lesser extent, Facebook. Terrorists infest social media with their toxic messages that is why it is important to bring social media companies together to make strategies – best practices in flagging terrorist content - to combat the abuse by terrorists.[31]

The terrorist propaganda disseminated via the Internet may cover a range of objectives and audiences. Their shared content may be tailored, to potential or actual supporters or opponents of an organisation or shared extremist belief, to direct or indirect victims of acts of terrorism or to the international community. Propaganda may be shared with potential or actual supporters focused on recruitment, radicalisation and incitement to terrorism through messages conveying pride, accomplishment and dedication to an extremist goal. It may also be used to demonstrate the successful execution of terrorist attacks to those who have provided financial support. Other objectives of terrorist propaganda may include the use of psychological manipulation to

[29] United Nations Offices on Drugs and Crime, „The use of the Internet for terrorist purposes" (New York: United Nations Offices, 2012): 5.

[30] Australian National University Cybercrime Observatory, *Cyber Terrorism Research Review* 54 (2017).: The opportunities created for terrorists who use these services - aside from the benefits of protected communication - is similar to that of using VPNs and proxy servers: it is difficult to trace a location and gather intelligence. In fact, Telegram claims that through their distributed infrastructure "we can ensure that no single government or block of like-minded countries can intrude on people's privacy and freedom of expression".

[31] Europol (2017) 54.

undermine an individual's belief in certain collective social values or generate fear or panic in a targeted population.[32]

The problem with the use of the Internet by terrorists is that particular acts conducted by them online are not considered to be crime in some countries. It makes prevention of these activities challenging. For example, encouraging terrorism is considered to be a crime in the United Kingdom, while in most of the countries it is not. The main legislation is the Terrorism Act 2000 and Terrorist Act 2006 in the UK. Under Section 1 of the Terrorism Act of 2006 it is prohibited to publish a statement with the intention to cause "members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences; or…he… is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences." In the United States encouragement of terrorism does not constitute a crime although incitement to violence is a criminal offence, which includes „a speech that is intended to incite or is likely to incite imminent lawless, violent action".

In the United Kingdom the dissemination of terrorist publications is also a criminal offense. Under Section 2(2) of the Terrorism Act of 2006, the dissemination of terrorist publications includes the following: "distributing or circulating a terrorist publication;" "giving, selling or lending of such a publication;" "offering such a publication for sale or loan;" "providing a service to others that enables them to obtain, read, listen to or look at such publication electronically; or "possessing such a publication with the intention disseminating it". Under Section 3, the encouragement of terrorism and dissemination of terrorist publications online, like Alaa Abdullah Esayed was prosecuted for encouraging terrorism and disseminating terrorist publications online through Twitter and Instagram.[33]

Section 56 Terrorism Act 2000 holds someone responsible for "directing, at any level, the activities of an organisation which is concerned in the commission of acts of terrorism" and it could include, for instance, websites linked to the terrorist group. If it is confirmed that the website provides support for the organisation like posting propaganda or raising funds, the creator of the website could be liable under this Section.[34]

The dissemination of information may be different than propaganda, since it is useful for their "cause" and not for a specific group. For example, Internet has also examples of "how to" bomb-making instructions and terror manuals

[32] United Nations Offices on Drugs and Crime, "The use of the Internet for terrorist purposes," 5.
[33] Maras, "Cybercriminology". 385-386.
[34] Gillespie, „Cybercrime – Key issues and debates," 113.

which allow people to produce explosive devices and increase the chance of a terrorist attack.[35] In several countries, in order to be held liable for incitement to terrorism, the requisite intent and a direct causal link between the shared terrorism supporting information and an actual plot or execution of a terrorist act is required. For example, in France the dissemination of instructive materials on explosives would not be considered a violation of French law unless the communication contained information specifying that the material was shared in furtherance of a terrorist purpose.[36]

The misuse of encrypted messaging platforms - such as Blackberry - by terrorists poses a real threat, especially since encrypted communication facilitates the preparation of plots and the subsequent claim of responsibility. The popularity of encryption technology has made some governments to introduce laws that are made to require the production of either the key to decrypt the information or the information itself, since without such laws the secure communication is limitless.[37] They use also the so-called Darknet, whichis a distributed anonymous network within the deep web that can only be accessed using software such as The Onion Router (TOR)[38] and other software and virtual private network (VPN), which secure the private network, using encryption and other security mechanisms to ensure that only authorized users can access the network and that the data cannot be intercepted.[39]

2.2 Financing terrorism

Financing terrorism is the most essential activity for terrorists to maintain their operation which might be expensive (e.g. training, weaponry, recruitment, livelihoods, executing attacks etc.). It is also crucial for the success of countermeasures against terrorism to know where and how they get

[35] A. Zoltán Nagy, "A számítógépes hálózatok, a terrorizmus új színterei," in *Tanulmányok Bodnár Imre egyetemi adjunktus tiszteletére: Emlékkötet,* ed. László Kőhalmi, István L. Gál, Péter Fülöp, Fanni Pilisi, Lilla Sági, Lili Németh (Pécs: Pécsi Tudományegyetem, Állam- és Jogtudományi Kar, 2014) 367.

[36] United Nations Offices on Drugs and Crime, „The use of the Internet for terrorist purposes," (New York: United Nations Offices, 2012): 6.

[37] Gillespie, „Cybercrime – Key issues and debates," 111.

[38] Weimann Gabriel, "Terrorist migration to the Dark Web," *Perspectives on terrorism 10, no. 3* (2016): 40-44.

[39] Kaiti Norton, „VPN Meaning & Definition," accessed April 18, 2018. https://www.webopedia.com/TERM/V/VPN.html

funding.[40] Financing terrorism is widely considered to be a criminal offence all around the world.

The manner in which terrorists use the Internet to raise and collect funds and resources may be classified into four general categories: direct solicitation, e-commerce, the exploitation of online payment tools and through charitable organizations. Direct solicitation includes making websites and using online platforms to request donations from supporters. Online payment systems like PayPal make it easier to transfer funds between parties, while they may be exploited through fraudulent means as identity theft, credit card theft and auction fraud. For example, the perpetrator's action was qualified as the finance act of terrorism in the United Kingdom case against Younis Tsouli, when profits from stolen credit cards were laundered by several means, including e-gold online payment accounts. The laundered money was used both to fund the registration by Tsouli of 180 websites hosting Al-Qaida propaganda videos and to provide equipment for terrorist activities in several countries. Approximately 1,400 credit cards were used to generate approximately £1.6 million of illicit funds to finance terrorist activity.[41]

Furthermore, using decentralised cryptocurrencies or so-called virtual currencies like Bitcoin and other altcoins (Ethereum) is also popular, because they may allow greater anonymity than traditional noncash payment methods. For example, Bitcoin addresses function as accounts, have no names or other user identification attached, the system has no central server or service provider. The Bitcoin system does not require or provide identification and verification of participants, therefore it cannot be associated with real world identity. Since there is no central oversight body, it makes it difficult for the law enforcement to target an entity for investigative or asset seizure purposes. Virtual currencies create challenges for law enforcement, since some jurisdictions consider them as goods or property, while some consider as taxable assets, but there are only a few ones which recognise them as currency. To sum it up, virtual currencies have a potential risk, since they make it possible for criminals to manage their criminal finance with ease (like money laundering, financing terrorism).[42]

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[40] Financial Action Task Force, "Virtual Currencies – Key Definitions and Potential AML/CFT Risks" (2014): 9.

[41] United Nations Offices on Drugs and Crime, "The use of the Internet for terrorist purposes," 7.

[42] Financial Action Task Force, "Virtual Currencies – Key Definitions and Potential AML/CFT Risks" 9-13.

They can use seemingly legitimate organizations[43] like charities or establish shell corporations, disguised as philanthropic undertakings to ask donations (for instance Benevolence International Foundation, Global Relief Foundation and the Holy Land Foundation for Relief and Development, all of which used fraudulent means to finance terrorist organizations in the Middle East).[44]

In the United Kingdom, under Section 14 of the Terrorism Act 2000 the terrorist property is defined as something which refers to "money or other property which is likely to be used for the purposes of terrorism, proceeds of the commission of acts of terrorism and proceeds of acts carried out for the purposes of terrorism." Specific offences under Sections 15-18, whether committed in the UK or overseas include: "inviting, providing, or receiving money or other property with the intention or reasonable suspicion that it will be used for the purposes of terrorism (fund-raising); using or intending to use money or other property for the purposes of terrorism (use and possession); being involved in an arrangement which makes money or other property available for the purposes of terrorism (funding arrangements); being involved in an arrangement which facilitates the retention or control of terrorist property by concealment; removal from the jurisdiction; transfer to nominees, or in any other way (money laundering).

According to the Hungarian Criminal Code, it constitutes terrorist financing as a criminal offence under Section 318: "any person who a) provides or collects funds with the intention that they should be used in order to carry out an act of terrorism, b) provides material assistance to a person who is making preparations to commit a terrorist act or who committed a terrorist act, or to a third party on his behest, or c) provides or collects funds with intent to support the persons provided for in Paragraph b), is guilty of a felony punishable by imprisonment between two to eight years." Under Subsection 2, "any person who commits the criminal offense referred to in Subsection (1) in order to carry out an act of terrorism in a terrorist group, or on behalf of any member of a terrorist group, or supports the activities of the terrorist group in any other form or provides or collects funds with intent to support the terrorist group is punishable by imprisonment between five to ten years."

According to Section 318/A, "any person who a) provides or collects funds with the intention that they should be used in order to carry out a terrorism-type offense; b) provides material assistance to a person who is making preparations to commit a terrorism-type offense or who committed a

[43] István L. Gál, *A pénzmosással és a terrorizmus finanszírozásával kapcsolatos jogszabályok magyarázata*, (Budapest: HVG-ORAC, 2012) 49-52.

[44] United Nations Offices on Drugs and Crime, "The use of the Internet for terrorist purposes," 7.

terrorism-type offense, or to a third party on his behest, or c) provides or collects funds with intent to support the persons provided for in Paragraph b), is guilty of a felony punishable by imprisonment not exceeding three years."

3. Conclusion

Without doubt terrorist groups use the Internet for their purposes in order to disseminate their propaganda for recruitment, promote radicalisation, raise funds for their operation, and communicate anonymously. The main problem is that most of these conducts are not considered to be criminal offenses in some countries, thus the unified regulation is missing on at international level. It means further challenges that terrorists exploit the different anonymization and encryption tools for their criminal activities. For this reason, all of these activities mean difficulties for both legislators and law enforcement.

Since there is no legal definition of cyberterrorism, such attacks generally fall under the domestic laws' definition of acts of terrorism, which may be also different.

To date, true cyberterrorism has not happened yet, but governments must be prepared to avoid the possibility of a "digital Pearl Harbour" or a "digital Mohács", which expressions appeared in the Hungarian literature.[45] The threat of cyberterrorism must be kept in perspective, cyberattacks clearly remain a real and significant threat, regardless of motivation. Although However, it is still difficult to establish an act as cyberterrorism or even cyberwarfare without the attribution of the cyberattack by an individual, terrorist group or state.

[45] László Kovács and Csaba Krasznay, „Digitális Mohács. Egy kibertámadási forgatókönyv Magyarország ellen," *Nemzet és Biztonság 2 (2010)* 44-55.

Learning Under Uncertainty: Right to Basic Education for Orphaned and Vulnerable Children in Conflict Situations in Kenya

MONGARE, ALICE BITUTU

ABSTRACT *Whenever we are faced with the dilemma of certain fundamental correlated human contributory facets such as justice, rights, needs, inter alia, it befits one to allude to the perennial concern of their substratum. Human rights are underpinned on the precept of the sanctity of human life. At this juncture, we note that a person is a juridical being, thus, s/he cannot afford to lose the expected human dignity no matter the situation at hand. Devoid of human life, there can never arise any iota of the question of rights. Human life becomes a conditio sine qua non for the other fraternity of rights. In the order of rights, human life enjoys a prominence stature BUT right to education is a way opener for realization of all the other rights. The exposition at hand interrogates the inkling of the right to education as a constituent of the universe of human rights. Human beings regardless of their accidental status, they ought to be accorded the dignity that they deserve ab initio. The orphaned too have a right to quality basic education just like their counter-part children whose parents are alive. Learning under uncertainty coupled with the misfortune of losing one's parent(s) occasions the orphaned children to encounter a double tragedy, further posing an oblique future to them. It is incumbent upon the State as well as other relevant government institutions to ensure that our life accidentals do not define us. The rule of law calls for equality before the law which raises moral questions appertaining to justice. The nagging question is where as well as why the existence of the mismatch between the theory and practice, yet the laws on delivery of the right to education are sufficient? To unravel this inescapable noticeable dilemma, this paper shall employ a critical approach in both the interpretation along with reviewing of the available relevant literature. Findings and recommendations will be given.*

KEYWORDS *right, basic education, vulnerable, conflict situation, quality education, orphaned*

1. Introduction

This paper sets out to discuss the varied challenges associated with the right to basic quality education in conflict situation for the orphaned and vulnerable. The orphaned and vulnerable children (OVCs) are finding it more and more difficult to access basic education. This is despite the fact that the right to basic quality education has been afforded three-tier recognition as a right and not as an appeal to charity, that is, not a privilege. Three tier for the reason that it is recognized under the Kenyan domestic regime, regional (African Human Rights System) and global (The United Nations System). As shall be conversed in this essay, law, policy, and practice largely fail to deem that the plight of OVCs thus impeding their access to education. The said duty bearers have subverte rights with priviledges. That is why the effect is felt that there are children who have a difficulty enjoying education as of right.

There are no pragmatic measures that the law, policy, and practice have adapted to see to it that the right to access basic quality education is not just a mere paper right. Human rights are a value that constitutions, as well as other laws, have afforded recognition as values that could ensure social justice and dignity. Sadly though, these values are not self-enforcing. They call for very pointed as well as specific mechanisms through which they are reduced from paper to action for the good of those they seek to assure dignity along with social justice.

2. Objective

The core objective of this exposition is to enquire about the noticeable mismatch between the sufficient celebrated transformational laws in place and their implementational strategy to tackle the plight of the orphaned and vulnerable children in Kenya. The realization of the foregoing is the pursuit of basic quality education since it is a way opener for the enjoyment of other rights. The OVCs are first and foremost humans like any other who deserve protection and enjoyment of their rights and fundamental freedoms.

3. Theoretical Framework

Several theories will be used to address the misunderstanding existing on the delivery of the right to basic quality education for the orphaned and vulnerable children. Delivery of right to education ought to be anchored on justice as a substratum for all societal undertakings in terms of as well as a pursuit for fairness. They include social contract, sociological systems theory

and distributive justice theory. All these theories speak to empowering the orphaned and vulnerable children by delivering their social economic rights with the right to basic education being a gateway to all these other rights.

3.1 The Social Contract Theory

Under this theory, the issue of concern is the accentuation of the nexus that exists between the State and the citizens. The role of the State here is to ensure that the delegated will by the citizens is respected by means of adhering to all the agreed upon responsibilities which are couched as treaties. The main State duty is the actualization of these responsibilities through upholding the rule of law. A right is embodied in law and laws have to be enacted alongside strategies of implementation put in place if rights are to be realized.[1] States need to do more than having laws generally in place if everyone including the vulnerable in society is to enjoy their right.

The Constitution of Kenya as the "Grundnorm" provides for equality before the law and particularly protection of the minority and marginalized groups.[2] Thus, interpreted at face value, the Constitution and other legislation on education[3] ought to provide for qualitative aspect of the right to basic education for all without specific sound implementation mechanisms to ensure displaced children access the aforesaid right. Ideally, implementation mechanisms support distributive justice theory and can only be meaningful to the lives of these children if the relevant stakeholders deliver their legally assigned social economic roles with a sharp focus on education.

Social economic rights, in which category right to education falls under, are categorized as second-generation rights.

Despite these rights being positive, they require the government to strengthen the pathways towards their realization, instead of the Kenyan government hiding behind progressive recognition.[4] This curtails effective implementation of the right to basic education in favour of these children as a vulnerable group. From a sociological-legal perspective, the interpretation of the States' protection of these rights ought not to be taken as a solitary endeavour, nonetheless, as a collective agenda; all the relevant societal institutions are called upon to participate in their varied capacities towards this

[1] Cf. Jeremy Bentham, *Introduction to the Principles of Morals and Legislation*, (Oxford: Oxford University Press, 1781)
[2] The Constitution of Kenya 2010, Article 27, 42 and 256.
[3] Basic Education Act of Kenya 2013, Children Act of Kenya 2001.
[4] *Ibid*.

collective realization. Furthermore, this standpoint is underpinned by the sociological facet of education.

3.2 Sociological Systems Theory

The issue being addressed in this paper is not to be understood from a privation of laws in place, however, it is a matter that calls for a paradigm shift.[5] Having enacted laws which assign different stakeholders divergent roles on the delivery of qualitative dimensions of education seems not sufficient. The sociological systems theory opines that the law is itself complex and effectiveness can only be achieved through interdependence.[6] This resonates with the theme of this paper that for the State to effectively deliver the social economic rights for children in conflict areas, there is need to employ synergic energy among all the stakeholders as legislatively provided. As opposed to each stakeholder acting independently on how they deem fit in the delivery of socio-economic rights. This is drawn from the meaning of system.

A system is therefore composed of regularly interacting or interdependent groups of activities and parts that form a whole. The central theme of the systems theory is the idea that when one part of the system fails, then the whole system is bound to fail. Interpreted ordinarily, if one stakeholder fails to do their part towards realization of the social economic rights for the OVC, education for the vulnerable and orphaned children situation fails. In order to realize social-economic rights, the State and other stakeholders need to pull together roles, resources and redistribute them fairly to the deserving orphaned and vulnerable children not to their able peers.

Niklas Luhmann a key proponent of societal systems theory[7] argues that social systems are systems of communication, and society is the most encompassing social system.[8] Each system has a distinctive identity that is constantly reproduced in its communication and depends on what is considered meaningful and what is not. If a system fails to maintain that

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[5] Cf. Thomas S. Kuhn, *The Structure of Scientific Revolutions, Third Edition* (Chicago and London: The University of Chicago Press, 1996)

[6] Michael D. A. Freeman*, Lloyd's Introduction to Jurisprudence 7th edn* (London: Sweet and Maxwell, 2008) 659.

[7] Niklas Luhmann was a German sociologist, philosopher of social science, and a prominent thinker in systems theory. Much of Luhmann's work directly deals with the operations of the legal system and his autopoietic theory of law is regarded as one of the more influential contributions to the sociology of law and socio-legal studies.

[8] Niklas Luhmann, "The World Society as a Social System" *International Journal of General Systems*, Vol. 8, No. 3 (1982) 131-138.

identity, it ceases to exist as a system and dissolves back into the environment it emerged from. The State should be able to communicate with the other stakeholders on the delivery of social economic rights including the right to basic education in a conflict situation.

Effective delivery of the social economic rights in conflict greatly depends on a working system. The system here entails the stakeholders who must work as a whole so that the right is delivered. The rights are also a system. For instance, the Basic Education Act provides sanctions against parents who do not comply with the requirement of the Act by ensuring their children's attendance in school.[9] The quality assurance and standards formulate policies and coordinates compliance. School heads will be on the lookout to see which child has not attended a school report to the police and hand over the case to court. A secure environment which is key in the delivery of the right to education is squarely the duty of the State but the State has to work with the police. This duty is not handled well hence impacting negatively on the right to basic education, which further impacts on other rights. The conflict has led to an uneven distribution of resources. This, thus, takes John Rawls's distributive justice theory, which is positioned in a way that the right is to be fully realized.

3.3 The Conflict Theory

In as much as this study borrows certain ideas from the conflict theory, of relevance to underscore is that the change referred to here is that of the mindset that later on shapes the other sorts of societal changes, that is, structural change(s). This is a sociological concept developed by Karl Marx as a response to a capitalistic form of an economic and political system of the West. It tends to discriminate against people based on social class and economic status.[10] The theory posits that tensions and conflicts might occur when resources which for instance influence status and power, are unevenly distributed among various groups in a society, and that the conflicts become the elements of change. In this context, power refers to the control of material resources and accumulation of wealth, as well as the control of politics and institutions, which constitute the society and one's social status in relation to others. The discriminative control of material resources is determined by culture.

By means of respect to resources, conflict is bound to arise from competing demands placed on resources by different claimants within the society. This is

[9] *Ibid*.
[10] Global witness on conflict (2011)

presented by Karl Marx in his dialectic materialism versus societal change and stratification; conflicts are the symptoms of disruption or transition within the society. From this standpoint, conflicts contribute to the preservation of social balance by capturing certain challenges, changes, and developments within a given society or in terms of governance which cannot be efficient devoid of basic education and distributive justice. The inkling question is who will fight for the rights of the orphaned and vulnerable in society?

3.4 Distributive Justice Theory

John Rawls, a proponent of the distributive justice theory, offers a solution to the above question by arguing that fairness, justice and equality mainly depend on the equitable distribution of benefits and burdens in society. States need to step in to regulate institutions and give a practical approach to the law.[11] Otherwise, the vulnerable in society will be forgotten in the basic provisions. The benefits and burdens in society include education, shelter, healthcare, economic wealth, political power and work obligations that every State should by use of the law examine through the lens of justice.[12]

Due to conflict, there is an unequal distribution of resources, thus offending Rawls's argument of equal distribution of resources. Unequal distribution can only be entertained if it benefits the least advantaged in society, like the children in conflict situations.[13] The positive discrimination can only be effected through affirmative action. The study further establishes some interventions stakeholders may employ to achieve accessibility to social, economic and cultural rights, in relation to the theory of distributive justice.[14]

The theory of distributive justice is based on utilitarianism philosophy that incorporates three patterns: need identification, equality, and utility when determining a situation.[15] Institutions ought to come up with interventions that will ensure equal access to rights by redistributing resources to protect the least advantaged and hence maximize happiness for the greatest number in society. The philosophy supports the right to education for the orphaned and vulnerable children in society since it argues that no member of society should live in deprivation. Yet the orphaned vulnerable children in Kenya are not able to access their right to basic education due to the able in society pocketing

[11] Cf. John Rawls, A *Theory of Justice* (New York: Harvard University Press, 1971) accessed September 10, 2014 www.ohio.edu/people/pic card/entropy/rawls.html
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Michael J. Sandel*, Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1992) 16.

resources meant to address their plight. This theory argues that for fairness, resources ought to be redistributed to restore the victims to the position where they ought to be before the loss of their parents.[16] In human rights discourse, it is the State that bears the primary duty to avail the right to education, however other statutes point to other stakeholders in the delivery of social-economic rights including education rights. Is there a strategy that can be used to achieve the rights of the orphaned and vulnerable children in the Kenyan society?

4. Literature Review

A right is an entitlement that accrues to all people by dint of being human. Education plays a central role in the personal and intellectual development of human beings. Despite these key roles there is a dearth of information especially on the protection, enforcement and fulfillment of the right to basic education for OVC in Kenya. The information that is readily available is foreign, which does not explain the situation at hand due to diverse jurisdictions. It is the researcher's argument that this paper will go a long way in analyzing the existing challenges faced by the orphans and the vulnerable children in accessing their right to basic education. Kenya can at its best learn from the international community on implementation of the right to basic education in conflict situations in Kenya.

The *Universal Declaration of Human Rights (UDHR)*, Art. 1 asserts that "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Moreover, Art. 2 states that "*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or another opinion, national or social origin, property, birth or another status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.*"

The *UDHR*, specifically on the subject matter at hand, under Art. 26, stipulates that "everyone has the right to education, which shall be free, at least in the elementary as well as fundamental stages." The elementary education shall be obligatory. Interestingly, Art. 26 (3) requires the parents to have a prior right to choose the sort of education that shall be proffered to their children. However, the Kenyan State, which in this context assumes the role

[16] "Corrective Justice," accessed 10 June, 2017, www.ucc.i.e/law//restitution/cj.hmt

of the parents for the orphaned, has legislated on the issue unfruitfully as the funds allocated to the OVCs seem not to reach their intended destination.

The formal status of the *United Nations Educational, Scientific and Cultural Organization (UNESCO)* as the lead agency in multifaceted education has never been disputed. Since its establishment in 1945, UNESCO has been the natural base for inter-governmental deliberations on the future of education. Much more intricate to achieve has been clarity and consensus on UNESCO's actual purposes and role: from day one there has been a divisive debate about the translation of UNESCO's lofty ideals into practical strategies for the advancement of education. The narrative of UNESCO, in so many *modus operandi*, is a chronicle of how transcendent values touching the human spirit are inevitably politicized when invoked by governments as a foundation for multilateral programming. That UNESCO survives is very much a product of its formal status within the United Nations system.

The protection it has received as a specialized agency is considerable, even with the absence of the United States between (1984–2003) and the United Kingdom (1985–1998). The protocol has demanded that due recognition is given, and this has lessened the sway on the organization of assaults on its universality, the severe limits of its budgetary aptitude, and the periodic vehemence of western critique. Even when its multilateral partners claim for themselves *de facto* leadership in multilateral education, the protocol has demanded that UNESCO receive due recognition as United Nation *lead agency* in education. Much of the account of UNESCO revolves around the manipulation and interpretation of symbols of how construings of education and its future could be couched at the global level. Thus, in comprehending the organization, the idea of UNESCO is as imperative as its program, both aspects worthy of detailed examination. UNESCO's own construction of myth, together with the silhouetting of symbols associated with it, form a key component of its history.

In its good times, UNESCO has been able to control much of the mythology and symbolism surrounding it; its low periods have come about when, in losing that control, the organization has itself occasioned the deepening of international dissension and tension. The right to education is a social right that arises from and is correlative to a positive duty to engender a child with learning that while assumed by society as well as associated with the tenet of parental responsibility rests with and is carried out by the State. Additionally, like other universal services to which all are guaranteed access by right, its provision has a redistributive effect.[17] The right to education fits

[17] David Feldman, *Civil Liberties and Human Rights in England and Wales, 2nd edn* (Oxford: Oxford University Press, 2002), 13-14.

into the welfare or interest theory of rights in part for the reason that it is perceived as compatible with the idea that children are rights holders, under which the right to education is protecting an interest in being educated the prominence of which has warranted the imposition of duties for the benefit of the rights holder.[18] Rights holder is the person supposed to benefit from the duty bearer, in this case the State.

In theory, the duty ought to be demanded as of right by the rights holder,[19] albeit, in practice, enforcement is complex. Even in the Soviet Union, where the State control was more or less total and all facets of education were centrally dictated, a basic right to education was prescribed.[20] There, as in the United Kingdom currently, education was delivered or at least regulated, by the State and, in practice, the right to education intended a right to whatever form of education the State had deemed indispensable or appropriate. In addition, the normative basis of education that the notion of a right to education implies is premised on the postulation that all children have to receive an education of a particular category or content.

Nonetheless, various qualifications to this tenet are requisite. *Firstly*, while contrasting the situation on the ground for the orphans and vulnerable children's situation, the education of the child is in the present day very much towards the private ordering public regulation continuum applicable to child welfare,[21] giving parents a moral and legal claim to determine aspects of the process of education. Additionally, to a legal responsibility concerning school attendance and good behaviour. Undeniably, under the Irish Constitution, 'the State acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.'[22] The parent may exercise this right by sending the child to a State or private school or educating him or her at home.[23] Sadly, for the OVCs, whose *assumed parent* by dint of the law is the State do not get to enjoy this benefit, it is farfetched.

Under the European Convention on the Human Rights (hereinafter: ECHR), weight is added to the above legal position by obligating the State as a duty bearer mandatorily to respect 'the right of parents to ensure such

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[18] David W. Archard, *Children, Family and the State* (Aldershot: Ashgate, 2003) 4-5.
[19] *Ibid*.
[20] Starting with the *Constitution of the Union of Soviet Republics* 1936, Art 121.
[21] Gilian Douglas and Nigel V. Lowe, 'Becoming a Parent in English Law', *Law Quarterly Review* 102 (1992) 414.
[22] Irish Constitution, Art 42(2).
[23] *Ibid*., Art 42(3)

education and teaching in conformity with their own religious and philosophical convictions.'[24] There is noticeably a tension in this affiliation between the State and the parent, arising from the potential conflict between the former's power and authority and the latter's basic rights. In the course of demands and conflicts between parents and the State, the OVCs are forgotten in their rightful provisions. In essence, parents have been placing demands against the government which more often or not have lead to conflict between the two. The growth of individual 'consumer' rights in education and the development of a homeschool 'partnership' approach since the 1980s have represented a transferal towards the private interest, with parents able to exercise a gradation of choice and with the opportunity to assert their preferences in realms tied to their own cultural values, such as single-sex schooling, religious education and sex education. To the OVCs in Kenya these are luxuries that are farfetched.

In some instances, the conflict may call for resolution with reference to international human rights norms, particularly as enshrined in the ECHR. *Secondly*, education might embroil an applied process, nonetheless, its universal provision occurs within an institutional framework, the scale, shape, and maintenance of which in turn are eventually dependent upon finite resources. The conditioning of the right to education under the ECHR as a consequence of resource limitations facing the State, which impact upon factors such as quality and choice, was clearly marked out by the judgment of the ECHR in the Belgian Linguistics case.

In particular, the Court confirmed that 'the Contracting Parties do not recognize such a right to education as would require them to establish at their own expense or to subsidize, education of any particular type or at any particular level.'[25]A reading of Article 21 of the Kenyan constitution protects the vulnerable through moving of the court by even the civil society. The problem at hand is that nobody knows the children rights.

Thirdly, on the other hand, there has been a clear trend in England and Wales over the past two decades towards increased diversity in the education system. Whether the underlying policy objective has been to harness popular support for greater 'consumer' choice or to support social annexation, the impression that is intended to be created is of a more flexible and socially responsive education system. At the same time, a growing highlighting on the need for education for citizenship and to impart more social as well as sexual responsibility, set against a continuing milieu of central curricular control, has prompted an uneasy compromise between individual education rights,

[24] ECHR Art 2 of Prot. 1 (second sentence).
[25] Belgian Linguistics (No 2) (1979–1980) 1 EHRR 252, para 3.

including those of minority groups, and the State's power to determine educational content and act in the national or general societal interest.

As concepts, education and rights are broad terms capable of dissimilar senses in various contexts. Read together, they coalesce into a basic human right, recognized in an array of international instruments, not least the *European Convention on Human Rights (ECHR)*, the *Universal Declaration of Human Rights*, the *United Nations Convention on the Rights of the Child (UNCRC)*, the *Charter of Fundamental Rights of the European Union (hereinafter: CFREU)*[26] and the new Constitution for Europe.[27] The Universal Declaration proclaims that 'everyone has the right to education,'[28] and this is mirrored in the *Charter of Fundamental Rights of the European Union*.[29] The ECHR provides, in Article 2 of the First Protocol, that 'no one shall be denied the right to education'.

Under the *International Covenant on Economic, Social and Cultural Rights (hereinafter: ICESCR),* the States Parties 'recognize the right of everyone to education'[30] and the parties to the UNCRC recognize 'the right of the child to education.'[31] Two fundamental principles are enshrined under the various international treaty obligations. *Firstly*, there is the principle of universality that education or at least elementary or primary education must be available, free of charge, to all. Definitely, basic education is provided that it ought to be compulsory for those of primary school age.[32] *Secondly*, there should be equal access to education for everyone. This provision has been well received by Kenya by being infused in its statutes.[33]

The ECHR lays emphasis on equality which ties the right to education to the requirement that Convention rights be enjoyed without discrimination.[34] Discrimination in the context of education is also, for illustration, covered by the UNESCO *Convention against Discrimination in Education*.[35] Article 27 of the Kenyan constitution is a replica of this provision, and most of the international instruments prescribe wide-ranging targets and values attached

[26] Agreed in Nice, December 2000.
[27] Cf. Douglas Hodgson, *The Human Right to Education* (Aldershot, Ashgate, 1998)
[28] CFREU Art 26(1).
[29] CFREU Art 14(1).
[30] ICESCR Art 13(1).
[31] ICESCR Art 28(1).
[32] Universal Declaration of Human Rights, Art 26(1); ICESCR, Art 13(2)(a); UNCRC, Art 28(1)(a).
[33] The Basic Education Act of Kenya
[34] ECHR Art 14.
[35] Holly Cullen, 'Education Rights or Minority Rights?' *International Journal of Law and the Family 7* (1993) 143.

to the education right. For instance, several provisions that education should promote understanding and friendship between those of different race or religious background, ethnic group, and that it should be designed to develop the person's or child's personality to the full. This explains the continued conflict among the different ethnic groups and a lack of development of the OVCs personality. Secondary education is to be made 'available and accessible to every child' under the UNCRC,[36] and 'generally available and accessible to all' under the ICESCR.[37]

The Universal Declaration, while not referring specifically to secondary education, provides that 'technical and professional education' should be made generally available.[38] Under the UNCRC, in furtherance of access to secondary education, States are required to 'take appropriate measures such as the introduction of free education and offering financial assistance in case of need.'[39] This appears to go further than the ICESCR, which calls for the employment of 'every appropriate means, and in particular . . . the progressive introduction of free education.'[40] However, the UNCRC appears to make unconditional the duty to ensure access to and availability of secondary education, Article 4, which calls for States parties to undertake all appropriate legislative, administrative and other measures for the implementation of the Convention rights, provides that 'with regard to economic, social and cultural rights, States shall undertake such measures to the maximum extent of their available resources', which will not be limitless.

As Fortin comments, 'Article 4 clearly acknowledges that the resource implications of such provisions could rule out their immediate or even long-term fulfillment.'[41] This is also true for the OVCs. Additionally, this might be particularly true for special arrangements that involve extra costs, such as provision for those with disabilities.

A similar position was confirmed by the *European Committee of Social Rights* in response to a complaint brought by Autism-Europe in respect of the arrangements in France for the education of children with autism.[42] It was alleged that there were qualitative and quantitative shortfalls in the provision of both mainstream and specialist education for such children, which violated

[36] UNCRC Art 28(1)(b).
[37] ICESCR Art 13(2)(b).
[38] UNCRC Art 26(1).
[39] UNCRC Art 28(1)(b).
[40] ICESCR Art 13(2)(b).
[41] J. Fortin, *Children's Rights and the Developing Law* 2nd edn (London: Lexis Nexis Butterworth, 2002) 44.
[42] *Autism-Europe v France*, Complaint No 13/2002 (2003), European Committee of Social Rights.

their rights in a discriminatory way according to Articles 15 and 17 of the *European Social Charter*. These Articles concern, respectively, measures to provide people with disabilities with education and the right to education through the provision of adequate institutions and services. This is also the position experienced by the OVCs but no cases have been taken to court to fight for their rights.

The Committee noted the flexibility that was needed where the realization of a right was 'exceptionally complex and particularly expensive to resolve'; however, it clearly found this a case where even the greater leeway that was necessary, given the particular form of education and costs involved, did not rationalize the failure to make suitable provision. The Committee accentuated that the realization of the relevant rights should occur within 'a reasonable time, with measurable progress and to an extent consistent with maximum available resources', which had not been ensued.[43] The question of how much time and how much latitude should be revealed over resourcing of provision to meet social rights obligations remains, however, uncertain.

Even in relation to standard educational provision, there might still be circumstances where, as of resource constraints, there is no access to a particular form of education as, for instance, in the *Ali* case, where there were inadequate primary school places as a result of financial constraints and teacher shortages in Tower Hamlets.[44] Moreover, the authority of the State to make choices about expenditure is acknowledged, as in the ECtHR's observation in Belgian Linguistics, noted above.[45] So far as higher education is concerned, all of the above international instruments refer to it but concede that not everyone could have the necessary capacity or ability to benefit from it. The UNCRC and the ICESCR enunciate that it should be accessible to all on the basis of 'capacity,'[46] and the Universal Declaration avers should be 'equally accessible to all on the basis of merit.'[47]

The ECHR does not mention equality of access to education specifically but promotes it via the non-discrimination duty in Article 14, which is mirrored in the UNCRC and elsewhere.[48] The Strasbourg case law indicates that access to higher education might be restricted to those 'who have attained the academic level required to most benefit from the courses offered.'[49] In relation to financial support for participation in higher education, only the

[43] Ibid., paras 53 and 54.
[44] *R v Inner London Education Authority ex parte Ali* (1990) 2 Admin LR 822.
[45] *Belgian Linguistics (No 2)* (1979–80) 1; EHRR 252
[46] UNCRC Art 28(1)(c); ICESCR Art 13(2)(c).
[47] UNCRC Art 26(1).
[48] UNCRC, Art 2; see also ICESCR, Art 2(2).
[49] X v UK App no 8844/80 (1980) 23 DR 228 at 229.

ICESCR alludes to it with its reference to 'the progressive introduction of free education.'[50] Basic education is not part of the services that should be progressively realized.

In Douglas,[51] Scott Baker L.J referred to the decision of the ECtHR in Petrovic v Austria,[52] where it was held that the State was under no duty under Article 8 of the ECHR to provide a parental leave allowance accordingly, Article 14 had no application. He said that, similarly, the State was under no duty to provide a student loan to support the right to education under A2P1; and so Article 14 could not be invoked by the student, who had claimed that the cut-off age of fifty-five years for eligibility under the student support regulations violated those provisions.

Scott Baker L.J held that the arrangements concerning student loans were 'a facilitator of education but they are one stage removed from the education itself.'[53] The absence of this financial support might 'make it more difficult for a student to avail himself of his Art 2 rights but they are not so proximately related as to prevent him from doing so.'[54] The various rights and co-relative duties concerning education reflect the fact that within modern societies education is generally perceived as fundamental to human welfare, since it not only gives the individual an essential means to self-fulfillment and maximization of personal potential, nevertheless correspondingly contributes to a collective economic and social benefits through the inculcation of skills and provision of enlightenment.

Landsdown contends that in many States where the right to education is not guaranteed in practice and where provision is substandard or non-existent citing UNICEF figures in the late 1990s, presenting that one hundred and thirty million children of school age worldwide had no access to basic education, there is not only an impact on health and the economy, however likewise 'impeded progress towards democracy.'[55] This figures could be more with the continuous conflict experienced in the world leaving some children Orphans and Vulnerable and thus unable to access their right to basic education for lack of parental guidance.

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[50] ICESCR Art 13(2)(c).

[51] *R (Douglas) v North Tyneside Metropolitan Borough Council and Secretary of State for Education and Skills* [2004] ELR 117.

[52] (2002) 33 EHRR 14.

[53] *R (Douglas) v North Tyneside*, n 34 above, at para [57].

[54] Ibid.

[55] Gerison Landsdown, 'Progress in Implementing the Rights in the Convention' in *Children's Rights in Education* ed. Stuart N. Hart et al (London: Jessica Kingsley, 2001) 37.

Fabre articulates that 'one can convincingly argue that the right to adequate education is necessary for people to participate in the democratic process and for such process to function,'[56] while Hodgson regards 'a proper education' as 'a prerequisite to a more reasoned exercise of political and civil liberties.'[57] In this regard, the UN *Committee on Economic, Social and Cultural Rights (CESCR)* has referred to the right to education as 'an empowerment right.'[58] One can rightly conclude on this basis that the OVCs for lack of education are far from participating in their democratic process and civil liberties.

The fact that education is critical to the proper enjoyment of economic, political and cultural rights is certainly implied in the statutory requirement in England establishing that the curriculum for a maintained State school should prepare pupils 'for the opportunities, responsibilities, and experiences of later life' and that, at the third key stage, that is, ages 11–14, Citizenship is to be a National Curriculum foundation subject.[59] The prescribed content of Citizenship includes 'the legal and human rights and responsibilities underpinning society'; 'central and local government, the public services they offer and how they are financed, and the opportunities to contribute'; 'the core facets of parliamentary and other forms of government'; and 'the electoral system and the significance of voting.'[60]

The interdependence of social, civil and political rights was part of T.H. Marshall's theories about citizenship, whose three elements correspond with these areas. In *Citizenship and Social Class* (1950),[61] Marshall identified citizenship as being dependent upon civil rights such as equality before the law and access to legal remedies, political rights such as the right to vote in a fair election and social rights, namely rights to welfare. The prominence of the social rights of citizenship would lie in their capacity for the inclusion of the individual in society, not least for the reason that the fullest enjoyment of the civil and political rights is conditional upon the welfare that social rights aim to guarantee. Independent citizenship depends upon having the necessary

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[56] Cécile Fabre, *Social Rights under the Constitution* (Oxford: Oxford University Press, 2000) 184.

[57] Douglas Hodgson, *The Human Right to Education* (Aldershot, Ashgate, 1998) 18.

[58] Committee on Economic, Social and Cultural Rights, 21st session, 15 Nov–3 Dec 1999. *Implementation of the International Covenant on Economic, Social and Cultural Rights. General Comment No. 13, The Right to Education E/C12/1999/10* (Geneva: United Nations, 1999), para 1.

[59] Education Act of Kenya 2002, ss 78(1)(b) and 84(3)(h)(i).

[60] "Prescribed content on Department for Education and Skills website" accessed April 26 2004, available at www.dfes.gov.uk.

[61] Cf. Thomas Humphrey Marshall and Thomas Bottomore, *Citizenship and Social Class* (London: Pluto Press, 1992)

social and economic resources to participate economically, socially and politically.[62] While rights to income maintenance, that is, social security, which are traditionally perceived as tied to the central aim of the welfare state, hold the key to social and economic participation, the right to education is no less chief in that respect. Heater adds weight to Marshalls citizen theory in the following sense: "*A citizen is a person furnished with knowledge of public affairs, instilled with attitudes of civic virtue and equipped with skills to participate in the civil and political arenas. The acquisition and enhancement of these attributes is in truth a lifelong undertaking: even so, a firm foundation must be laid down in schools to ensure both their early and systematic learning.*"[63]

Social rights should, therefore, aim to ensure that, on the basis of equality of opportunity, there is 'access to educational, training and employment opportunities to facilitate participation by the individual in civil society to the limits and extent of his or her ability.'[64] The Kenyan constitution provides for social rights and welfare through positive discrimination by provision of cash transfer and the idea that equality is inherent in the very notion of social rights is imperative, especially in the light of criticisms that Marshall's concept of citizenship did not address issues of social diversity or pluralism.[65] The challenge is that these laws are paper laws and OVCs do not get to enjoy these rights.

One of the difficulties, however, arises from the fact that, in the area of education, the provision itself is unequal in terms of quality and availability. This is partly because of local variations in funding, expenditure, and costs. For instance, teacher shortages have been a problem in many parts of Kenya, as recruitment is hindered by high living costs. A case in 1990 arose from a shortage of primary school places in the north eastern part of the country, due to a shortfall in teacher recruitment for fear of insecurity as non-Muslims have been butchered in cold blood by the al-Shabab terrorist. In the borough, which had a high concentration of children of Bangladeshi origin, there were nearly three hundred children who did not have a school place. The parents claimed

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[62] Raymond Plant, 'Citizenship, Rights and Welfare' in *The Welfare of Citizens: Developing New Social Rights* ed. Anna Coote (London: IPPR/Rivers Oram Press, 1992) 15.

[63] Derek Benjamin Heater, *Citizenship. The Civic Ideal in World History, Politics and Education 3rd edn* (Manchester: Manchester University Press, 2004) 343.

[64] Keith D. Ewing, 'Social Rights and Constitutional Law', *PL*, Vol. 104 (1999):106.

[65] Cf. Ruth Lister, *The Female Citizen* (Liverpool: Liverpool University Press, 1989); Katherine O'Donovan, 'Gender Blindness or Justice Engendered' in *Rights of Citizenship* ed. Robert Blackburn (London: Mansell, 1993); Anne Philips, *Democracy and Difference* (London: Polity, 1993)

that an infringement of a private law right arose from the LEA's a government education welfare and provider in Bangladesh, and there was a breach of duty to ensure that there were 'sufficient' schools, a duty defined in the Education Act 1944 as requiring there to be schools that were sufficient 'in number, character and equipment to afford for all pupils opportunities for education offering such variety of instruction and training as may be desirable having regard to their ages, abilities, and aptitudes . . .'[66] this can be equated with the Kenya's Teachers service Commission TSC , in charge of placement, which has also failed to consider the plight of the OVCs.

The plight of the OVCs in Kenya could not have been put better than was held by Woolf J. while dealing with the education rights in Bangladesh, that the LEA's duty was a 'target' duty only and did not give rise to an enforceable private law right.[67] The LEA was not acting unlawfully if it was doing all it reasonably could to fulfill its duty with the finite resources available to it. This case illustrates two important factors about the right to education as a social right.

First, it illustrates the intricacy faced by the individual in enforcing it, a fact that will be further illustrated with reference to post Human Rights Act 1998 cases below. Plant reasons that there is an assumption that 'the general provision of public services is what social rights require, nonetheless equally it is clear that these have not led, by and large, to individually enforceable rights.'[68] On that basis, he maintains, social rights 'are actually a bit of a sham.'[69]

Enforceable rights, he pronounces, could be a means of empowerment of the citizen. On the other hand, in relation to decisions on provision for children with special educational needs, which are often contested by parents, outcomes can be somewhat hit and miss. For instance, while there is a statutory duty on LEAs to arrange the educational provision specified in a child's statement of special educational needs,[70] the advantage to the parent or child is diminished by the difficulty in securing that the provision they have chosen is specified.

Dean views the substantive social rights in areas such as education, health or social care as 'tenuous'[71] on the basis that the rights that arise out of the State's obligations in such areas are imprecise and uncertain. In relation to

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[66] Education Act of Kenya 1944, s 8(1).
[67] *R v Inner London Education Authority ex p Ali and Murshid* [1990] 2 Admin LR 822.
[68] Raymond Plant, n 45 above, at 26.
[69] *Ibid*.
[70] Education Act of Kenya 1996, Sec 324(5)(a). See Chap 6.
[71] Hartley Dean, *Welfare Rights and Social Policy* (Harlow: Prentice Hall, 2002) 155.

education, parents have some limited rights over the choice of school and to information about the provision, nonetheless little control over the content of their children's education. Children with special educational needs 'have a right to have their needs assessed, however not necessarily to command the resources necessary to satisfy their needs.'[72] A fundamental reason for the ambiguous status of the right to education that Dean appears to be identifying is that 'education is not so much a right for either children or their parents as an obligation, and it is not clear that the education system has ever existed to serve the interests of children or their parents.'[73]

Dean's approach could be somewhat at odds with the consumerist notion of education rights that developed during the 1980s and 1990s, and perhaps even more so with the notion of education as a human right that has come to greater prominence as a result of the Human Rights Act 1998. Nonetheless, it is true that there remain fundamental parental obligations linked to education. In some respects, the State could be realized as acting as an agent for the parent in fulfilling a basic moral and legal duty. That would be consistent with the parent's continuing right to educate his or her child otherwise than at school, for instance at home, and the fact that parents and the State have parallel duties to ensure that a child receives an 'efficient' education 'suitable' for his or her 'age, ability and aptitude.'[74] The State's duty, imposed on LEAs, arises when a child under compulsory school age will not receive suitable education for the reason that 'illness, exclusion from school or otherwise'; the LEA must make arrangements for suitable full-time or part-time provision.

In a case, *ex parte* T, where the LEA sought to cut the provision for a girl with chronic fatigue syndrome (ME) from five to three hours per week due to budgetary constraints, the House of Lords held that the statute did not recommend that resource considerations were relevant to the question of what was 'suitable education.'[75] Lord Browne-Wilkinson, who gave the only substantive judgment, drew support from the fact that the content of the parallel parental duty to ensure the child received a suitable education 'cannot vary according to the resources of the parent.'[76] This case, consequently, contrasts with the Tower Hamlets case above by virtue of the differences in the nature of the respective duties. Woolf L. J was clear in the earlier case that the statutory duty to ensure that there were sufficient schools did not give rise to an enforceable right for the individual, whereas the House of Lords in *ex parte* T considered that the statutory obligation to ensure a suitable education

[72] *Ibid*.
[73] *Ibid*.
[74] Education Act of Kenya 1996, Subsec. 7 and 19.
[75] At 256E–F.
[76] At 256H.

meant that the LEA owed a 'statutory duty to each sick child individually and not to sick children as a class.'[77]

This decision illustrates that some education rights are enforceable as strict duties.[78] It has been contended that this reinforces the possibly of construing them as property rights.[79] Carney and Hanks, nevertheless, discussing Reich's argument in favour of welfare entitlement as a form of 'new property,'[80] contends that the property metaphor is dependent upon the aptitude for individualism and that this makes the novel property concept 'highly problematic as a foundation for the welfare state.'[81]

In education, though, there is arguably more scope for individualism than in many other areas of state welfare provision. This and the fact that there has been a trend towards the commodification of education suggests that this is a sphere that warrants further analysis by property law theorists. The second problem with education as a social right is that scarcity places the individual in a competitive situation that, as Stychin elucidates, confines the potential of certain social rights to ensure social inclusion on the basis of equality.[82] Some parents are better able, due to wealth or the cultural capital derived from their own privileged educational backgrounds, to derive benefit from the rights that are available to enforce access or choice. Moreover, social and economic barriers operate in relation to participation in particular levels of education. Despite the above clear legal stand point on access to right to basic education the orphaned and vulnerable children in the conflict situation face undesirable challenges in access to their social economic rights and education.[83]

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[77] At 257A–B.

[78] I. Hare, 'Social Rights as Fundamental Human Rights' in *Social and Labour Rights in a Global Context* ed. Bob Hepple (Cambridge: Cambridge University Press, 2002) 153.

[79] Timothy S. Kaye, '"Education, Education, Education": Commodity for Sale or Property Right?," in *Property and Protection* ed. Franklin Meisel and Peter J. Cook (Oxford: Hart, 2000) 61–86.

[80] Charles A. Reich, 'The new property', *Yale Law Journal*, *Vol. 73* (1965): 733.

[81] Terry R. Carney and Peter Hanks, *Social Security in Australia* (Melbourne: Oxford University Press, 1994) 106.

[82] Carl F. Stychin, "Consumption, Capitalism and the Citizen: Sexual and Equality Rights Discourse in the European Union" in *Social Law and Policy in an Evolving European Union* ed. Jo Shaw (Oxford: Hart, 2000) 258.

[83] Winnie Mitullah, "Understanding Slums: Case Studies for the global Report on Human Settlements 2003: The Case of Nairobi, Kenya," (Nairobi: UNHABITAT, 2003) 17.

5. Findings

- The study has established that Basic education is out of reach for the orphaned and vulnerable children in conflict situations in Kenyan society, due to their poor status. Ashoka argues that education is a basic provision that should be enjoyed by all.[84] His views are a contradiction to the practice on the ground. Beyond human rights approached as seen above for the right to education to be meaningful it must be available, accessible, acceptable and adaptable by all.[85] This however is a pipeline dream far from realization.
- ECED in informal settlement and conflict areas does not receive much support from the government. Due to meagre resources and being privately owned, there are poor structures and infrastructures, hence compromising the least available of education's quality. Despite the government enacting laws that resonate with international law standards, overcrowding is a major concern coupled with the government's lack of integrated sound policy on basic education in conflict situation.
- A further finding is that most available literature was written before the constitution 2010 thus the changes therein have not been captured. The recent government reforms and policy on attainment of Free Primary education are not factored in.86 The education sector in Kenya has seen many task forces, committees, commissions and working parties that all have meant to reform the sector.[87] according to Bonyo the structures available have paid less attention to the social economic rights of the vulnerable and Orphaned children in slum dwelling and thus conflict situations.[88]

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[84] Achoka, J. S. K., "Access to basic education in Kenya: Inherent Concerns," *Educational Research and Review*, *Vol. 10, No. 2* (2007): 1.

[85] Committee on Economic, Social and Cultural rights, General comment no. 13, the Right to Education (Twenty first session, 1999), U.N.Doc. E/C.12/1999/10(1999).

[86] Draft Report Baseline survey on the right to basic education and parental involvement in school governance in Kenya tracking awareness, information responsibility among all stakeholders in basic education. A study commissioned by: Kenya National Association of Parents of Parents, November 2009.

[87] The Ominde commission, 1964; The Presidential Working Party on the second University led By Makay the national conference on education and training 2003: whose recommendations led to the development of session paper no.1 of 2005.

[88] Elijah Don Bonyo, "A Critique of Kenya's Education Reform Process and Task Force Report," *Presented at the Discussion Forum on education Sector Reforms* (Nairobi: Panafric Hotel, 2012)

6. Conclusion

The disquisition was silhouetted by the posit that there was a discrepancy between the transformative sufficient laws and their implementation intended for the tackling of the plight of the orphaned and vulnerable in the access to the right to basic quality education. The methodology utilized in the pursuit of feasible panaceas to the asserted quandary was the critical approach coupled by interpretation of the relevant information to the problem and the phenomenon encountered in tandem with the subject matter of focus. Illumined by the preceding, myriad of recommendations were mooted as they are presented in the subsequent subsections.

7. Recommendations

1. It is the considered view of the researcher that the entire basic education for OVCs ought to be one of the functions to be undertaken by the county governments. This is informed by the fact that current constitutional position only requires early childhood, village youth polytechnics to be managed by county governments and the rest of primary education, secondary education, post-secondary education would remain with the national government. Some of the advantages of devolving the basic education component are that it is the best mode of realizing access to basic education for OVCs.[89] This will as well facilitate the principle of subsidiary, which calls for decision making as well as implementation to be effected by the level of government closest to the individual citizens.[90] Better citizen participation could be achieved by the creation and facilitation of the County Education Board (CEB) to vindicate the tenet of subsidiary.[91]
2. There is need to undertake legal reforms to increase access, acceptability, adaptability and availability of basic education. Access to basic education could be increased through such measures like school health programs, comprising de-worming, health clinics, and jigger fighting campaigns. There is need for the development of non-formal basic education programs which would be complementary and not replace formal education. There is need for increased investment

[89] Ben Sihanya, "Public Participation and Public Interest Lawyering under the Kenyan Constitution: Theory, Process and Reforms", *Law Society of Kenya Journal*, *Vol. 17, No. 1* (2013): 9.
[90] Ibid.
[91] Ibid.

in infrastructure of public primary schools. This would provide OVCs with similar opportunities.

3. There is a greater need for the State to make basic education more accessible in the marginalized areas of the Northern frontier counties.[92] Through the ensuring of such endeavors the great geographical inequality as depicted in the Kenya National Bureau of Statistics (KNBS) report will be reduced. This need has similarly been recognized by Vision 2030, which envisions the establishment of one boarding primary school in each of the constituencies of the pastoral areas in addition to the construction of five hundred and sixty primary schools.[93]
4. It is indispensable to have harmonized standard of judicial decision making in the promotion of socio-economic rights. These contrasting decisions illustrate lack of harmony in the protection of socio-economic rights. Thus, the need to harmonize these decisions in support of basic education has never been so urgent. There is need for courts of law to adopt uniformity towards enforcement of basic education.
5. Though the State has an obligation to promote, protect and fulfil economic along with social rights, the obligation is more often hardly met. It is recommended that the courts need to be more consistent and use more supervisory orders as an approach to ensuring enforcement of basic right to education. Through this, the State would be held to account for the protection of ESCR rights. This has been done in other jurisdictions such as South Africa.
6. To solve the problem of harmful cultural practices, gender equity in education that affect access to basic education for OVCs, there is need to increase civic education among those practicing it on the dangers of such practices. This would comprise intensifying surveillance of FGM for the purpose of prosecuting those committing the outdated practice, which is a criminal offence.
7. The problem of resource constraints and poverty that affect the access, acceptability and availability of basic education in basic education infrastructural development could be solved through more budgetary allocations from the government. Additionally, sharing of resources such as teachers between schools that are wealthier and the poor ones

[92] This is an administrative area in Kenya incorporating the Northern arid and semi-arid lands spanning from east to west of the country and is mostly populated by pastoralist nomadic communities.

[93] Kenya Vision 2030, Chapter 3, *Foundations of Vision 2030*, Government of Kenya (2007) 16.

could reduce resource constraints. Furthermore, deliberate measures have to be made to invest in basic education infrastructure in terms of constructing more classrooms, provide electricity and proffer more teachers.

8. Children whose access to basic education is affected by lack of parental care and protection could be solved by encouraging Kenyans to actively take up foster parenthood. This should likewise entail relaxing the rules regulating foster parenthood as a measure to expedite the process.
9. Children affected as well as infected with HIV/AIDS will need a number of interventions. For those infected there is need to engender them with anti-retroviral or treatment for the already sick. Social support groups could be formed to mitigate the negative effects of children affected by HIV.
10. Insecurity in the marginal areas affects access to basic education and to resolve it measures have to be taken to increase security through better intelligence gathering. The creation of boarding schools will solve some of the challenges facing OVCs. For a start, it will ensure that the children are provided with healthy and nutritious meals. Dropout rates will go down for the reason that the OVCs will no longer have divided attention to leave school in search of livelihood. It is also easier to provide security and medical care in a boarding environment especially for those living in marginal areas.

Recent and Future Developments of PSI Re-use in Europe[1]

SZŐKE, GERGELY LÁSZLÓ

ABSTRACT *The re-use of public sector information is an important part of open government concepts aimed at building open and transparent government. Today, this is part of the European Union's strategy and, since 2003, a set of requirements for Member States to manage their relations with market participants and stakeholders in a transparent and equal way in order to effectively re-use public data. The present study focuses on the stages of development and future development and seeks to answer what important factors are needed for the re-use of public data to meet the associated social and legislative expectations.*

KEYWORDS *public sector information, re-use of PSI, transparency*

1. Introduction

Many experts agree that there is a huge economic and social potential in the (commercial) re-use of public sector information (PSI), and the new developments in the field of data-mining, including the use of new and powerful, often self-learning algorithms to analyse Big Data, may boost the development significantly. The European Union adopted the legal framework quite early (in 2003), and revised it fairly in 2013, in order to ensure (at least a minimum level of) harmonisation in this field in the Member States. Although there have been significant steps towards open data in many countries, and more and more data sets are available online, it is by far not obvious, whether the regulation of the re-use of PSI is a success story or a failure in Europe. The recent tendencies, mainly the new

[1] „The work was created in commission of the National University of Public Service under the priority project KÖFOP-2.1.2-VEKOP-15-2016-00001 titled „Public Service Development Establishing Good Governance" in the *István Egyed Postdoctoral Program*

proposal to amend the PSI directive[2] shows, that the European Union is really committed in developing the PSI landscape and utilize its potential.

In this essay, I will shortly introduce the recent tendencies in the field of PSI regulation, and then analyse the potential future developments in detail.

2. The development of the European PSI regulation

2.1 Starting points

Directive 2003/98/EC on the re-use of public sector information was adopted by the European Union in 2003;[3] and right at the beginning it expressly strived for minimum harmonization and emphasized, "This Directive does not contain an obligation to allow re-use of documents. The decision whether or not to authorise re-use will remain with the Member States or the public sector body concerned."[4] The review and amendment of the Directive in 2013[5] resulted in substantial theoretical changes, the core of which is that although the public or confidential nature of a certain data set remains in the competence of the Member States (thus the Directive makes no changes whatsoever in this respect), if certain data are regarded public under Member State regulation, they must be made accessible for the purpose of re-use.[6] In addition, the Directive extends its

[2] Proposal for a directive of the European Parliament and of the Council on the re-use of public sector information (recast) – Proposal - COM(2018) 234 final

[3] Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (hereinafter PSI Directive 2003).

[4] Paragraph (9) of the Preamble of PSI Directive 2003

[5] Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information (PSI amending Directive). Hereinafter the consolidated version of the Directive is taken into account and is referred to as "PSI Directive".

[6] Under paragraph (8) of the Preamble of the PSI amending Directive, "Directive 2003/98/EC should therefore be amended to lay down a clear obligation for Member States to make all documents re-usable unless access is restricted or excluded under national rules on access to documents and subject to the other exceptions laid down in this Directive. The amendments made by this Directive do not seek to define or to change access regimes in Member States, which remain their responsibility."

scope to public data managed by libraries, museums and archives[7] (in the Hungarian terminology so called cultural public data), although several rules concerning exceptions are laid down pertaining to the re-use of such public data. According to a further novelty, cost-based regulation is replaced by charging, based on marginal costs but with several exceptions.

On the basis of the obligation to be regularly reviewed, the Directive is currently being reviewed,[8] in the framework of which the relevant questionnaire could be filled in between September and December 2017 within the framework of a public consultation.[9] The Commission subsequently issued its proposal for the amendment of the Directive on 25 April 2018, which I will analyse in the following chapters.

2.2 Opportunities and barriers in re-using PSI

2.2.1 Early arguments

Making public data accessible and re-using them was expected to bring several advantages which became clear well before the Big Data era. On the one hand, unnecessary concurrencies can be diminished in administration, on the other hand, re-use for economic purposes can increase GDP and create jobs, which aspect has gained more weight recently. PSI "has proved to be a promising means of boosting economic growth and effectiveness".[10] In addition, transparency can grow, including the transparency of the operation of the state[11], which is beneficial for

[7] For the changes see also Zsolt Ződi, "Elvek és valóság Európában: a PSI-irányelv érvényesülésének problémái (Miért nem szereti az európai közszféra megosztani az adatait a magánvállalkozásokkal?)," in *Decem anni in Europaea Unione I.,* ed. Pál Sáry (Miskolc: University of Miskolc Press, 2015) , 184.

[8] "Public consultation on the review of the directive on the re-use of Public Sector Information (PSI Directive)," accessed May 05, 2018, https://ec.europa.eu/info/consultations/public-consultation-review-directive-re-use-public-sector-information-psi-directive_en

[9] Unfortunately, the questionnaire is currently not accessible.

[10] Tanja Jaatinen, "The relationship between open data initiatives, privacy, and government transparency: a love tirangle?", *International Data Privacy Law 6, no. 1* (2016) 28. Cf. also with 29. about the details on the value of public sector information.

[11] Balázs Hohmann, „The interpretation of transparency from the legal point of view," in *4th FEU Conference Proceedings,* ed. Tamás Haffner (Pécs: Sopianae Association, 2018) 157-159.

efficiency and social control (namely the democratic state of the rule of law) as well.

2.2.2 Big Data, Industry 4.0, Smart Cities

The phenomenon of Big Data throws a different light on the re-use of public data, it may even highlight it, the effects of which are becoming more and more visible, albeit rather slowly. It is quite avowed that the activity of the public sector is based on data: using information is deeply embedded in provisioning services, inspection and policy-making activities.[12] Hence any changes (mainly if these changes seem to be radical) in the way of managing data shall significantly affect the operation of the public bodies.

The phenomenon of Big Data has been defined in a number of ways, however, according to a widespread approach it can best be described in English by various features beginning with the letter "V". Thus this phenomenon refers to the quick, even real time analysis (velocity) of a vast amount of data (volume), varied especially as regards how structured they are (variety), having a dubious level of reliability and trustworthiness (veracity), with the purpose of generating some new (business or social) value (value), the results of which are often made more receptible for the target audience by data visualization (visualization).[13]

The potential data sources are quite varied, from the online user-generated contents[14] through the applications recording the smallest online operations to the existing databases of undertakings and state bodies, and the latter, as regards this study, has special importance. There are two further essential sources of the ever-growing amount of data: on the one hand, whenever data are analysed, reported or used to with the aim to draw a conclusion from, new data, which can also be processed are promptly

[12] Marijn Janssen and Jeroen van den Hoven "Big and Open Data (BOLD) in government: A challenge to transparency and privacy?" *Government Information Quarterly 32. no. 4* (2015) 363, https://doi.org/10.1016/j.giq.2015.11.007

[13] See the classic approach of 3Vs by Gartner (https://www.gartner.com/it-glossary/big-data), the 4Vs and later the 5Vs concept of the IBM (http://www.ibmbigdatahub.com/infographic/four-vs-big-data, https://www.ibm.com/blogs/watson-health/the-5-vs-of-big-data/), and the 7Vs approach of Eileen McNulty (http://dataconomy.com/2014/05/seven-vs-big-data/), accessed April 25, 2018.

[14] Like online profiles, comments, posts, blog posts, uploading video and audio files, and also sharing all these contents (often labelled as "web 2.0 services").

generated. On the other hand, an increasing role is played by data collected by sensors on devices and linked together in a network[15].

Besides the data measured by devices for geopositioning, and also cameras and various smart gadgets, it should also be noted that processes referred to by the term "Industry 4.0" clearly indicate that thousands of sensors will gather all sorts of data in the course of industrial production too, "and now we enter Industry 4.0, in which computers and automation will come together in an entirely new way, with robotics connected remotely to computer systems equipped with machine learning algorithms that can learn and control the robotics with very little input from human operators."[16]

Another tendency is worth noting, namely that the appropriate analysis of data collected by local authorities with all sorts of devices is also an important element of the concept of Smart City, "the smart city is considered an urban environment at the same time equipped, interconnected and intelligent. An appropriate hardware, software, and network equipment composed of sensors, kiosks, personal devices, smartphones, tablet PCs, GPS devices, the web, social networks, etc. can detect massive amount of data on the life of the city in real-time."[17]

Data alone are not sufficient,, the main issue is how to analyse them. Not surprisingly new data mining technologies and powerful algorithms have emerged recently to solve this problem, including self-learning algorithms, which may "develop" by themselves if enough data are available for them. Self-learning algorithms, which can learn more precisely and efficiently if they can use more data for "learning" are gaining more and more increasing importance.[18]

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[15] As regards the tendency of the "Internet of Things", the term devices should be taken in a broad sense, including everything that can collect data at present or in the future, from mobile phones to smart watches, from cars to smart gauges, from coffee makers to traffic count devices.

[16] Bernard Marr: "What Everyone Must Know About Industry 4.0", accessed April 25, 2018, https://www.forbes.com/sites/bernardmarr/2016/06/20/what-everyone-must-know-about-industry-4-0/#40bc69d795f7

[17] Federico Fonatana, "The Smart City and the Creation of Local Public Value", in Smart City - How to Create Public and Economic Value with High Technology in Urban Space, ed Renata Paola Dameri and Camille Rosenthal-Sabroux (New York: Springer, 2014) 122.

[18] Big Data Report, "Big Data: A Report on Algorithmic Systems, Opportunity, and Civil Rights" *Executive Office of the President* (2016): 10.

These phenomena raise several ethical and legal concerns,[19] nevertheless, the key issue is the quantity and quality of the data the particular actors have, be they small or big corporations or even states. Exploiting the potentials of Big Data means extraordinary business opportunities and considerable benefits for the society as a whole, so these can be used for making profiling more accurate for the forecasting of future behaviors, as well as in health care research, in making energy networks more efficient, developing transport, etc.[20] Data are actually resources the exploitation of which is not easy but promise substantial social advantages and economic benefit. In the application of this approach, it seems to be an enormous waste if the society gives up the utilization of often partly structured databases collected, generated and stored from public funds by the state through the course of performing its public tasks.

2.2.3 Challenges in the implementation of Open Data policies

However, well-grounded concerns as to the re-use of public data have arisen since the very beginning. These fears usually questioned the feasibility of public data re-use rather than its necessity and were mainly formulated when the term Big Data was not well-known yet.

According to the summary by Zsolt Ződi, criticisms concerning the Directive are manifold. Firstly, public sector data are quite often not in a technical condition suitable to be made accessible in large amounts in appropriate quality and administrative organisations do not possess resources to serve the needs of private undertakings for public data. Secondly, administrative organisations do not necessarily have internal accounting and cost clearing systems capable of precisely determining either the actual or the marginal costs of the particular data. Thirdly, compared to the American legal system serving as a model, the data may

[19] E.g. the transparency of these algorithms is a hot issue in legal academic literature, mainly because their relevance is surely going to increase with the evolution of Artificial Intelligence (which is, at this point, mainly based on Big Data and the new analysing methods).
But also several privacy concerns have arisen in the past few years, resulting of dozens of publications in this issue, mainly because Big Data analysis tends to be used for predicting future actions and behaviours with a considerable degree of probability.

[20] Omer Tene and Jules Polonetsky, "Big Data for All: Privacy and User Control in the Age of Analytics" *Northwestern Journal of Technology and Intellectual Property 5* (2013): 245-248.

be subject to different fairly substantial legal restrictions, especially as regards data protection and copyright.[21]

In addition to these difficulties foreseeable even at the adoption of the Directive, new difficulties have also arisen. Bodies performing public tasks are often public data re-users themselves and part of their revenues should come from fees charged for value added services, consequently, their interests will be in conflict with the appearance of new competitors on the market.[22] This aspect clearly appeared in the 2013 amendment of the Directive, which introduced marginal cost charging as the main rule but by way of exception, it allowed bodies that are required to cover a substantial part of their costs relating to performing their public tasks from their own revenues or in respect of documents for which the public sector body concerned is required by the Member State, to cover a substantial part of the costs relating to their collection, production, reproduction and dissemination from their own revenues to charge a reasonable return on investment in addition to the actual costs incurred.[23] A further practical barrier is quite often the personal attitude of leaders acting in the public sector, which is connected to the far-reaching issue as to what the role of the state is, what public task performance it extends to and where "value added" service begins. In other words, these leaders consider actors on the market re-using public data as organisations taking the best part of profits in their own interest rather than actors generating value, creating jobs or facilitating economic growth.[24]

Similar concerns are collected and classified by Kaiser, albeit not in connection with the concrete application of the Directive but from a broader perspective concerning the use of open data. The counter-interested status of public servants together with the uncertainty caused by government changes, in the transparency of producing and reproducing data, and the difficulties caused by the diverse forms and structures of data all rhyme well with the foregoing. In addition, there are some further aspects arising, such as the obscurity of users' (commercial) needs, the diverse legal status of data and consequently the not always clear licencing conditions applicable to their use, linguistic obstacles and the hardly

[21] Zsolt Ződi, "Elvek és valóság …," 177.
[22] Ibid.180.
[23] Article 6, paragraphs (2)-(3) of PSI Directive
[24] Ződi, "Elvek és valóság …," 180-181.

assessable nature of economic and social benefits all have a great weight in themselves and seem to demand a solution in any case.[25]

Some other sources also create significant socio-technical barriers, inter alia, barriers related to the creation of data, to the publication of data, and – in other respects, barriers related to finding Open Data, their use (analysis and processing) and discussing and providing feedback on them.[26]

In conclusion, it can be suggested that besides several promising advantages, boosting the re-use of public data is not an easy task at all and its actual success is influenced by economic, cultural and attitude-related aspects reaching well-beyond regulatory factors. Initially this was clearly indicated by the approach of the EU Member States to the implementation and practical application of the PSI Directive.

2.3 The implementation of the PSI Directive

The implementation and actual application of the PSI Directive was not a success story in the beginning, since Member States received it with relative indifference. The deadline for the transposition was 1 July 2005 but only a few Member States had managed to accomplish it by then,[27] and even until 1 January 2007 seven Member States failed to tender notice concerning transposition.[28] Moreover, some of the implementing Member States (including Hungary) merely modified laws on freedom of information but in fact did not change the existing practice.[29] On the whole, the Directive had little effect until the 2010s, thus Zsolt Ződi rightly called it a "forgotten directive".[30]

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[25] Kaiser Tamás, "Nyílt kormányzat, nyílt adatok: a szabad hozzáféréstől a hatékony újrafelhasználásig," in *Antikorrupció és integritás,* ed. Eszter Dargay and Lilla Juhász (Budapest: Nemzeti Közszolgálati Egyetem, 2015) 82-83.

[26] Anneke Zuiderwijk and Marijn Janssen, "Barriers and Development Directions for the Publication and Usage of Open Data: A Socio-Technical View,", in *Open Government. Opportunities and Challenges for Public Governance* ed. Mila Gascó-Hernández (New York: Springer, 2014) 119-123.

[27] Katleen Janssen and Sara Hugelier, "Open data as the standard for Europe? A critical analysis of the European Commission's proposal to amend the PSI Directive,", *European Journal of Law and Technology* (2013): 2.

[28] Judit Szoboszlai, László Majtényi, Lóránd Ambrus-Lakatos, András Jóri, Gábor Cserháti and Máté Szabó, "A közszféra adatai hasznosíthatóságához szükséges jogalkotási feladatok," *(*Budapest: Eötvös Károly Intézet, 2007) 126.

[29] Ződi Zsolt, "Elvek és valóság …," 177.

[30] Zsolt Ződi, "A nemzeti adatvagyon és az elfelejtett irányelv," *Gazdaság és jog 19, no. 10* (2011) 20-23.

However, its review in 2012 and the subsequent proposal for its amendment meant a great step forward, which is well indicated by the fact that each Member State transposed it into its domestic law by the deadline set.[31] The changes are due on the one hand to the recognition of the growing importance of Big Data, on the other hand to the appearance of the more and more widespread idea of open government and open data.[32]

2.4 Open Data in Europe

Open Government and the policy of Open Data closely related to it have gained a new impetus in the past decade and, like the flourishing of the freedom of information in the 20th century, it can partly be linked to the government of the United States: the Obama administration re-launched the website 'data.gov' and issued the Open Government Directive in 2009.[33] Originally three elements meant to be of equal importance could be identified: the importance of transparency, social participation and collaboration,[34] but later this approach was enriched by several new goals and the ideas of the re-use of government information, the improvement of public services and the strengthening of economic growth and innovation appeared.[35] An essential element of Open Government is the open accessibility of data. The conditions for this openness are the principles of non-payment, technical openness (data should be accessible in a format suitable for processing through IT tools), legal openness (data should be accessible and re-usable without any restrictions e.g. copyright restrictions) and findability.[36]

The spread of Open Data policy is manifested in the growing number of Open Data portals featuring more and more data where government and

[31] Proposal - COM(2018) 234 final, 1.
[32] Janssen and Hugelier, "Open data as the standard for Europe? A critical analysis of the European Commission's proposal to amend the PSI Directive," 2-3.
[33] "Memorandum for the Heads of Executive Departments and Agencies, Executive Office of the President, accessed 12 May, 2018, https://obama-whitehouse.archives.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf
[34] Sándor Munk, Rita Fleiner, András Mincsik ,Zsolt Sikolya and Mihály Nyáry, "Kapcsolt nyílt kormányzati adatok és kutatásuk keretei Magyarországon" *Pro Publico Bono* 4, no. 1. (2014) 144.
[35] The list of the elements of open government created by Amanda Clarke and Mary Francoli is cited in Kaiser, "Nyílt kormányzat, nyílt adatok: a szabad hozzáféréstől a hatékony újrafelhasználásig," 75-76.
[36] Munk et al., "Kapcsolt nyílt kormányzati …," 158.

public service bodies publish easily re-usable data sets in large amounts free of charge, usually in a format suitable for being processed by computers. The different data sets can easily be found on these websites as they are typically displayed in a wellclassified manner (e.g. transportation, commercial data, environmental data, health care, and science, etc.).[37]

The penetration of the Open Data approach cannot be questioned.[38] The European Commission adopted the EU open data strategy in 2011,[39] providing a great impetus for the amendment of the PSI Directive. Comprehensive analyses and summaries on European Open Data policy undoubtedly commence from the European Data Portal (https://www.europeandataportal.eu), run by the European Commission, which, in addition to collecting the data sets of European (domestic) open data portals including the data of the open data portal of the EU, displays a number of analyses, guidelines manuals and training materials related to the use of open data.

Documents systematically analysing and summarising the development of open data policies have special relevance to this study article. Studies summarising the results of three years from 2015 up to now have deployed basically the same method for analysing the open data policies of the Member States. Development is assessed from two aspects, Open Data Readiness and Portal Maturity. Further aspects have been defined within these two areas, thus Open Data Readiness is measured by the existence of open data policies, licence rules (e.g. principle of non-payment, application of open format), the existence of national and local coordination, the volume of the use of open data and also political, social and economic

[37] These experiences were gained through browsing the following webpages without any predetermined plan http://data.europa.eu (EU), http://data.gov.uk (United Kingdom), and https://www.govdata.de/ (Germany), accessed May 05, 2018.

[38] This is well demonstrated by the success of the Open Government Partnership initiative, which was launched in 2011 and which now has more than 70 participating countries (https://www.opengovpartnership.org/about/about-ogp), accessed May 05 2018, unfortunately, Hungary left the partnership in 2016 [See Gov. Decree 1719/2016. (XII. 6.) Korm.].

[39] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Open data An engine for innovation, growth and transparent governance COM(2011) 882 final

effects. Portal Maturity is analysed based on the usability of the portal, the quality and quantity of data sets and the ease of re-use.[40]

The objective and unequivocal nature of these aspects may be open to question, nevertheless, on the whole it shows that the Commission tries to create a picture of the actual state of open data policy regardless of how the particular Member States met the requirement of compliance with the regulation pertaining to the re-use of public data. It is clearly seen that great emphasis is placed on the actual operation of the open data portals.

From the foregoing, it is obvious that the implementation of open data policies has in its heart websites (open data portals) with huge amounts of data sets from a wide range of public data areas displayed (published) in a proactive way and downloadable without identification and free of charge.

Although this approach gave a substantial impetus to the amendment of the PSI Directive or rather to the acceptance of its underlying objectives, the European and based on it the domestic legal frameworks of the re-use of public data do not prescribe what has been described above at all, nevertheless, they slightly encourage it (though do not prescribe it either). In line with the logic of the regulation under the PSI, the organisation or person (usually an actor on the market) intending to re-use data can have access to a part of public data through applying for it and contracting to this effect (in other words by identification) in return for a certain fee charged.

3. Future developments of PSI regulation

In the course of the review of the PSI Directive, a proposal for its amendment[41] was adopted, which was based on a wide consultation and a detailed study assessing the state of affairs.[42] Its aim was to eliminate the contradictions referred to above and at least partly bridge the relatively wide gap between the objectives of the open data policy and the PSI regulation in effect. As a starting point, the Commission stated, "on the

[40] European Data Portal, "Open Data Maturity in Europe", accessed May 05, 2018, https://www.europeandataportal.eu/sites/default/files/edp_landscaping_insight_report_n1_-_final.pdf 11-13.

[41] Proposal - COM(2018) 234 final

[42] Study to support the review of Directive 2003/98/EC on the re-use of public sector information. The report was created by a consortium of Deloitte, the Open Evidence, the Wik Consult, the Time Lex, the Spark and the Lisbon Council (SMART 2017/0061), accessed May 10, 2018, https://publications.europa.eu/en/publication-detail/-/publication/45328d2e-4834-11e8-be1d-01aa75ed71a1/language-en

whole the PSI Directive works well", however, there are some points where it should be amended in order for the potential inherent in the re-use of public data to be fully exploited.[43]

The Commission originally examined the possible effects of four, finally actually five scenarios: 1) a baseline scenario, which would mean maintaining the current approach without changes; 2) the possibility of discontinuing existing EU action (repeal of the PSI Directive); 3) the adoption of soft law measures only; and 4) amendments of the PSI Directive complemented with soft law measures, and within it the application of a) a higher intensity and b) a lower intensity regulatory solution. Based on an impact assessment, the Commission finally chose this last option.[44]

It is also important to indicate that the Commission intends to clarify the relationship between the PSI re-use regulatory regime and some other relevant legal instruments, mainly law on data protection, law on the sui generis protection of databases and the proposed directive on the free flow of non-personal data.[45] This would be very important, since one important factor that encumbers the re-use of public sector information, as we could see above, is the (real or assumed) uncertainty regarding the legal status of such data, and privacy and copyright concerns are key issues in this rather complicated playground.

In this chapter we try to make a quite comprehensive analysis of the proposal package, but also try to emphasise the areas that reacting to the phenomena of Big Data and Open Data have come to the conclusion that besides the soft parts, the package has quite "marked" elements as well, however during the long legislative procedure the final wording may change substantially.

3.1 Extended scope of application to some of the public undertakings

First of all, the Commission intends to extend the scope of the PSI directive beyond the public sector bodies to documents, held by some type of public undertakings,[46] namely public undertakings acting in the field of

[43] Proposal - COM(2018) 234 final, 6.
[44] Proposal - COM(2018) 234 final, 8.
[45] Proposal - COM(2018) 234 final, 8.
[46] Public undertaking is defined as „any undertaking over which the public sector bodies may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it."

water, energy, transport and the postal sector, as well as some other very special public undertakings acting as air carriers fulfilling public service obligations or acting as Community ship owners fulfilling public service obligations. If a document is produced outside the scope of the provision of services in the general interest as defined by law or other binding rules in the Member State, they would be still out of the scope of the Directive.[47]

According to the Proposal, the obligations of such public undertakings are less strict, than that of public sector bodies. First, and most importantly, they are not obliged to open up for they data for re-use, but if they decide to do it, or a Member State national law prescribes it, the general provisions of the Directive shall apply. Practically saying, the documents held by public undertakings would be in the same position, as those documents in which libraries (including university libraries), museums and archives hold intellectual property rights under the current law. Second, the rules of charging are different. Public undertakings fall outside the scope of the marginal-cost based charging regime, consequently they can calculate charges based on the costs of collection, production, reproduction and dissemination, and – where applicable – anonymisation of personal data and measures taken to protect commercially confidential information, together with a reasonable return on investment.[48]

3.2 Research data

Another important issue concerns research data. Generally, it is quite a controversial question, when the notion of open access and free culture may conflict copyright laws and reasonable commercial interest as well. Many criticize the current regime of scientific publication, in which the scientific publishers play an inevitable role. The Open Science movement also plays an important role in the EU policies.[49]

The Proposal takes some cautious steps in order to promote the access of scientific data. Generally as, the summary of the proposal says: "Member States will be obliged to develop policies for open access to research data resulting from publicly funded research while keeping flexibility in implementation." The main aim is to put research data under

[47] Proposal - COM(2018) 234 final 22-23.
[48] Proposal - COM(2018) 234 final, 26.
[49] Cf. European Commission, Directorate – General for Research and Innovation, "Open innovation, Open Science, Open to the World – a vision for Europe, European Commission, 2016," accessed May 04, 2018, https://publications.europa.eu/en/publication-detail/-/publication/3213b335-1cbc-11e6-ba9a-01aa75ed71a1

the PSI regime, once they have already been made accessible as a result of open access mandates.[50]

First of all, "research data" is planned to be defined as "documents in a digital form, other than scientific publications, which are collected or produced in the course of scientific research activities and are used as evidence in the research process, or are commonly accepted in the research community as necessary to validate research findings and results." This means, that the publications themselves are excluded from this definition.

The Directive is planned to oblige the Member States to support the availability of research data by adopting national open access policies on publicly funded data.[51] This is quite a soft-law approach, which means that it will remain in the Member States' competence to regulate the accessibility of research data. The scope is limited only to public funded data, the Directive has manifestly nothing to do with business research, development and innovation.

The next provision seems to be more important, and fits well to the general approach of the European PSI regulation. The planned new text of Art. 10(2) would prescribe that once publicly funded research data are accessible (based on national law or on the decision of the holder of the data) through an institutional or subject-based repository, it shall be open for commercial or non-commercial re-use under the conditions set out in Chapters III and IV of the PSI Directive.[52] The text would also provide that "in this context, legitimate commercial interests and pre-existing intellectual property rights shall be taken into account, and third parties IP rights should be respected. This last sentence seems to be hard to interpret, mainly concerning legitimate commercial interests. Who will decide, whether these interest exist at all? If there is such interest, does it mean that no re-use is possible, or it may be possible under some kind of "limited" conditions?

Generally, it seems that the Commission would like to extend the scope of application to research under some special conditions, but the actual impact of this intention is not yet clear.

[50] Proposal - COM(2018) 234 final, 7.
[51] Proposal - COM(2018) 234 final, 27.
[52] Proposal - COM(2018) 234 final, 28.

3.3 Changes regarding charging

The proposal also intends to indicate changes in the charging regimes regarding the re-use of PSI. The discussion about the price of the public sector information is not new, the debate about this also came forward when the PSI Directive was adopted.[53]

First of all, the proposal makes it clear that the re-use may be free of charge.[54] In my opinion, it is a clear reflection to the Open Data movement, but mostly symbolic, since the PSI Directive in effect also enables the re-use of data free of charge.[55] Secondly, one of the exceptions from the marginal-cost principle would be eliminated, namely Art 6(2) point b), which allows charging based on the cost of collection, production, reproduction and dissemination, together with a reasonable return on investment if the documents for which the public sector body concerned is required to generate sufficient revenue to cover a substantial part of these costs. The other – and more important – exception, which allows the same (cost-based charging) more generally for those public sector bodies that are required to generate revenue to cover a substantial part of their costs relating to the performance of their public tasks, would remain unchanged.

Finally, a new element of the costs can be identified: the anonymisation of personal data and measures taken to protect commercially confidential information, where this is necessary. Even in these cases only marginal costs can be taken into account, which practically means no costs in many cases, if the data are already anonymised or confidential information are already deleted from those data(sets).

On the whole, these planned amendments seem to be very small steps forward to access public sector information free of charge, except in the case of the so called high value datasets (see below).

3.4 Access to dynamic data via APIs

Concerning the main directions of the proposal, one of the most progressive areas reacting to the phenomenon of Big Data is the proposed

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[53] Johan Pas and Bruno de Vuyst, "Re-establishing the Balance between the Public and the Private Sector: Regulating Public Sector Information Commercialization in Europe", *The Journal of Information, Law and Technology (JILT*), no. 2 (2004) 5.

[54] Proposal - COM(2018) 234 final, 25.

[55] Cf. with the wording of Art. 6(1) of the PSI Directive: „Where charges are made for the re-use of documents…"

regulation pertaining to access to dynamic data through APIs. There are several cases indeed, for instance meteorological data or real-time traffic data, where the potential, inherent in the data can only be ensured if access is prompt, regular and guaranteed. This demand can best and most visibly differentiate between access for the purpose of public data re-use and access for the purpose of constitutional control.

The proposal intends to attain this aim by complementing Article 5 on formats. Under the new paragraph (4), "Public sector bodies and public undertakings shall make dynamic data available for re-use immediately after collection, via suitable Application Programming Interfaces (APIs)." This sounds quite strong and coercive but it is softened by paragraph (5). Under the paragraph, if this activity "would exceed the financial and technical capacities of the public sector body or the public undertaking," such documents "shall be made available in a timeframe that does not unduly impair the exploitation of their economic potential."[56] "Documents in an electronic form, subject to frequent or real-time updates are qualified as dynamic data".[57]

Even though the proposed paragraph 5 lends itself to a number of possible interpretations, it is safe to say that in the case of data quickly becoming out-dated and after a while becoming totally worthless, such as traffic data, timetables etc., the Directive would compel Member States to make data immediately accessible through API. Even if the Commission's proposal refer to these rules as "soft" obligations[58], in our view they are rather strict and may require substantial investments on the side of the organisations concerned, while at the same time they are fairly progressive. These rules, however, may trigger fierce debates in the future.

3.5 High value datasets

A further substantial novelty would be the incorporation of (framework-like) rules pertaining to the so called high value datasets. The Directive would expressly prescribe that these datasets be available for free, machine-readable and accessible via APIs so that the conditions for re-use will be compatible with open standard licences.[59]

The framework nature of the regulation lies in the fact that the itemized definition of high value datasets in a delegated legal act, in other words a

[56] Proposal - COM(2018) 234 final, 29.
[57] Proposal - COM(2018) 234 final, 26.
[58] Proposal - COM(2018) 234 final, 8.
[59] Proposal - COM(2018) 234 final, 35.

list applicable compulsorily would be left to the Commission. According to the proposal, the Commission will select the datasets based on the assessment of their potential to generate socio-economic benefits, the number of users and the revenues they may help generate, and their potential for being combined with other datasets, subsequently to a cost-benefit analysis. Not only would the Commission create a list of the datasets, but it would also define further rules for the conditions of re-use, the formats of data and metadata and technical modalities of their publication and dissemination.[60]

In our opinion, the proposal concerning high value datasets is highly progressive. It would partly eliminate the currently existing contradiction between the objectives of the open data movement (free of charge, proactive publishing) and the logic behind the current PSI regulation (accessibility upon request, charging marginal costs). Although the draft directive uses the term "making data available", when defining detailed conditions, it uses the term "publishing", which would probably mean proactive publishing regardless of request.

A further important element of the regulation is that the Commission should select high value datasets with due care and by taking into account aspects stipulated in a statutory instrument. By doing so, the regulation would react to the (partly) well-grounded criticisms according to which in the course of publishing on open data portals unneeded datasets "reacting" to a non-existing market demand are published quite often, and consequently they are actually never used.

4. Conclusions

The phenomenon of Big Data and the worldwide development of Open Data and Open Government movement clearly put the European attempts to foster the re-use of PSI in a different context. It seems that the European legislator tries to face the challenge. Although the Commission evaluates the proposal for the amendment of the PSI Directive as containing mainly "soft-law" instruments, in my opinion it clearly indicates relevant and "hard law" changes. For the main, the proposal on sharing dynamic data via APIs and to publish high value datasets free of charge can be regarded as really progressive changes. Hopefully the complicated European procedure of enacting a new law and the need for reaching compromises will not attenuate this proposal.

[60] Ibid.

Prevention of Credit Card Fraud Crimes

TÓTH, DÁVID

ABSTRACT *The current study analyzes the possible prevention means against credit card fraud. With the development of information technology, there are many convenient ways to use credit cards as a payment method in the cyberspace but the risks of being victimized by fraudulent conducts also elevated. The offenders find newer and newer ways to get personal and credit card data from victims in order to cause financial damage.*

There are legal and non-legal means against credit card fraud. The most important legal means is the statutory provisions of the Criminal Code (Act C of 2012) related to credit card offences. The study aims to give suggestions to improve the regulation of these crimes. Non-legal means may involve the education of clients, increasing security of credit cards and online payment solutions, and monitoring of clients payment etc. With the exploration of prevention means, the numbers of credit card frauds may be reduced in the future.

KEYWORDS *credit card fraud, prevention, cybercrime*

1. Introduction

The current study analyzes the possible prevention means against credit card fraud. With the development of information technology there are several convenient ways to use credit cards as a payment method in the cyberspace but the risks of being victimized by fraudulent conducts also elevated. The offenders find newer and newer ways to get personal and credit card data from victims in order to cause financial damage.

There are legal and non-legal means against credit card fraud. The most important legal means are the statutory provisions of the Criminal Code (in Hungary the Act C of 2012) related to credit card crimes. The study aims to give suggestions to the improvement of the regulation of these crimes. We also aim to analyse the procedure of foreign countries closely related to the Hungarian regulation (Austria, and Anglo-Saxon countries: the United Kingdom and the United States of America). .

Non-legal means may comprise education of clients, increasing security of credit cards and online payment solutions, monitoring of the clients

payment etc. With the exploration of the prevention means we may reduce the numbers of credit cards in the future.

2. Types of credit card frauds

Credit card fraud is a criminal term, which contains all credit card fraud related crimes. In the Hungarian Criminal Code (Act C of 2012), the following crimes belong to this:

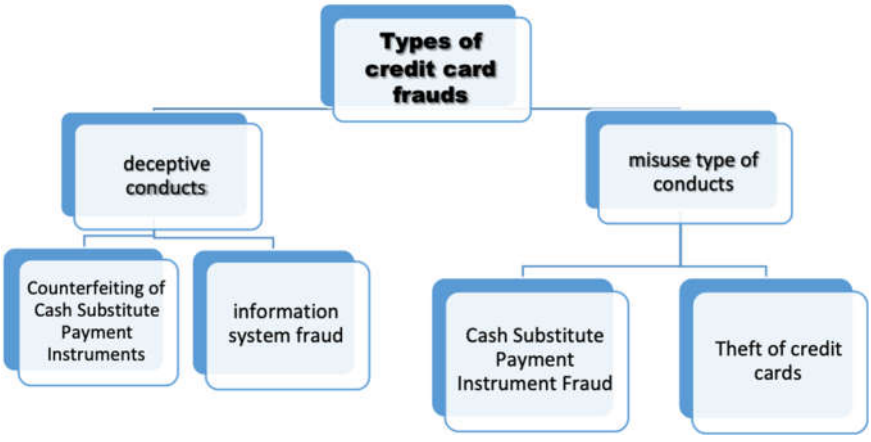
- Aiding in Counterfeiting Cash-Substitute Payment Instruments;
- Cash-Substitute Payment Instrument Fraud;
- Counterfeiting of Cash-Substitute Payment Instruments;
- Information System Fraud;
- Credit card theft .

On the one hand, credit card fraud is the unauthorized, illegal use of your credit card either to obtain goods without paying for them or to obtain funds from your account by way of a cash withdrawal.

On the other hand, credit card fraud is part of a broader theft of your identity, and your personal information that is often used to take out new loans or other lines of credit in your name. This second type of credit card fraud is also called identity theft.

There are several ways to classify these crimes. According to the first method we can divide the crimes based on the type of conducts. The two main groups are deceptive conducts and misuse type of conducts. Counterfeiting of credit cards and information system fraud are deceptive type of crimes. Cash substitute payment instrument fraud and the theft of credit cards are misuse type of crimes. They are illustrated in the following chart:

Chart 1. Types of credit card frauds[1]



They can also be divided into material and immaterial crimes. On the one hand, material crimes involve crimes which cause financial damage to the victim. Material crimes constitute information system fraud and the theft of credit cards. On the other hand, immaterial crimes mean that by committing the conduct (e.g. counterfeiting of a credit card) establishes the statutory provisions of the crime per se. Immaterial crimes mean counterfeiting of cash substitute payment instruments and cash substitute payment instrument fraud.

According to P.W. Singer and Allan Friedman if credit card frauds are committed in online space we can classify these offenses as cybercrime (computer crime). Computer crime is the use of digital tools by criminals to steal or otherwise carry out illegal activities. The most pervasive type of cybercrime is "credential fraud," or the misuse of account details to defraud payment and financial systems. Such systems include credit cards, ATM accounts, and online banking accounts. In order to access these accounts, criminals can obtain security credentials like passwords and other data, "phishing" e-mail, which poses as a communication from a financial institution and presents a link where the victim is prompted to enter his credentials.[2] J.P. Cross regards credit card fraud as identity theft.[3] According to Katalin Parti and Tibor Kiss classification of these conducts

[1] Constructed by the author

[2] P.W. Singer and Allan Friedman, *Cybersecurity and cyberwar. What everyone needs to know.* (New York: Oxford University Press, 2014) chap. 1, Kindle version

[3] J.P. Cross, *Identity theft protection. How to prevent identity theft and credit card fraud*. (New York: LCPublifish, 2014) first half, Kindle version

falls within the group of information technology crimes against property (virtual property breaching crimes).[4]

3. Credit card fraud in practice

3.1 Methods of credit card fraud

Credit card fraud hinders the development of the economy in two ways:

- it causes important direct economic losses, as indicated by the estimated level of card fraud of EUR 1.44 billion mentioned above. For example, due to card fraud airlines lose globally around USD 1 billion per year ;
- it reduces consumers' trust, which may result in reduced economic activity and limited engagement in the digital single market. According to the most recent Eurobarometer on Cyber Security the vast majority of Internet users (85 %) feel that the risk of becoming a victim of cybercrime is increasing. In addition, 42 % of users are worried about the security of online payments. Because of security concerns, 12 % are less likely to engage in digital transactions such as online banking.[5]

Under the March 2017 report of the Consumer Sentinel Network, 77% of consumers named telephone as the method of initial contact listed for fraudsters' method of choice. This Network collects fraud and identity theft complaints made to the state and federal government.[6]

There are many ways for offenders to obtain your personal information. Here are a few examples:

- Searching through your trash to find discarded receipts or copies of card numbers;
- A dishonest retailer, clerk copying your credit card information, including the security feature on the back of the card.

Perpetrators may use high tech devices as well:

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[4] Katalin Parti and Tibor Kiss, „Informatikai bűnözés*"* in *Kriminológia* ed. Andrea Borbíró, Katalin Gönczöl, Klára Kerezsi and Miklós Lévay (Budapest: Wolters Kluwer, 2016) 495-497.

[5] Proposal for a Directive of the European Parliament and of the Council on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA

[6] Federal Trade Comission: "Consumer Sentinel Network Data Book 2017," accessed June 20, 2018, https://www.ftc.gov/policy/reports/policy-reports/commission-staff-reports/consumer-sentinel-network-data-book-2017/main

- *ATM frauds:* Nowadays more and more people are victimized by ATM frauds. Criminals can plant so-called skimmer devices (electronic card readers, tiny cameras etc.) in ATM slots. After the ATM user puts the credit card into the ATM card reader slot, the skimmer device picks up all the information from the card's magnetic strip. With miniature cameras offenders can obtain our PIN code as well. After the criminals obtained the data, they can create clone credit cards and use them as the original ones.
- *Recording radio frequency signals:* Easy and comfortable payment methods such as paypass have risks. Paypass credit card communicates with the point of sale terminal with radio frequency signals but these can be recorded by skimmer devices.[7]
- *Phishing:* This conduct refers to phone emails, phone calls, or letters claiming to be business or financial institutions you might know or belong to, asking for your credit card or other personal information. Their aim is that you will voluntarily reveal your personal information so that they can use your credit card for their advantage.

3.2 A sample case study

A sample Hungarian case study can be a good example to demonstrate the deceptive power of crimes of credit fraud type . The following story is a summary of an interview made with an anonymous victim.

The perpetrator called the victim on phone in the name of a company that provides telephone and other communication services to consumers. He told her he had won an iphone 7 device and 150 000 Forints because she had been a long time client of the company and there was list where she was the 1000th one. The offender called her attention that the phone call is recorded and told the client not to give any personal information.

After this, he offered optional colours for the device and told her in which store she could obtain it. The offender said she could pick up the money at a local ATM or use internet bank but he noticed that the first one was much faster. Eventually he persuaded her to apply the first option and after this she went to the nearby ATM. While the victim walked to the ATM they were still connected on the phone with the offender. When she arrived, the offender told her the prize pool number. He warned her that

[7] A. Zoltán Nagy "A pénz- és bélyegforgalom biztonsága elleni bűncselekmények" in *Magyar Büntetőjog Különös rész.* ed. Mihály Tóth, A. Zoltán Nagy (Budapest: Osiris, 2014) 501-502.

she had to choose the universal charge option so she could obtain 15 000 forints ten times. She had to repeat the procedure for several times. The prize pool number was actually a phone number (probably that of his or some friends of his). Eventually the offender stole 90 000 Forints from the victim. The bank fortunately noticed the suspicious transactions so after the 90 000 Forints charge the bank froze her account. The bank tried to reach the victim during these transactions but she was active on the phone with the offender. They only reached her after hanging up. Before the end of the phone call the offender asked for the recipe numbers of the transactions. He told her that this was necessary to obtain the Iphone 7. He also warned her that she should destroy the invoices at once. Probably this was only a part of the play.

During the interview the victim told me that when she had been typing the numbers in she had not realized that it was a phone number and all the time she had been thinking of the reward. She had felt safe because she had not given any personal information to the offender. The offender had held her under control and she basically had lost her free will. The case shows that these deceptive crimes have an important psychological element. The offender wanted to make sure that the victim felt safe with her, tried to sound as official as possible and even encouraged her several times that she was about to win the device and the money. Cases like this can draw the attention of the public so that the future possible victims can avoid this situation.

3.3 Credit card fraud cases world-wide

I would only want to highlight a few examples without attempting to be exhaustive. These cases show us how dangerous credit fraud can be.

The first one is the Equifax Breach. Equifax Inc. is a consumer credit reporting agency with over 800 million individual consumers. In the fall of 2017, credit reporting bureau Equifax announced that it had been the victim of a huge breach that put the personal information of over almost 150 million Americans at risk. Though the attack began in May 2017, it was not revealed until July. The New York Post reported that a fraud prevention company saw a 15% spike in overall online fraud attempts, which was likely related to the stolen data. The company was blamed for the breach of exploiting a flaw in its software, which resulted in hackers being able to access clients' personal data like social security numbers, birth dates, addresses, drivers' license numbers, and credit card numbers. After the cyber attack, the company offered a free year of credit monitoring service to everyone in the U.S. with a valid social security number. It also began

offering a service called "credit lock," which is similar to a credit freeze but easier to lift and re-engage if necessary. According to a poll by CreditCards.com 21% of consumers had never checked their credit scores or reports at all, even if they had heard news about the Equifax data breach and this clearly shows there is much work to be done in educating the public to be aware of the dangers of the crime.[8]

The second credit fraud case is one of the largest in the history of the United Kingdom. In the mid-2000s, an international crime group stole credentials for over 32,000 credit cards, made clone cards, and caused financial harm. They used these cards to rack up over £17 million ($24.1m) in fraudulent charges over a period of several years. The scam was initiated by Russian and Eastern European criminals working out of London. Their elaborate scheme involved transporting money from the UK to Poland through Estonia, Russia, and the USA. However, these hackers were eventually caught during a routine anti-terrorism check by transportation police.[9]

The third case is called the CardSystems Solutions Inc, case**.** About 40 million credit card numbers were stolen by an "unauthorized individual" who infiltrated CardSystem Solution's computer networks. The third-party payment processor company reported that it performed transactions for more than 100,000 companies with more than $15 billion total in annual monetary processes. Data breaches these days often reach a massive scale because of the amount of sensitive data available online. In this situation, it was among the largest computer hacks in history, with millions of accounts affected.[10]

4. Means of prevention to avoid credit card fraud

There are two main means of prevention against credit card fraud: legal and non-legal means. The most important legal way to deteriorate criminals is statutory provisions of the Criminal Code. Thus, I will analyse the Hungarian regulation and also show examples from abroad.

[8] Alex Miller: "The Best Ways To Prevent Credit Card Fraud & Theft," accessed June 30, 2018, https://upgradedpoints.com/how-to-prevent-credit-card-fraud/
[9] Alex Miller: "The Best Ways To Prevent Credit Card Fraud & Theft"
[10] https://shiresfinancial.com/8-biggest-credit-card-scams-on-record/, accessed June 30, 2018

4.1 Legal means

4.1.1 Counterfeiting of cash-substitute payment instruments and aiding in counterfeiting cash-substitute payment instruments

The legal object of the crime is the safety of the flow of the cash-substitute payment instruments as well as the legal order of the financial management.[11] With this statutory provision not merely the interests of bank account owners are protected but financial institutes as well.[12]

The object of perpetration is the cash-substitute payment instruments which may have material or electronic form. The definition of these can be found in the closing provisions of the Hungarian Criminal Code:

'cash-substitute payment instrument' shall mean non-cash means of payment provided for in the act on credit institutions, as well as treasury cards, traveller's checks, credit tokens and bills of exchange made out in accordance with the Personal Income Tax Act, provided they contain protective fixtures, such as coding or signature, against duplication, fraudulent making or forgery, and against unauthorized use.[13]

'electronic payment instrument' shall mean, in addition to the non-cash means of payment provided for in the act on credit institutions, treasury cards and electronic credit tokens made out in accordance with the Personal Income Tax Act, provided that they are used through the information system.[14]

These include credit cards, debit cards, meal vouchers, cheques, travellers cheques etc.[15]

Under the Criminal Code cash-substitute payment instruments and electronic payment instruments issued in other States shall receive the same protection as those issued in Hungary.[16]

The statutory provisions contain three perpetration conducts:

- falsification of non-cash payment instruments,

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[11] József Gula, "A pénz- és bélyegforgalom biztonsága elleni bűncselekmények" in *Magyar Büntetőjog Különös Rész* ed. Tibor Horváth and Miklós Lévay (Budapest: Complex kiadó, 2013) 581-599.

[12] Péter Polt, "Pénz és bélyegforgalom biztonsága elleni bűncselekmények" in *Büntetőjog Különös rész II.* ed. Blaskó Béla (Budapest: Rejtjel, 2013) 288.

[13] Act C of 2012 Section 394 (2).

[14] Act C of 2012 Section 459. (1) 20.

[15] A. Zoltán Nagy "A pénz- és bélyegforgalom biztonsága elleni bűncselekmények" 500.

[16] Act C of 2012 Section 392. (3).

- manufacturing counterfeits,
- and recording data stored on electronic payment instruments or the related security features, using technical means.

The subject (the offender) of the crime can be anybody. The crime can be committed only intentionally, there is no negligent form of it.

This crime is a misdemeanour and punishable by imprisonment not exceeding one year.

Lastly it is important to note that the preparation of this crime is also punishable.[17]

The independent crime of aiding in counterfeiting cash-substitute payment instruments is very similar to preparation of the previous crime. This crime is established when somebody:

- produces, supplies, receives, obtains, keeps, exports or imports, or
- transports in transit through the country, or
- distributes any material, means, equipment or computer program intended to be used for counterfeiting cash-substitute payment instruments or
- for the recording of data stored on electronic payment instruments or
- the related security features, using technical means.

The most important difference compared to the preparation of counterfeiting is that in this case to effectuate the crime, no intention to use is required. The most typical example is when someone sells a skimmer device to a criminal. This crime was introduced in the Hungarian Criminal Code in 2003 due to legal harmonization[18] and prevention purposes. The offence has an aggravated case: if somebody commits the crime in criminal association with accomplices or on a commercial scale, and it is punished by imprisonment not exceeding two years.[19]

4.1.2 Counterfeiting Cash-substitute payment instrument fraud

The legal subject and the object of perpetration of the crime is the same as mentioned above. However, there are differences in the perpetration conducts. The conducts can be categorized into the following groups:

- unlawful obtainment of cash-substitute payment instruments;
- commandeer cash-substitute payment instruments;

[17] Polt, "Pénz és bélyegforgalom biztonsága elleni bűncselekmények" 287.

[18] László Bujáki, "Készpénz-helyettesítő fizetési eszközök védelme," in *Az Európai Büntetőjog Kézikönyve*. ed. Ferenc Kondorosi, Katalin Ligeti (Budapest: Magyar Közlöny Lap- és Könyvkiadó, 2008) 493.

[19] Act C of 2012 Section 459. (1) 20.

- and transit type of conducts;
- supplies, obtains, exports or imports, or transports in transit through the territory of Hungary any counterfeit or falsified cash-substitute payment instrument;
- or a cash-substitute payment instrument that has been commandeered or obtained in the manner specified in Paragraph a);
- or data stored on electronic payment instruments or the related security features;[20]

This crime in the basic case is a misdemeanour and punishable by imprisonment not exceeding one year.

The subject of crime can be anybody. The crime can be committed only intentionally.

Under the new Criminal Code the form of the crime has changed . Earlier the crime was completed when financial damage was caused by the criminal act. Under the current regulation this is not required, the crime can be established even if the criminal did not cause any financial damage. Moreover if the criminal act caused financial damage not the cash-substitute payment instrument fraud but another crime, information system fraud shall be established by the courts.[21] To sum it up, cash-substitute payment instrument fraud has become an immaterial crime.

The aggravated case of this crime is a felony, and it is established when somebody commits the offence in criminal association with accomplices or on a commercial scale.[22]

Lastly, I would like to highlight a court decision regarding the crime. Under the BH 2009.43, expired credit cannot be the perpetration object of the crime.

4.1.3 A brief overview of the regulation of the Austrian Criminal Code

Credit fraud related crimes are regulated in the division 13 of the Austrian Criminal Code under the title Offences against the integrity of money, security, stamps and other currency transactions.

The division contains the following credit card related crimes:

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[20] Act C of 2012 Section 393. (1) b.

[21] Gábor Molnár, "Pénz- és bélyegforgalom biztonsága elleni bűncselekmények" in *Büntetőjog II. Különös rész.* ed. Ervin Belovics (Budapest: HVG-ORAC, 2016) 729-750.

[22] Act C of 2012 Section 393. (2).

- Counterfeiting of non-cash means of payment (§ 241a.)
- Acceptance, transfer, and possession of counterfeit non-cash means of payment (§ 241b.)
- Preparation of counterfeiting of non-cash means of payment (§ 241c.)
- Theft of non-cash means of payment (§ 241e.)
- Acceptance, transfer, or possession of stolen non-cash means of payment (§ 241f.)
- Reconnaissance of data of non-cash means of payment (§ 241h).

The next table summarizes the conducts and sanctions of the crimes:

Table 1. - Conducts and sanctions of the relevant crimes.[23]

Name of the crime	*Perpetration conducts*	*Sanctions*
Counterfeiting of non-cash means of payment (§ 241a.)	▪ the *production* of a false non-cash means of payment or ▪ the *forgery* of a genuine non-cash means of payment intending that it be used as if it was genuine in legal dealings	*in the basic case:* imprisonment for up to 3 years. *aggravated case:* (who commits the offence commercially or as a member of a criminal association is): imprisonment for 6 months to 5 years
Acceptance, transfer, and possession of counterfeit non-cash means of payment (§ 241b.)	who ▪ *obtains,* ▪ *acquires* for himself/herself, or for an other person, ▪ *transports,* ▪ *makes available* to an other person or ▪ otherwise *possesses* a false or forged non-cash means of	imprisonment for up to 1 year or a fine not exceeding 720 penalty units

[23] Constructed by the author

	payment intending that it be used as if it was genuine in legal dealings	
Preparation of counterfeiting of noncash means of payment (§ 241c.)	who, intending to enable himself/herself, or an other person to counterfeit a non-cash means of payment, ▪ *produces*, ▪ *obtains* from or ▪ *makes* available to an other person, or ▪ otherwise *possesses* any instrument or tool which because of its particular nature is evidently designed for counterfeiting non-cash means of payment	liable to imprisonment for up to one year or a fine not exceeding 720 penalty units
Theft of non-cash means of payment (§ 241e.)	who ▪ *acquires* a non-cash means of payment which the person is not authorized to use or not authorized to use by himself/herself alone with the intention that the person or a third person gains an undue advantage from the use of the non-cash means of payment ▪ *acquires* a non-cash means of payment which the person is not authorized to use or not authorized to	liable to imprisonment for up to two years

		use by himself or herself alone with the intention to enable himself/herself, or an other person to counterfeit a non-cash means of payment.	
Reconnaissance of data of non-cash means of payment (§ 241h)	who ▪	*reconnoitres* data of non-cash means of payment with the intention that the person or a third person gains an undue advantage from their use in legal dealings, or to enable himself, herself, or an other person to counterfeit non-cash means of payment.	*basic case:* imprisonment for up to 1 year or a fine not exceeding 720 penalty units *aggravated case:* (who commits the offence commercially or as a member of a criminal association is): imprisonment for up to 3 years

There are special provisions for grounds for exemption from criminal responsibility in the case of theft of non-cash means of payment. A person is not liable if there is no risk that the non-cash means of payment be used in legal dealings or if that risk has been eliminated without the person's involvement, but if the person unaware of these circumstances freely endeavours to eliminate these risks. Similar rules can be found in the case of reconnaissance of data of non-cash means of payment.

There is a possibility for the offender to apply active repentance in all cases. The offender must freely and before the false or forged non-cash means of payment is used in any legal dealings, eliminate any risk that the means be used in this way by destroying the non-cash means of payment, by destroying the instrument or tool used to counterfeit non- cash means of payment, or in any other way. The perpetrator is not liable if there is no risk that the non-cash means of payment be used in legal dealings or if that risk has been eliminated without the person's involvement, but if the

person unaware of these circumstances freely and genuinely endeavours to eliminate these risks.[24]

4.1.4 The current regulation of the European Union

As I mentioned before, the Hungarian regulation is based on the 2001/413/JHA: Council Framework Decision of 28 May 2001 (hereinafter: Council Framework Decision) combating fraud and counterfeiting of non-cash means of payment.

Under the organizations of the EU it is necessary that a description of the different forms of behaviour requiring criminalisation in relation to fraud and counterfeiting of non-cash means of payment cover the whole range of activities that jointly constitute the menace of organised crime in this regard. By giving protection by criminal law primarily to payment instruments that are provided with a special form of protection against imitation or abuse, the intention is to encourage operators to provide that protection to payment instruments issued by them, and thereby to add an element of prevention to the instrument.

According to the Framework decision "payment instrument" shall mean:

- a corporeal instrument,
- other than legal tender (bank notes and coins),
- enabling, by its specific nature,
- alone or in conjunction with another (payment) instrument,
- the holder or user to transfer money or monetary value,
- as for example credit cards, eurocheque cards, other cards issued by financial institutions, travellers' cheques, eurocheques, other cheques and bills of exchange, which are protected against imitation or fraudulent use, for example through design, coding or signature.[25]

The list of examples are indicative and not exhaustive.

Under the EU regulation there are three groups of perpetration conducts:

1. Offences related to payment instruments;
2. Offences related to computers;
3. Offences related to specifically adapted devices.

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[24] Christian Bertel and Klaus Schwaighofer, *Österreichisches Strafrecht Besonderer Teil II. §§ 169 bis 321 StGB* (Wien, New York: Springer, 2008) 145-159.

[25] Council Framework Decision Article 1

Offences related to payments instruments can be committed with the following conducts:

- theft or other unlawful appropriation of a payment instrument;
- counterfeiting or falsification of a payment instrument in order for it to be used fraudulently;
- receiving, obtaining, transporting, sale or transfer to another person or possession of a stolen or otherwise unlawfully appropriated, or of a counterfeited or falsified payment instrument in order for it to be used fraudulently;
- fraudulent use of a stolen or otherwise unlawfully appropriated, or of a counterfeited or falsified payment instrument.[26]

The second group can be committed only intentionally with the following conducts:

- performing or causing a transfer of money or monetary value and thereby causing an unauthorised loss of property for another person, with the intention of procuring an unauthorised economic benefit for the person committing the offence or for a third party, by:
  - without right introducing, altering, deleting or suppressing computer data, in particular identification data, or
  - without right interfering with the functioning of a computer programme or system.[27]

The third group contains preparation type of conducts:

- the fraudulent making, receiving, obtaining, sale or transfer to another person or possession of:
  - instruments, articles, computer programmes and any other means peculiarly adapted for the commission of any of the offences described under Article 2(b);
  - computer programmes the purpose of which is the commission of any of the offences described under Article 3.[28]

The council framework decision requires the Member States to punish these conducts in their Criminal Code because they are not directly applicable, only after having been transferred into the national law. The EU also requires the Member States to punish the participation, instigation and attempt of these crimes.[29]

[26] Council Framework Decision Article 2
[27] Council Framework Decision Article 3
[28] Council Framework Decision Article 4
[29] Council Framework Decision Article 5

As for punishment, the framework decision requires that each Member State shall take the necessary measures to ensure that the conduct referred to in Articles 2 to 5 is punishable by effective, proportionate and dissuasive criminal penalties, including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition.[30]

Also it is important to mention that according to the Council framework decision, legal persons are also punishable if they commit these crime. The framework decision offers examples for sanctions against legal entities, which can be applied by Member States:

1. exclusion from entitlement to public benefits or aid;
2. temporary or permanent disqualification from the practice of commercial activities;
3. placing under judicial supervision;
4. a judicial winding-up order.[31]

All in all, Hungarian legislation fully adapts to the framework decision and thus no amendment is required for the Criminal Code at this moment.

4.1.5 A new Directive proposal for the European Union

The European Commission drafted a new Directive proposal[32] for the European Parliament and the Council to replace the current framework decision and modernise the regulation regarding credit fraud type of crimes.

The reasons for the new Proposal is that the current EU legislation provides merely minimum rules to criminalise non-cash payment fraud. The European Agenda acknowledges that the Framework Decision no longer reflects today's realities and insufficiently addresses new challenges and technological developments such as virtual currencies and mobile payments.

Credit card fraud hinders the development of the digital single market in two ways:

- it causes important direct economic losses, as the estimated level of card fraud of EUR 1.44 billion mentioned above indicates. For

[30] Council Framework Decision Article 6

[31] Council Framework Decision Article 8

[32] Proposal for a Directive of the European Parliament and of the Council on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA {SWD(2017) 298 final} {SWD(2017) 299 final} Brussels, 13.9.2017 COM(2017) 489 final 2017/0226(COD) (Further referred as Directive proposal)

example, the airlines lose around USD 1 billion per year globally in card fraud;

- it reduces consumers' trust, which may result in reduced economic activity and limited engagement in the digital single market. According to the most recent Eurobarometer on Cyber Security the vast majority of Internet users (85 %) feel that the risk of becoming a victim of cybercrime is increasing. In addition, 42 % of users are worried about the security of online payments. Because of security concerns, 12 % are less likely to engage in digital transactions such as online banking.

The Directive draft has three specific objectives that address the problems identified:

- Ensure that a clear, robust and technology neutral policy/legal framework is in place;
- Eliminate operational obstacles that hamper investigation and prosecution;
- Enhance prevention.

The proposal has several important and modern definitions:

- *"payment instrument"* means a protected device, object or record, other than legal tender, which, alone or with a procedure or a set of procedures, enables the holder or user to transfer money or monetary value or to initiate a payment order, including by means of digital mediums of exchange;
- *"protected device, object or record"* means a device, object or record safeguarded against imitation or fraudulent use, for example through design, coding or signature;
- *"payment order"* means a payment order as defined in point (13) of Article 4 of Directive (EU) 2015/2366;
- *"virtual currencies"* means a digital representation of value that is neither issued by a central bank or a public authority, nor necessarily attached to a fiat currency, but is accepted by natural or legal persons as a means of payment and can be transferred, stored or traded electronically.

The Member States, provided that the Directive will be adopted, should implement the rules and punish the following crimes:

- Fraudulent use of payment instruments;
- Offences preparatory to the fraudulent use of payment instruments;
- Offences related to information systems;
- Tools used for committing offences.

Article 8 would consist the penalties for natural persons:

- Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 to 7 are punishable by effective, proportionate and dissuasive criminal penalties.
- Member States shall take the necessary measures to ensure that the offences referred to in Articles 3, 4 and 5 are punishable by a maximum term of imprisonment of at least three years.
- Member States shall take the necessary measures to ensure that the offences referred to in Article 6 are punishable by a maximum term of imprisonment of at least two years.
- Member States shall take the necessary measures to ensure that offences referred to in Articles 3, 4 and 5 are punishable by a maximum term of imprisonment of at least five years if:
    - they are committed within the framework of a criminal organisation, as defined in Framework Decision 2008/841/JHA, irrespective of the penalty provided for in that Decision;
    - they involve extensive or considerable damage or an aggregate advantage of at least EUR 20 000.

Article 10 would contain the sanctions for legal persons.

Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 9(1) is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and which may include other sanctions, such as:

- exclusion from entitlement to public benefits or aid;
- temporary or permanent disqualification from the practice of commercial activities;
- placing under judicial supervision;
- judicial winding-up;
- temporary or permanent closure of establishments which have been used for committing the offence.

Personally I think, the legal definitions of progressive virtual currencies, due to several countries have no regulation to these and as a consequence they are in a “gray zone”. Hopefully after the adoption of the Directive, the regulation will become more effective regarding the prevention of these crimes.

4.2 Non-legal means

4.2.1 Prevention proposals

It is very easy to be victimized by this crime, thus I would like to present some prevention proposals:

- Try to use ATM machines which are inside of a building;
- If you notice any problem, contact the bank or the police and do not accept help from third persons;
- Keep your certificate of the ATM transaction.

Other fraud protection practices include:

- Do not give your account number to anyone on the phone, unless you have made the call to a company you know to be reputable;
- Report any questionable charges to the card issuer;
- Carry your cards separately from your wallet. It can minimize your losses if someone steals your wallet or purse;
- During a transaction, keep your eye on your card;
- Do not write your account number on the outside of an envelope.

If you become a victim of credit card fraud you should consider the following steps :

- report the crime to the police and to the bank,
- initiate the freeze of your credit card.
    - *Credit Freeze:* As discussed above, a fraud alert is a free and temporary measure that helps alert creditors that they should perform extra identity checks before issuing any new lines of credit. In contrast, a credit freeze is a much stronger measure. After you place a freeze on your account with all three credit reporting agencies (Equifax, Experian, TransUnion), no one will be able to open new accounts under your name until the freeze is lifted. Though you can freeze and unfreeze your account at any time (temporarily or permanently), this solution is usually better for those who do not often plan on taking out any new lines of credit. You can, however, freeze and unfreeze your accounts by phone or online using a PIN you will acquire during the process.
    - *Credit Lock:* A credit lock is similar to a freeze in that no new accounts can be opened on your behalf while it is in place. You also need to ensure the lock is placed with all three reporting agencies. The difference is that you will not use a PIN to lock/unlock your credit, and the process is usually more immediate than with a freeze. You can use a computer

or mobile app to lock/unlock, but it cannot be done over the phone. There is also a fee for using a credit lock, which varies depending on the reporting agency and can also change over time. If you use this service, you should pay close attention to the agreement you sign up for. Some agencies charge a monthly fee that can increase, making this option potentially more expensive than a credit freeze.

- *Credit Monitoring Services:* While credit locks and credit freezes prevent access to your accounts, credit monitoring services simply help you keep a close watch on their activity. You can pay for credit monitoring that cost $10-$30 per month. Paid packages often comb the internet to see if your information is being used fraudulently, and may even offer robust insurance against any losses from fraud that occur under their watch. Many companies also offer free credit monitoring that can alert you automatically of any changes to your credit report (we have mentioned Credit Karma, Credit Sesame, and Quizzle above). Unless you have been a victim of identity theft, many consumers find that free credit monitoring combined with keeping an eye on their credit reports is enough to make them feel safe. You can also make strategic decisions about when paying for credit monitoring might be worth. For example, if you are planning to buy a home next year, you might want monitoring to help ensure your credit score is as high as possible (in order to get a good rate on your mortgage).

4.2.2 An action programme

I would like to suggest a similar prevention in the field of credit card fraud like the Pericles 2020 programme. The Pericles programme is dedicated to the fight against counterfeiting money. The programme funds staff exchanges, seminars, trainings and studies for law enforcement and judicial authorities, banks and others involved in combating euro-counterfeiting. Actions can take place in the euro area, in EU countries outside the euro area and in third countries. Since 2015 applications by all 28 (now 27) Member States' competent authorities can be introduced to receive co-financing. The DG ECFIN can also initiate actions to complement Member States' initiatives. The Pericles 2020 programme spends a bit more than € 7,3 million on the implementation of the programme, for the period between 1 January 2014 and 31 December 2020.

A similar aim should be to prevent and combat credit card fraud thus enhancing the competitiveness of the Union's economy and securing the sustainability of public finances. With this programme, Member States could develop a credit fraud detector, improve security and create workshops.

5. Summary

All in all, crime prevention in the field of credit card fraud, due to the development of information technology is a difficult task, since offenders can commit crimes more easily. There are two main tools for combatting credit card fraud: legal means and non-legal means. The Criminal law is the most important legal means. The adequate Criminal law regulation can deteriorate offenders from committing the crime and also prevent repeat offences. Hungarian legislation should consider the Austrian regulation as a role model since in my opinion the Austrian model is more effective because it is stricter and covers more perpetration conducts.

In my view, non-legal means are more important. If the bank account clients are aware of the technics of the criminals, they can avoid becoming victims. Awareness can be enhanced by action programmes similar to the Pericles programme.

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