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CONTENT

Communication of the Judiciary*

FEKETE, KRISTÓF BENEDEK

ABSTRACT *The author describes the limitations of the freedom of expression of judges and courts in the context of the fundamental right to freedom of expression, which, due to its prominent position in a democratic constitutional state, is limited in content compared to the general one, also in view of the historical precedents in Hungary. Starting from the relevant constitutional and statutory provisions and in the light of the practice of the Venice Commission and the European Court of Human Rights, the study outlines and analyses the possibilities for individual judges and courts to express their opinions. The paper presents, through a number of pragmatic examples, the prevailing practice in Hungary on the subject under study, which works with undoubtedly one of the most stringent regulatory solutions.*

KEYWORDS *opportunity for the courts to express their views, freedom of expression of judges, the political role of the courts, the independence and impartiality of the courts, the authority of the courts*

1. Introduction

According to the practice of the Constitutional Court, the right to freedom of expression is the "mother right" of the fundamental rights of communication,[1] one of the most elementary fundamental rights, the existence of which is a precondition for the exercise of many other fundamental rights.[2] Like most

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[1] See Decision No. 30/1992. (V. 26.) of the Constitutional Court, in Decisions of the Constitutional Court (DCC) 1992, 167, 171.; confirmed by Decision No. 37/1992. (VI. 10.) of the Constitutional Court, in DCC 1992, 227, 229.

[2] Freedom of expression therefore guarantees, on the transactive side, freedom of speech; freedom of the press; freedom to disseminate information; freedom of conscience and religion; freedom of scientific, artistic, literary creation and teaching; and on the interactive side, it promotes freedom of the press (including elements related

fundamental rights, however, freedom of expression is not an absolute right, it can be limited based on a test of necessity, proportionality or real risk, and in some cases this is unavoidable. In Hungary, as in Civil Law systems, it is essentially the constitution itself that provides the framework for the limitations of fundamental rights, so in our case freedom of expression needs to be approached in this context.[3]

The aim of this paper is to present the specific right of Hungarian courts and judges to freedom of expression. In the context of the analysis, it is therefore essential to assess the restrictive provisions applicable to individual judges and the statements recently made by the central administration, which are on the increase.

I hope that this paper will serve as an attention-grabbing work, which can serve as a real reference point for understanding and qualifying individual court statements, press releases and positions.

2. The right of judges and courts to express their views

Freedom of expression, one of the most complex fundamental rights, is not without limits, and its exercise can be restricted within certain constitutional limits. The question therefore arises as to the criteria and circumstances under which the restriction of the right to freedom of expression of courts and individual judges can be justified in a given case, in terms of their special public status. Unfortunately, the limitations of this paper do not allow for a thorough description of the discrepancy between the broad exercise of fundamental rights enjoyed by citizens and the specific service status (this has been covered by many authors in the domestic legal literature,[4] and is therefore unnecessary here). As a starting point for this particular case of restriction of fundamental rights, it is therefore worth noting that the service relationship in itself is a restriction of fundamental rights, and that anyone who enters into such a relationship must be aware of the constraints that this entails and cannot enjoy the same fundamental rights in all respects in the same way as a citizen. It is important to underline that the limits of this right are significantly influenced by the development of life circumstances, and therefore the paper – bearing constitutional and statutory regulation in mind, and drawing on the practice of the European Court of Human Rights (hereinafter: ECtHR or the Court) and the

to the media and the internet); freedom of assembly; freedom of association; the right to strike; and freedom of learning. Cf. Nóra Chronowski, "A szabad véleménynyilvánításhoz való jog," in *Magyar alkotmányjog III. – Alapvető jogok,* ed. Tímea Drinóczi (Budapest-Pécs: Dialóg Campus, 2006), 295.

[3] It should be noted that in systems based on the US model, constitutions typically do not contain such limits, leaving their "setting" to judicial practice.

[4] See for instance Orsolya Szántai, "A véleménynyilvánítás szabadsága és a bírák számára tilalmazott politikai tevékenység összefüggései," https://www.mabie.hu/index.php/1537-dr-szantai-orsolya-a-velemenynyilvanitas-szabadsaga-es-a-birak-szamara-tilalmazott-politikai-tevekenyseg-osszefuggesei.

Venice Commission – presents the specificities of this fundamental right through some major cases, grouped in the following points.[5]

2.1 Expression of opinion by judges sitting in individual cases

As in the constitutions of European countries, the Hungarian Fundamental Law does not contain a specific prohibition on the right of judges to express their opinions[6], so the starting point for Hungary is Paragraph (1) of Article IX, according to which everyone has the right to freedom of expression.[7] Consequently, the specific limits applicable to courts and judges are detailed in a cardinal law,[8] in our case the relevant parts of Act CLXII of 2011 on the Legal Status and Remuneration of Judges (hereinafter: the Judges Act).

Section 43 of the Judges Act states that judges may not, outside their official capacity, *publicly* express opinions on cases that are or were pending before the court, in particular with regard to cases they have judged, i.e. any other expression of opinion, from expressions of opinion among friends or relatives to publicity in the press, other than professional consultations within the judicial organisation, is prohibited.[9] This is a very strong restriction of the fundamental right in question, but it is nevertheless justified.[10] This rule limits the fundamental right of judges to do so *"in order to uphold the authority and impartiality of the courts"*[11].

There is no doubt that the value judges place on their own or another court case can have a significant impact on society's perception of the judiciary.[12] The aim of the legislation is therefore to exclude any factor that could undermine confidence in the professionalism of the courts and in the independence and impartiality of judges. Just think of the unforeseeable consequences of allowing judges to criticise in public the decisions taken in

[5] Cf. Bernát Török, "A munkavállaló szólásszabadságának alkotmányjogi keretei," in *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban – A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*, ed. Lajos Pál (Budapest: HVG-ORAC Lap- és Könyvkiadó Kft., 2022), 23.

[6] See Point 12 of Venice Commission Opinion No. 806/2015. European Commission for Democracy Through Law (Venice Commission): Report on the Freedom of Expression of Judges. Adopted by the Venice Commission, at its 103rd Plenary Session (Venice, 19-20 June 2015) CDL-AD(2015)018

[7] Accordingly, see Article 10(1) of the European Convention on Human Rights (ECHR).

[8] See Paragraph (8) of Article 25 of the Fundamental Law.

[9] See Point 2 of the detailed reasoning to Section 28 of Act LXVII of 1997 on the Legal Status and Remuneration of Judges (hereinafter: the previous Judges Act).

[10] See European Network of Councils for the Judiciary Working Group, „Judicial Ethics Report 2009-2010 – Judicial Ethics: Principles, Values and Qualities," June 2010. 6., https://www.encj.eu/images/stories/pdf/ethics/judicialethicsdeontologiefinal.pdf.

[11] See Point 2 of Article 10 of the ECHR.

[12] See Point 2 of the detailed reasoning for Section 28 of the previous Judges Act.

particular court proceedings or the management of a particular procedure.[13] Consequently, the provisions of the Act apply to pending and completed cases as well as to cases decided by a judge other than his/her own.[14]

The limitation on the expression of a judge's opinion in an individual case is any assessment or position relating to the correctness and legality of the court's procedure or decision in a specific and identifiable court case, or to anybody involved in the case or connected to the circumstances of the case.[15] Accordingly, judges are not allowed to disclose information about the persons involved in the dispute that they have learned through their judicial activity and must keep secret any information that they have not disclosed during the trial.[16]

According to Paragraph (1) of Section 44 of the Judges Act judges are prohibited from providing information to the press, radio and television on the case before them, i.e. judges are prohibited from publicly expressing their opinion on pending court proceedings, and from commenting on or justifying court decisions in the press, radio and audiovisual programmes.[17] The only acceptable way for the judiciary to publicly criticise court decisions is through the appeal system.[18] As far as non-public criticism is concerned, a judge may, of course, in the context of his or her official capacity, express an opinion on an individual case in a professional context (deliberation, training or collegial meeting), when only judges (and court staff or professional invitees) are present, without any constraints.[19]

Having reviewed the ways in which a judge may give an opinion on a case pending before him or before another judge or on a case that has already been concluded, it is now necessary to analyse the form of information that may be given. There is a natural desire on the part of society to be properly informed about court cases, which are typically "exciting" and of great interest. In such cases, it is particularly important for the courts to inform the public so that they understand the law and inspire respect and confidence in the administration of justice.[20] Pursuant to Paragraph (2) of Section 44 of the Judges Act, the president of the court or a person authorised by him/her (press spokesperson) may provide information to the press, radio and television on cases pending or concluded before the court. In all cases, the information provided must be prompt, objective, credible and accurate in a way that the average person seeking justice can understand. In the context of judicial communication, it is also possible to present the pending case, but the elementary limitation of the

[13] Cf. Felicitász Szemán, "A bíró jogai és kötelezettségei," in *A bírák nagy kézikönyve*, ed. László Gatter (Budapest: CompLex Kiadó Jogi és Üzleti Társadalomszolgáltató Kft., 2010), 116.
[14] See Point 2 of the detailed reasoning for Section 28 of the previous Judges Act.
[15] See Point 2 of the detailed reasoning for Section 28 of the previous Judges Act.
[16] Cf. Point 17 of Venice Commission Opinion No. 806/2015.
[17] Cf. Point 19 of Venice Commission Opinion No. 806/2015.
[18] See Szemán, "A bíró jogai és kötelezettségei," 117.
[19] See Szemán, "A bíró jogai és kötelezettségei," 117; cf. Point 2 of the detailed reasoning for Section 28 of the previous Judges Act.
[20] Cf. Point 24 of Venice Commission Opinion No. 806/2015.

information is that it cannot go into the merits of the case, i.e. it cannot detail the judge's strategy of conducting the litigation, his plans, his position on the assessment of the evidence, etc., and in general it must avoid the appearance of prejudice.[21] In this context, a major paradigm shift has taken place in Hungary in recent years in terms of court information: the courts are trying to function as primary sources from which the press can effectively start and continue, thus reinforcing each other's impact in the field of information. Accordingly, the central website of the courts (www.birosag.hu), and also the social media platforms of the individual courts, provide up-to-date information on individual cases and decisions. Getting back to the quality of the information, it is possible to explain closed court cases and decisions, but "commenting" on them must be moderate and factual, so comments can only be made in a way and to the extent that facilitates understanding.

2.2 Expression of judges' opinions on organisational and operational matters

In exploring this topic, one of the most interesting issues is undoubtedly the dimension of the public expression of judges' opinions in relation to the organisation and functioning of the court, given that judges also enjoy the freedom of expression in this respect.

In contrast to making statements, the Judges Act does not impose any obstacles to the provision of information on the organisational and operational issues of the court, nor does it even mention the scope of the persons entitled to receive such information or the content of such information. Therefore, *a contrario*, it follows that any member of the court may provide information on a matter of concern to the courts, in particular

- "[on the] functioning of the judicial organisation in general and on its specific department,
- on the activities of the court apart from a specific case,
- on data of public interest or in the public domain which demonstrate the efficiency of the functioning of the judicial organisation,
- on the situation of the courts and the problems of the organisation,
- on the functioning of the judicial administration, and
- on issues and problems relating to the operation of courts in general or of a specific court"[22].

The rationale behind this is that the operation of the court, as a tax-funded body exercising public authority, subject to the legal framework, must be transparent and to a certain extent controllable. The Constitutional Court has also taken the view that, when it comes to a general question relating to the

[21] See Felicitász Szemán, "A sajtó tájékoztatásának rendszere," in *A bírák nagy kézikönyve*, ed. László Gatter (Budapest: CompLex Kiadó Jogi és Üzleti Társadalomszolgáltató Kft., 2010), 513.
[22] See ibid. 514.

functioning of the judicial organisation, the right to freedom of expression takes precedence over the interest in protecting the authority of the court.[23] This is fully in line with the ECtHR's view that it would have a "chilling effect" on freedom of expression if a judge was afraid to participate in public debates of public interest concerning the administration of justice for fear of the consequences of any critical opinion based on generalities.[24]

Of course, this does not mean that all content and forms are permissible, since the development of public discourse cannot be indifferent to the law (either), since "preserving the authority of the courts (in line with this, ensuring order and dignity in the courtroom) and guaranteeing the proper functioning of the judiciary are considered to be fundamental constitutional values of paramount importance"[25]. For this reason, certain principles and rules must be respected.

The first and most important of these principles is the principle of judicial independence, which is the basis of confidence in the entire judicial branch of power.[26] Another standard is provided in Paragraph (2) of Section 37 and Section 107 of the Judges Act. Under the former, judges are required to conduct themselves in a manner befitting their office and to refrain from any conduct that would undermine confidence in the judicial process or the authority of the court. The latter section should be interpreted in conjunction with this, according to which a judge commits a disciplinary offence, and is liable to the court of his/her service, if he/she culpably (i) breaches the obligations of his/her service [see Decision No. 21/2014. (VII. 15.) of the Constitutional Court, in DCC 2014, 582 et seq.], or if (ii) by his/her lifestyle or conduct he/she damages or endangers the prestige of the judicial profession [e.g. addictions (chemical or behavioural addiction)].

The main purpose of the legislation is undoubtedly to preserve the authority of the judiciary and to achieve and maintain confidence in the proper administration of justice (under the rule of law). In this light, legislation offers courts of service a wide range of possibilities for assessing disciplinary offences

[23] "The weight of a restrictive law to be considered against freedom of opinion is greater if it directly serves to enforce and protect another fundamental right, less if it protects such rights only implicitly, through the intermediary of an 'institution', and least if its object is merely an abstract value (e.g. public peace)." Decision No. 30/1992. (V. 26.) of the Constitutional Court, in DCC 1992, 167, 178.

[24] Cf. Paragraph 100 of the Decision in the case of *Kudeshkina v. Russia*, (29492/05) of 26 February 2009 of the ECHR. The cited decision came after a judge of the Moscow City Court stated in a newspaper and radio interview that the president of the court was putting pressure on him in a specific case. As a result, he was dismissed as a judge for *conduct incompatible with judicial authority*.

[25] See Point [33] in the Reasoning of Decision No. 3001/2022. (I. 13.) of the Constitutional Court

[26] "The institutional guarantee of the independence and autonomy of the judiciary, underpinned by law, is an unquestionable value and an important safeguard of human and civil rights and the rule of law." Decision No. 33/2012. (V. 17.) of the Constitutional Court, in DCC 2012, 99, 110.

and the conduct of judges, which is relevant to this paper. One can also agree that, given the diversity of situations, it was prudent for the legislator to draw a broad framework, which can be filled with case-by-case judgments, as loss of "confidence" and impairment of "authority" are categories that require careful examination, reflection and decision.

The Code of Ethics for Judges, which is similarly brief but contains specific situations that can be subject to substantive scrutiny, should also be mentioned. According to Paragraph (4) of Article 3, a judge shall exercise due diligence when using the World Wide Web. He/she shall only disclose information, audio and video recordings concerning his/her person and his/her relatives that do not undermine judicial dignity. The expression of his/her opinion on the Internet may not undermine the authority of the court, the dignity of the judicial profession or the rules governing the making of statements. The quoted paragraph basically sets out the general guidelines applicable to all situations, whereas Paragraphs (3) to (5) of Article 6 bring the issue under examination closer.

> (3) A judge shall not criticise the guidelines of his/her superior court before the parties, nor shall he/she express a different opinion. In his/her decisions, he/she shall refrain from insulting courts of lower instance and from undermining the authority of the judiciary. He/she shall not express any other criticism of the decisions taken by his/her colleagues. He/she may, however, evaluate and comment on these in a constructive manner in the exercise of his/her scientific, teaching or other professional activities.
>
> (4) Judges shall refrain from using language that suggests a distinction between the parties and shall refrain from expressions of sympathy or condescension.
>
> (5) Judges shall refrain from any expression concerning their colleagues which suggests misconduct or judgments serving political or other interests.

Paragraph (4) of Article 3 lays down general requirements similar to those of the statutory provisions. Paragraph (3) of Article 6, however, already precludes criticising courts of higher instance before the parties and expressing a different view. From this, however, it logically follows that if such conduct is prohibited before the parties, the judge may not communicate in the same way to the public. According to the second sentence of Paragraph 3, courts of higher instance shall also exercise "self-restraint" in their decisions in which they lecture courts of lower instance (e.g., by not being condescending, implying that the judge of lower instance is incompetent). These two requirements are supplemented by the third sentence of Paragraph 3, according to which a decision taken by another judge may not be criticised in any other way, for

example outside the proceedings.[27] This can be illustrated by a decision of the ECtHR, in which the former president of the Penitentiary Court of Naples, in the context of a judicial or prosecutorial recruitment application, which was the subject to an internal investigation, stated in response to a journalist's question that a member of the selection board had used his/her influence to favour his/her relative. The Disciplinary Board therefore issued a warning to the former President who made the statement, but who, following an appeal to the Court of Cassation, brought the case before the Court for violation of his/her freedom of expression. The Court concluded, however, that the President who gave the interview had not shown the restraint expected of him in the exercise of his fundamental right in a situation in which the authority and impartiality of the courts were likely to be called into question.[28]

A thought should be given to the freedom of expression of judicial leaders. As already discussed above, the administrative heads of the judiciary (court presidents) have broad powers of declaration and information, which, in my view, do not need further explanation. Apart from that, however, the new ethical approach published on the basis of the revision of the Code of Ethics for Judges contains very interesting and valuable ideas, which, compared to the current one, goes into much more detail about senior judges, or as the new proposal puts it: court leaders.[29] The revised Code of Ethics basically divides the expressions of judicial leaders into two parts: first, there is communication within the organisation, where they shall refrain from any behaviour, statements or actions that offend the dignity of their subordinates;[30] second, there are prohibitions on communication outside the organisation, which is composed of several parts, depending on the manner and content of the communication. Before going into these, however, we must ask a cardinal question: is it possible to separate the opinions of the court leader and the court as that of a part or that of the whole? And so we come to the first category, which seeks to highlight and regulate the dilemma raised by the question in the revised Code, namely by laying down that "*Court leaders shall refrain from presenting their own opinion as the opinion of the judges of the department* and shall not otherwise abuse their right of representation."[31] An example of this is when the presidents of the regional courts wrote a letter to the outgoing President of the National Office for the Judiciary (hereinafter: NOJ), which was made public, but without consulting the judiciary. The second category is related to the courts of service

[27] All these requirements are closely linked to the expression of the opinion of the judge in the individual case discussed in the previous point.

[28] See Paragraph 71 of the Decision in the case of *Di Giovanni v. Italy*, (51160/06) of 9 July 2013 of the ECtHR.

[29] See Decision No. 16/2022. (III. 2.) of the National Judicial Council on the Code of Ethics for Judges and its adoption (hereinafter: Code of Ethics), which has been effective since 15 July 2022. It is worth noting that the President of the Curia, in his motion dated 25 May 2022, requested the Constitutional Court to declare this decision to be unconstitutional and to quash it. (Case number: II/01285-0/2022)

[30] See Paragraph (1) of Article 9 of the Code of Ethics.

[31] See Paragraph (4) of Article 9 of the Code of Ethics. *Emphasis added by me.*

and their procedure. According to the Code of Ethics, court leaders shall refrain from expressing any opinion on cases involving the court of service until the end of the proceedings (they must exercise restraint, as a judge in an individual case), taking particular care to protect the privacy of the person concerned.[32] (For an example of this, see the case of László Ravasz, which is perfectly summarised in the application to the ECtHR.[33]) Finally, according to the third category of regulation, court leaders shall refrain from insulting the self-administration and interest representation body of the judiciary, from discriminating against its members and shall respect their legitimacy.[34] This can be the case, for example, if the court union proposes something to the court leader, who then disparages it and the union members (e.g., in the context of a court staff meeting, the organisation of a cultural programme, he/she says that the union only deals with such things of secondary importance, that there is no money for it anyway, etc.).

2.3 Judicial opinions on draft legislation

The courts, as one of the three classical and indispensable branches of power, play a crucial role in the life of the state and the rule of law. It is therefore a desirable and natural need for those who administer justice not only to be confronted with finished legislation (typically acts of Parliament), but also to be active participants and shapers in the drafting of the various laws that affect them. This is the only way to ensure that the experience of legal practitioners is properly reflected in legislation, which can pave the way for a more agile judiciary in the future, as it is possible to "prepare" them for reforms already in the legislative process.[35]

This issue is not regulated in detail in the Fundamental Law, so in the present case we have to start from the provisions of Act CXXX of 2010 on Legislation (hereinafter: Legislation Act).[36] According to Paragraph (1) of

[32] See Paragraph (5) of Article 9 of the Code of Ethics.

[33] See the request of László Ravasz, submitted to the Court, https://webcache.googleusercontent.com/search?q=cache:AJ8RW4WJ0WwJ:https://tasz.hu/files/tasz/imce/ravasz_kontra_magyarorszag_ejeb_kerelem.doc+&cd=2&hl=hu&ct=clnk&gl=hu.

[34] See Paragraph (6) of Article 9 of the Code of Ethics.

[35] Cf. "A Kúria középtávú intézményi stratégiája, különös tekintettel a joggyakorlat-elemző tevékenység fejlesztésére" (The medium-term institutional strategy of the Curia, with special regard to the development of case-law analysis) (Budapest: Semmelweis Kiadó, 2013), 40.

[36] In this context, Points 12 and 13 of Government Decision No. 1144/2010. (VII. 7.) on the Rules of Procedure of the Government stipulate that, as a general rule, proposals and draft ministerial decrees must be sent for consultation, with a deadline for the submission of comments, to the political director of the Prime Minister, the administrative state secretaries, the government commissioner and the head of the government office concerned, who may comment on the draft, and that drafts concerning the functions of the *courts* and prosecutors' offices shall be discussed with

Section 19 of the Legislation Act, where an act of Parliament expressly gives a state, local government or other body the right to comment on draft legislation affecting its legal status or functions, the drafter of the legislation must ensure that the body concerned can exercise that right. In this context, the Legislation Act does not define the parties entitled to consultation, nor the formal and substantive conditions and requirements, leaving these to another act of Parliament. Paragraph (2) of Section 19 of the Legislation Act therefore states that the drafter of the legislation shall ensure that the draft legislation and its reasoning are made available for consultation and comment, as provided for in the act on public participation in the preparation of legislation. The Act divides consultation into two named categories: first, the *general consultation*, which is always mandatory and provides for the possibility to submit comments by email via the contact details provided on the website;[37] and second, the optional direct consultation, under which the Minister responsible for preparing the legislation may establish strategic partnership agreements with relevant persons, institutions and organisations, involving them in the direct consultation.[38]

After such an introduction, opinions on draft legislation affecting the courts can be divided into two broad categories: first, the opinion of the court as an organisation, conveyed by the President of the NOJ, which is responsible for the central administration of the courts; and second, the personal opinion of individual judges.

2.3.1 Opinion of the "court" as a whole

For the purposes of Point (e) of Paragraph (1) of Section 76 of Act CLXI of 2011 on the Organisation and Administration of Courts (hereinafter: Courts' Organisation Act), the President of the NOJ, in his/her function of general central administration, obtains and summarises the opinions of the courts through the NOJ, and gives opinions on draft legislation affecting the courts, except for municipal regulations. In this connection, the President of the NOJ may also propose legislation concerning the courts to the initiator of the legislation, and participates as an invited guest in the meetings of parliamentary committees when discussing items on the agenda relating directly to legislation concerning the courts.[39]

It is essential, therefore, that the opinion of some of the actors of the judicial organisation is condensed at the NOJ, and the President of the NOJ, acting in

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the President of the *NOJ* and the Attorney General, and drafts concerning the Constitutional Court, the State Audit Office, the National Bank of Hungary, autonomous state administration bodies and autonomous regulatory bodies must also be discussed with the President of the body concerned.

[37] See Paragraph (1) of Section 7 and Sections 8 to 12 of Act CXXXI of 2010 on public participation in the preparation of legislation.

[38] See Paragraph (2) of Section 7 and Sections 13 to 15 of Act CXXXI of 2010 on public participation in the preparation of legislation.

[39] See Points (d) and (f) of Paragraph (1) of Section 76 of the Courts' Organisation Act.

his/her discretionary capacity, without any constraints, presents the position and opinion on the draft legislation. In my view, the role of the supreme judicial body[40], which ensures the unity of the application of the law by the courts, should be significantly greater than it is at present, given that the opinion of the Curia is currently just one of the opinions of the courts, although its role in the administration of justice is much more important.[41]

In connection with all this, it is also necessary to point out that, in my view, the initiation of legislation also constitutes a kind of expression of opinion, especially when, for example, the President of the NOJ puts forward a specific proposal. (Such was the case when the President of the Curia, the President of the NOJ and the Attorney General wrote to the Ministry of Justice requesting that the normal judicial order be restored as soon as possible after the end of the state of emergency imposed by the coronavirus pandemic[42].)

2.3.2 Opinions of individual judges

In my view, the freedom of expression of individual judges in relation to draft legislation is "unlimited". Individual judges have the opportunity to give their opinion on concepts and proposals that affect them and their organisation. The law does not lay down any specific prohibitions in this area, but they must nevertheless be subject to the strict requirements of their status and other criteria laid down by law when expressing their opinions.

At this point it is inevitable to briefly mention the ECtHR decision adopted in response to the series of opinions on the reforms of the Hungarian court system. In *Baka v. Hungary*, the Court established, in a ratio of 15:2, a violation of Article 10 of the ECHR. The case can be summarised as follows.

András Baka had been a judge at the ECtHR for 17 years when he was elected President of the Supreme Court for a 6-year term by Parliament in 2009. It is important to note that according to the previous legislation, the president of the predecessor of the Curia is also ex officio the president of the National Council of Justice, which before 2012 was responsible for the central administration of the courts, which means that in this capacity he had not only the right but also the duty to express his opinion on concepts, draft laws and reforms affecting the courts. He did so through a spokesperson, in open letters, in statements and in his speeches in Parliament. He challenged several laws,

[40] See the second sentence of Paragraph (1) and Paragraph (3) of Article 25 of the Fundamental Law.

[41] "The new Legislation Act no longer mentions the Supreme Court or the Curia as a participant in the legislative preparatory process or as an opinion-giver on draft legislation." See "A Kúria középtávú intézményi stratégiája," 41.

[42] "A rendes bírósági működés visszaállítását kéri a Kúria elnöke, az OBH elnöke és a legfőbb ügyész", https://jogaszvilag.hu/napi/a-rendes-birosagi-mukodes-visszaallitasat-keri-a-kuria-elnoke-az-obh-elnoke-es-a-legfobb-ugyesz/. It should also be noted that the "opinion" of a body or organisation on draft legislation etc. does not derive from freedom of expression.

including the law implementing the forced retirement of judges, where the mandatory retirement age for judges was reduced from 70 to 62 years, which the Constitutional Court later declared to be incompatible with the Fundamental Law in its Decision No. 33/2012. (VII. 17.).[43] Finally, because of his critical but not at all unprofessional opinions[44], the new rules of the Fundamental Law and related acts led to the loss of his status of Chief Justice (under the new rules, he did not have the required 5 years of judicial service, as the time spent in international courts could no longer be counted).[45]

The main question was in what capacity András Baka made his statements. In this regard, the Court accepted that he had expressed his public opinion in his official capacity and that his mandate as Chief Justice had been prematurely terminated because of his critical views.[46] The Government's arguments, however, were not well-founded in the sense that such a change was necessary to maintain the authority and impartiality of the courts,[47] as no professional arguments were put forward that András Baka was unfit for his post. This would have been particularly unfortunate because the majority who voted for the change to remove him from office had also contributed significantly to his election as President of the Supreme Court. Consequently, the ECtHR considers that the fact that András Baka, as the highest official in the Hungarian judiciary at the time, lost his position because of his expression of his opinion does not serve to enhance the independence of the judiciary.[48]

Summarising the court's decision, it can be concluded that András Baka's expression of his opinion did not go beyond strictly professional criticism, and that he was clearly involved in a dispute of public interest and concern. The Court also stressed that "[the] premature termination of the applicant's mandate undoubtedly had a 'chilling effect', i.e. it certainly discouraged not only the applicant but also other judges and presidents of courts from participating in future public debates on legislative reforms affecting the judiciary and on issues relating to judicial independence in general."[49] In short, this intervention "proved unnecessary in a democratic society".

[43] See Decision No. 33/2012. (VII. 17.) of the Constitutional Court, in DCC 2012, 99, 99.
[44] See Paragraph 171 of the Decision in the case of *Baka v. Hungary* (20261/12) of 23 June 2016 of the ECtHR.
[45] See Paragraphs 12-26 of the Decision in the case of *Baka v. Hungary* (20261/12) of 23 June 2016 of the ECtHR.
[46] See Paragraph 151 of the Decision in the case of *Baka v. Hungary* (20261/12) of 23 June 2016 of the ECtHR.
[47] See Paragraph 155 of the Decision in the case of *Baka v. Hungary* (20261/12) of 23 June 2016 of the ECtHR.
[48] See Paragraph 157 of the Decision in the case of *Baka v. Hungary* (20261/12) of 23 June 2016 of the ECtHR.
[49] See Paragraph 173 of the Decision in the case of *Baka v. Hungary* (20261/12) of 23 June 2016 of the ECtHR.

2.4 Academic, literary and artistic opinions of judges

In line with the role of the judiciary in the rule of law, individual judges are subject to very strict conflict of interest rules. For the purposes of the relevant provisions of the Judges Act, beyond discharging his/her office, a judge may only carry out academic, teaching, artistic, copyright-protected, editorial and proofreading work, in the course of which he/she may also formulate opinions, without compromising his/her independence, impartiality or the appearance thereof, or obstructing the discharge of his/her official duties.[50]

These paid activities, which are enumerated in the Act, can be carried out without infringing the independence of the judiciary, i.e. in a specific case, the theoretical chances of damaging the authority of the court and the trust in its independence and impartiality are extremely low. According to the fourth sentence of Paragraph (3) of Article 6 of the Code of Ethics for Judges, in the exercise of his/her academic, teaching or other professional activities, a judge may give constructive assessments and opinions on the decisions of his/her peers. It is necessary to stop here, because, in my opinion, to emphasise the constructive nature means restricting freedom of expression, since judges are already subject to strict rules that restrict individual opinions. It can also be taken as a basic assumption that judges, in their academic, teaching, etc. activities, do not want to give voice to opinions with destructive or disruptive intentions, but by making constructiveness exclusive, ethical rules unjustifiably exclude a significant group of opinions.[51] According to the concept of the revised Code of Ethics, judges are free to express opinions, publish, lecture, teach and perform other similar activities on law, the legal system, the administration of courts and related matters.[52] They were probably motivated by past tensions between the President of the NOJ and the National Council of the Judiciary (hereinafter: NJC), and are intended to confirm the freedom of action in this direction.

In detailing the content of the activity referred to in this point and certain aspects of the expression of opinions by judges, it can be stated that the topic is far from being simple, nevertheless there are certain rules that are helpful. The principle of political neutrality makes it clear that judges may, for example, participate in the drafting of academic or literary works or professional studies without any restrictions, but political works are an exception.[53] This includes presenting papers at conferences, publishing studies, etc., which should not have any negative consequences, provided that the authority of the court is taken into account.[54] It may be interesting to ask, however, whether this applies

[50] See Paragraph (1) of Section 40 of the Judges Act.

[51] The revised concept no longer even includes "constructive nature". See the third sentence of Paragraph (4) of Article 8 of the Code of Ethics.

[52] See Paragraph (2) of Article 4 of the Code of Ethics.

[53] Cf. Point 19 of Venice Commission Opinion No. 806/2015.

[54] See Paragraph 50 of the Decision in the case of *Wille v. Liechtenstein* (28396/95) of 28 October 1999 of the ECtHR.

to current politics, or whether it also extends to political evaluation from a historical perspective: i.e. is the judge's opinion (also) excluded, for example, in relation to political evaluation of much earlier eras?

The maintenance of the *appearance* of independence and impartiality is also a cardinal element of the current legislation, examples of which include "[a] judge may not give a lecture on the application of the law at an event organised by a political party, paint a portrait of his/her client, have his/her book published by a person whose case is pending before the judge, undertake teaching activities for a company whose court proceedings are known to the judge, etc."[55] It is clear that the scope for this type of expression of opinion is very broad, but the limitations mentioned here are not without reason. Just as each of these categories of expression, forms of expression, etc. is judged one by one, as the following summary of cases illustrates.[56]

In 2012, a judge of the Bucharest Court of Appeals published an article suggesting that the President of the Court of Cassation's former career as a prosecutor could be linked to the repression of the communist regime before the political regime change.[57] The article of the judge was the subject to an investigation, at the end of which the Disciplinary Board found the violation of Paragraph (1) of Article 18 of the Romanian Code of Ethics for Judges, since the judge's article expressed an opinion that violated the moral and professional integrity of his fellow judge. This decision was later upheld by all the forums available as legal remedies, so the infringement was entered in the judge's professional file, which hindered his career as a judge. The Court nevertheless took the view that there had been a breach of the ethical rules, which clearly stated that judges were prohibited from expressing opinions on the moral and professional integrity of their colleagues, and that the judge's action could not therefore be considered to be an expression of an opinion protected by the ECHR. The sanction served as a calculable, statutory and legitimate purpose that is necessary in a democratically functioning society. The Romanian authorities struck the right balance between the right to freedom of expression and the need to preserve the reputation of the judiciary and the judge, and the sanction imposed was not excessive in the circumstances.

2.5 Political opinion of the court

According to the third sentence of Paragraph (1) of Article 26 of the Fundamental Law, which Paragraph (1) of Section 39 of the Judges Act sets out in the same way, *judges may not be members of political parties or engage in*

[55] Szemán, "A bíró jogai és kötelezettségei", 101. Note that the wording in the quote is not adequate, since a judge has no "client".

[56] For more detail, see the Decision in the case of *Panioglu v. Romania* (33794/14) of 8 December 2020 of the ECtHR.

[57] The article was literary in nature and language, in which the writer did not use violent or obscene language.

political activity.[58] Accordingly, they must refrain from any opinions or conduct that might reveal their political beliefs to the public.[59] They should also take care not to encourage others to draw political or dubious conclusions from their opinions.[60] Given that many have written about the political role of judges from a variety of perspectives, here I will only briefly present and evaluate the court's manifestations and opinions on political issues,[61] justified by the fact that there has been a paradigm shift in the courts: courts want to be authentic and primary sources of justice on issues of justice. In this context, I will present in this section a number of cases of opinions attached to political manifestations.

2.5.1 „Treason"

It is well known that the activities and functioning of judges and courts in general, but also in specific cases in recent years, have been surrounded by lively public debates, which have become highly politicised.[62] The first case relates to a specific court case, the gist of which is summarised below.

(a) On 24 September 2020, at first instance, the Budapest Environs Regional Court acquitted Béla Kovács, a former politician of the Hungarian Jobbik (Movement for a Better Hungary) Party, of espionage, but sentenced him to 1 year 6 months' suspended imprisonment and a fine of HUF 600,000 for budget fraud.[63] According to the indictment, Béla Kovács, who was a member of the European Parliament from 2010 to 2019 and a member of Jobbik until the end of 2017, between 2012 and 2014 passed information to Russian intelligence agents on energy issues, European Parliament elections, the domestic political situation in Hungary and the expansion of the Paks nuclear power plant, among other things, for which the prosecution requested a prison sentence. Béla Kovács denied all the accusations and stated that he represented only Hungary's

[58] „Judges shall not engage in political activities, shall not participate in political meetings and events and shall refrain from political statements in public. A judge may not be a member of an organisation or have relations with an organisation or a permanent or occasional grouping whose purpose or activities are unlawful, discriminatory or offensive to the public trust in the judicial profession." See Paragraph (1) of Article 2 of the Code of Ethics for Judges.

[59] Cf. Szemán, "A bíró jogai és kötelezettségei," 95.

[60] See Point II of Position No. 1/2015. (VII. 7.) of the NJC.

[61] For English readers, "politics" is not the same as in English; it covers all aspects of social life. Here the article state that judges should not be involved in the battle of political parties, or they cannot make statements by party line.

[62] Cf. Szántai, "A véleménynyilvánítás szabadsága és a bírák számára tilalmazott politikai tevékenység összefüggései".

[63] "Regarding the accusation of budgetary fraud, which was related to the violation of the rules on the employment of interns, Béla Kovács admitted that he had made a mistake, but stressed that he had compensated the European Parliament for the damage caused." "2020 – Tizenkét hónap krónikája," 59, http://polhist.hu/wp-content/uploads/2021/01/12_honap_kronika_2020.pdf.

interests and did not help any foreign secret service. The judge acquitted him of the charge of espionage, which he justified with the following: "By expressing his opinion, he was helping Russian interests, but he was not harming the interests of the EU or Hungary."[64]

b) In the light of the previous point, Tamás Deutsch, the MEP of the incumbent political force, wrote the following about Béla Kovács in his Facebook post the same day, referring to him with a nickname: "According to the 'independent' Hungarian court, KGBéla, a former Jobbik politician, was recruited by the Russian secret service, trained as an agent working for the Russian secret service, and KGBéla met regularly and conspiratorially with the case officers of the undercover Russian secret service agent in Budapest, who was in diplomatic status. On this basis, the court acquitted KGBéla of the charge of espionage. Let's be clear: the non-final judgment of the court of first instance in this case is net treason. That's it."

c) The day after the publication of the post, on 25 September 2020, the President of the NOJ addressed an open letter to Tamás Deutsch. In the open letter, the President of the NOJ informed the public in a factual way, but without detailing the merits of the case, how Béla Kovács was condemned by the non-final judgment and how the proceedings could continue, also in the light of the appeal of the prosecutor. In the letter, the President of the NOJ also stressed that "Hungarian courts are independent, without quotation marks", adding that "independence does not mean that the judgments of the judiciary cannot be subject to criticism, but *the statement of the Honourable Member goes beyond the limits of expression*"[65]. In view of all this, the President of the NOJ in his closing statement rejected the statement questioning the independence of the court and classifying the judgment of the case as treason.[66]

In connection with this case, the question may well arise: can individual judges and court leaders also speak out in defense of justice, or can only the President of the NOJ, who is responsible for the central administration, speak out? In the light of what has been discussed so far, it can be concluded that individual judges may, in this way, in no way "defend" their profession, and what is more, court leaders (or press spokespersons) may, in principle, only express an opinion up to the point of objective and professionally informed clarification. Nevertheless, the President of the NOJ, as a leader representing

[64] „The former member of parliament was an undercover agent of the Russian intelligence service and was trained to keep cooperation hidden. For example, the Russians were interested in the EU's case against Gazprom, the South Stream issue, Ukraine's relations with the EU, the Russian visa issue and a range of other current issues. In each case, Kovács gave his opinion on these, but was not given the task of digging up any secrets about these. But he knew that his opinion was important to Russia." See ibid. 59.

[65] Emphasis added by me.

[66] See the open letter of the President of the National Office of the Judiciary to Tamás Deutsch, Member of the European Parliament. https://birosag.hu/sites/default/files/2020-09/OBH_eln%C3%B6ke_lev%C3%A9l%202020.09.25..pdf.

the views of the court as an organisation, may defend the judiciary and, where appropriate, there is no obstacle for him/her to speak out, even in public debates with political implications, and to express a strong opinion, as long as he/she does so in order to preserve the authority of the court. In my view, the more liberal nature of opinion-forming is also reinforced by the fact that the President of the NOJ does not have a judicial function, and in this sense he/she is not considered an "ordinary" judge who would pass judgments, and his/her relationship with the Parliament makes his/her reactions to certain political issues and manifestations unavoidable.

2.5.2 The question of drawing up a new constitution with simple majority in Parliament

An interesting addition to this topic is the question of whether it is possible to draw up a new constitution with simple majority in Parliament, which seems to be "purely" political. In the run-up to the 2022 parliamentary elections, it was a recurring question whether, if the united opposition succeeds in replacing the incumbent government, but not with a constitutional majority (two-thirds of all MPs in parliament, in this case), the Fundamental Law could be amended by a simple majority. Naturally, a number of renowned experts took the floor on the subject, but there is a perception that the two divergent views led to parallel positions.

The President of the Constitutional Court was the first to comment on this political discourse, from the point of view of the functioning of the body. The President of the Constitutional Court stressed that the growing political ideas aimed at disrupting the functioning of one of the basic institutions of the rule of law, which has been unquestionable since the political changes in 1989-90, and, ad absurdum, at dissolving the Constitutional Court, are unacceptable. The President of the Constitutional Court also stressed that "such manifestations are direct and serious attacks on the rule of law and democracy, and as such are totally unacceptable in a democratic state governed by the rule of law".[67] Reacting to the open letter of the President of the Constitutional Court, the President of the NOJ stated in a statement that "any change to the Fundamental Law and other norms of the hierarchy of legal sources can only be made in full compliance with the legislation in force"[68].

All this raises the question: is there any justification for this kind of manifestation, given that it will be in line with the position of a political actor, in this case, the governing powers (regardless of whether the author of this

[67] Open letter of Tamás Sulyok, President of the Constitutional Court, addressed to President János Áder, Prime Minister Viktor Orbán and Speaker of Parliament László Kövér on 14 December 2021, https://alkotmanybirosag.hu/uploads/2021/12/nyilt_level_st.pdf.

[68] "Az Országos Bírósági Hivatal közleménye," https://birosag.hu/hirek/kategoria/birosagokrol/az-orszagos-birosagi-hivatal-kozlemenye.

paper shares this view), and thus directly or indirectly orienting people in one direction or another. However, based on an extended interpretation of the ECtHR's case-law, these opinions, while responding to "purely" political concerns, are permissible because they relate to constitutional issues, which by their very nature have political implications.[69]

The political element as such does not therefore limit the court's freedom of expression, provided that it fits within the criteria discussed above and, in particular, does not relate to the merits of a specific case and does not in any way undermine the court's authority.

2.6 On the conduct of European judges

At this point, it is inevitable to highlight the relevant findings of the European Network of Councils for the Judiciary (hereinafter: ENCJ). Since June 2010, the report *Judicial Ethics – Principles, Values and Qualities* has served as a guideline for European judges to reinforce common principles and values and to align their behavior with them as closely as possible.[70]

The report deals specifically with issues of conduct and expression in the public and private life of judges, taking into account the limits of their office, but also the balance between their rights as citizens (outside their duties).[71] The report states that a judge „[h]e [or she] is entitled to complete freedom of opinion but must be measured in expressing his opinions, even in countries in which a judge is allowed to be a member of a political organization" but at the same time "[t]his freedom of opinion cannot be manifested in the exercise of his [or her] judicial duties".[72]

The ENCJ working group contrasts the public and private lives of judges, with a separate assessment of the manifestations associated with each. It is quite clear that the benchmark for European judges is the requirement for restraint, but it is also clear that the report emphasises the educational and explanatory function of a judge in the exercise of his or her freedom of expression.[73]

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[69] Cf. Paragraph 67 of the Decision in the case of *Wille v. Liechtenstein* (28396/95) of 28 October 1999 of the ECtHR.

[70] Cf. Jan Jaap Heldens, Claire Houg, and Sebastiaan van de Kant, "Freedom of speech of the judge. When does a judge speak on behalf of his office and when as his own private person? (Can such a distinction even be made?)," 9. https://www.ejtn.eu/PageFiles/20509/Themis%20Paper%20Judicial%20Ethics,%20The%20Netherlands.pdf.

[71] ENCJ Working Group: "Judicial Ethics Report 2009-2010 – Judicial Ethics: Principles, Values and Qualities," June 2010. 5. https://www.encj.eu/images/stories/pdf/ethics/judicialethicsdeontologiefinal.pdf.

[72] In countries where we can talk about the political involvement of judges, national regulations may of course restrict the freedom of expression of judges concerning the requirements of independence and impartiality. See ibid. 5., 12.

[73] This is because a judge is ideally placed to interpret and explain the law he or she applies, thereby reinforcing the legal awareness and support for the law. See ibid. 6.

In public life, judges, like other citizens, have the right to express political opinions in such a way that the individual can have full confidence in the administration of justice without any concern for the judge's opinion. Equal restraint is required in relation to the media, as a judge must not be seen to be biased by reference to the expression of an opinion. The report also warns judges to be wary of criticism and attacks. The judge's discretion – although it must be restrained – must not, however, be restricted in cases where democracy or certain fundamental elements of a democracy with its values (e.g., the rule of law, legal certainty) or certain fundamental freedoms are at stake, in which case the judge may be allowed to give a kind of "extra opinion" compared with the "usual".[74]

In private life, in the performance of his duties, the judge may not abuse his status or assert it against third parties, nor may he exert pressure on him or give the impression of doing so. The report recognises that „[l]ike any person, a judge has the right to his [or her] private life", and that the requirement of modesty should not be an obstacle to this, but it goes on to state, in a terse and unspecific manner, that a judge has the right to lead a normal social life, and "[i]t is enough if he takes some common sense precautions to avoid undermining the dignity of his [or her] office or his ability to exercise it.[75]

In addition to the parts described in the report, the Bangalore Principles of Judicial Conduct, the ENCJ London Declaration on Judicial Ethics, the Resolution on Judicial Ethics of the European Court of Human Rights, or the European Convention on Human Rights in general, which also contain many useful ideas on the subject, may also be mentioned.

3. Summary

Opinion 3 of the Consultative Council of European Judges states that "[j]udges should not be isolated from the society in which they live, since the judicial system can only function properly if judges are in touch with reality. Moreover, as citizens, judges enjoy the fundamental rights and freedoms protected, in particular, by the European Convention on Human Rights (freedom of opinion, religious freedom, etc). [...] However, such activities may jeopardise their impartiality or sometimes even their independence. A reasonable balance therefore needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties."[76]

[74] It should be noted that the NJC is of particular importance in this area, as it gives its opinion on all major issues affecting the judiciary, such as the state of the rule of law or the President of the Curia, but also evaluates pending cases. For these, see the relevant documents of the NJC, such as the minutes of the meeting 2020.OBT.XI.57/24.
[75] See ibid. 6.
[76] See Points 27 and 28 of Opinion 3 of the Consultative Council of European Judges. Accessed on 17 June 2022, https://rm.coe.int/168070098d.

As is clear from the text of the opinion, certain fundamental rights, in particular the right to freedom of expression, are an integral part of the judicial system and play a crucial role in the life of the state. The study has therefore reviewed in detail the issue of expression of opinion surrounding Hungarian judges and courts, which has resulted in the following summary findings.

a) In order to preserve the authority and impartiality of the courts, *the judge who adjudicates an individual case* is in fact barred from expressing his or her opinion "outwardly", towards society, but may communicate "inwardly", towards the members of the court organisation, openly and without any constraints. Otherwise, information on a specific case is provided by the persons authorised by law (president of the court, press secretary). The question is whether this is the right solution. If yes, then how should we improve the explanation of case law, because in the age of the internet, "everyone" understands the law and judges immediately on the basis of their subjective sense of justice. But is it possible to do anything about it? Is the communication from the press secretary and the president of the court enough? We must recognise that time and technology have moved beyond this decades-old regulation. So this alone could “destroy” the authority of the whole judiciary without the courts themselves being able to do anything (e.g. explain the judgement on their own website etc.).

b) In matters of judicial organisation and operation, there are no very strict restrictions on the expression of opinions, and therefore judges are free to express their opinions on almost all issues and topics related to the third branch of power, in a manner appropriate to their status. The question is whether this is the right practice. Perhaps so, but this may give rise to the following questions. When a judge criticises publicly on administrative issues, how does this resonate with the public? Especially politically. Wouldn’t it be better to deal with such criticisms in the internal public sphere? In this case, too, the judge is actually "criticising himself/herself", because he/she is criticising his/her own organisation, its administration and management, and thus can even exert a destructive effect.

c) Opinions on draft legislation may be interpreted in two broad categories: first, the opinion of the judicial organisation as a whole, which may consist of several judicial opinions, and which are formulated in their final form by the President of the NOJ; second, the opinion of individual judges, which are formulated by each judge himself/herself and without any special constraints.

d) In expressing their academic, literary and artistic opinions, judges shall pay particular attention to the requirements of independence and impartiality and to the authority of the court. In this respect, it may be recalled that there is in principle no framework that precisely sets out the limits to such expressions of opinion, but it can be stated beyond doubt that judges must refrain from any politically motivated activity, as set out above. It is difficult because anything can be political: a professional statement, a work of art, etc., so you cannot predict it, because the political nature of it will depend on political assessments.

e) Finally, with regard to the court's opinions on political issues, the courts’ determination to shape public debates on judicial matters from a professional

perspective, which I believe can contribute to the high(er) quality of political-social discourse, is to be welcomed.

4. Further questions and conclusions

The paper mixes the right of judges to express their opinions with the public's opinion of the courts. These are two completely different things, not to be confused. Moreover, there is also the issue of political opinions, which must be clearly distinguished from each other here—if the paper is to take the step of examining the issue of expression of opinion in detail—as follows:

a) the extent to which a judge may invoke his/her basic rights by reason of his/her service relationship,
b) the basis on which society expresses its opinion on the administration of justice and whether there are limits to this,
c) how the latter should be handled (what the court should do to explain the judgments in a clear way),
d) what about political opinions, how to deal with them, etc.

a) The starting point for the exercise of fundamental rights by judges, as in the case of non-judges, is always the provisions of the Fundamental Law. Where applicable, this zero point is the general freedom of expression enshrined in Paragraph (1) of Article IX of the Fundamental Law. Accordingly, any exercise of fundamental rights by a judge that arises from it is subject to a special filter, which is essentially contained in the cardinal rule. This screening mechanism is, however, linked to the provisions of the Fundamental Law, i.e. it must meet the test of necessity, proportionality and real risk. Therefore, it is not possible to give a fully adequate answer to the question posed, since the specific fundamental right(s) must always be weighed against the interests and values to be protected, such as *the authority of the courts, the preservation of judicial independence and impartiality, the maintenance and enhancement of confidence in the judiciary, etc.* In principle, therefore, judges can exercise their fundamental rights in a wide range of ways, but the framework set out above is reflected in both the transactive and interactive sides of judicial expression: nevertheless, the diversity of life situations means that it is not possible to draw up an exhaustive catalogue of the exercise of fundamental rights of judges.[77]

b) The expression of opinions in society can be described as impulsive without exaggeration, especially in the age of the Internet, where there is no need for personal "stand", but where opinions, in many cases without any

[77] It happened that a judge expressed his opinion about the judicial procedure, his colleagues and the judiciary in general in his own case, in which he was the plaintiff, as a consequence of which the court of service dismissed him, and later the Constitutional Court annulled the dismissal decisions for violation of Paragraph (1) of Article XXVIII of the Fundamental Law. See Decision No. 21/2014. (VII. 15.) of the Constitutional Court, DCC 2014, 582 et seq.

professionalism, can be expressed without limit and almost without consequences. On social media platforms, however, the filtering mechanisms that ensure factuality and quality in the traditional press are not, or barely, in place. The web plays a crucial role in information and evaluation because of its speed, size, scope and accessibility, so it is not surprising that it is becoming increasingly important, if not the most important, in building, shaping and influencing public opinion. As a result, society often expresses its opinions based on what it hears first or most often, what is most accessible to the masses and, importantly, what they can identify with. It is not surprising that the vast majority of news consumers will not read the often very complicated and lengthy court decisions etc., but that is not even expected. This is where the communication system of the judiciary really plays a key role, as it can provide people with professional information in a lighter form, stressing that a lot depends on the relationship between the courts and the press, and the extent to which they involve and assist the work of the press.

With regard to the limits of opinions on justice, it is necessary to look at the practice of public actors. It goes without saying that the determination of whether a person is a public figure is always a matter of individual discretion,[78] but judges, as public figures exercising public powers (officials[79]), are considered public figures, and sometimes even prominent public figures, in the context of their judicial activity,[80] i.e. they are subject to public criticism, along with the courts, and, moreover, they are subject to an obligation of greater tolerance because of this capacity. But this does not mean that they have to tolerate all opinions. According to the practice of the Constitutional Court, "[the] freedom of expression *no longer provides protection against self-serving communications, outside the scope of public debate, such as those relating to private or family life, which are intended to humiliate, use abusive or insulting language or cause other damage to rights.* Nor does it defend an opinion expressed in a public debate if the views expressed therein *violate the boundless core of human dignity*, and thus amount to a manifest and serious denigration of human status".[81] As a result, a court or judge is obliged to tolerate criticism of their functioning, which enjoys broader constitutional protection in the case of value judgments and narrower constitutional protection in the case of factual findings.[82]

[78] See Decision No. 3030/2019. (II. 13.) of the Constitutional Court, ABH 2019, Volume Two, 151, 156.

[79] Cf. Decision No. 36/1994. (VI. 24.) of the Constitutional Court, DCC 1994, 219, 219. et seq.

[80] For example, the judges of the Courts of Appeal and the Curia are considered to be prominent public figures. See Paragraph (1) and Point (d) of Paragraph (2) of Article 4 of Act LIII of 2017 on the Prevention and Combating of Money Laundering and Terrorist Financing.

[81] Decision No. 13/2014. (V. 18.) of the Constitutional Court, DCC 2014, 286, 302.

[82] For example, a judge, as a public figure, has the possibility to defend his/her personality rights in a civil action.

c) Well-functioning democratic societies presuppose well-informed citizens (from reliable sources), reflecting a wide range of interests and equal participation in critical debates. Accordingly, in free and democratic societies, the function of the media is to create a pluralistic public sphere and thereby contribute to the building of citizens' opinions and will. This publicity must take place without influencing the content or creating a lasting field of tension. Opinions and debates, which are often politicised, are voiced, expressed and clash on all kinds of platforms, but especially on the web. Thus, the criticism of a judicial judgment can immediately provoke opposing opinions and very different reactions - anger and hatred, praise and criticism, etc. - and the different opinions reinforce and weaken each other, often in an inappropriate style. There can be many reasons for this, ranging from political orientation to lack of knowledge and prejudice.[83] It is quite obvious that the courts cannot and do not have the task of resolving all the problems raised above, but they can try to fill the knowledge gap. In my opinion, it can greatly contribute to this if the judge does not qualify and explain his own judgement but explains the reasons for his decisions in detail. It would be appropriate to prepare brief court law reports, whether in audiovisual or other forms, as the commentary, evaluation and (mis)interpretation of court judgments on secondary, tertiary, etc. platforms "do not require" the justification, precise and factual knowledge of the judgments. Prompt presentation is extremely important in this context, as the public "judges" before the thorough written reasons are given in some cases (especially more complex ones), i.e. the judicial reasoning may appear to be more of an explanation than the "final product" of a well-founded decision.[84]

d) Political or politically charged opinions evaluating the administration of justice appear on several levels: direct and indirect. Indirectly, there is no constitutional or other legal provision prohibiting Parliament from holding critical debates on the courts and the judiciary. Accordingly, it cannot be directly ruled out that individual members of parliament or party politicians may criticise or disapprove of the functioning of the administration of justice outside the parliamentary framework, e.g. in the form of press statements, announcements, etc. What is more, the public (the masses) are also allowed to express any disapproval of the justice system.

It would be foolish to assume that lawmaking is isolated from politics and therefore not open to criticism, but some forms of expression diminish the legitimacy and authority of these courts. Bearing in mind that, in the context of the judicial service, even if a judge is a public figure, he cannot defend himself in public in the same way as a politician who is a public figure. For the purposes of Paragraph (1) of Section 26 of the Fundamental Law, judges are independent, subject only to the law, and cannot be instructed in their judgement, i.e. any influence on the judiciary, in particular partisan pressure, is prohibited by the Fundamental Law. Consequently, in the absence of legal regulations, it is necessary to exercise restraint and avoid open political debate

[83] See József Petrétei, *Anyagok a bíráskodásról* (*Typescript*) (Pécs: 2020), 7.
[84] Cf. the same, 6.

and public political conflict over judicial decisions, as this clearly undermines public confidence in the courts and justice, and through criticism of the functioning of this branch of government, the legitimacy of the entire system of power may be called into question.[85] In this respect, the dissenting opinions and objective clarifications of those who represent the judiciary (typically: the President of the NOJ), who defend the courts, are absolutely appropriate.

[85] Cf. the same, 9.

Biases in the Criminal Justice System with Reference to the Practice of Compulsory Treatment of Mentally Ill Offenders*

GULA, KRISZTINA PETRA

ABSTRACT *One of the least researched areas of the economic analysis of law today is Criminal law and Criminal justice. A contemporary line of thinking and examination is the behavioural economic approach that reflects on various mental distortions (i.e. biases) affecting the decision-making and situation-assessment of individuals. The focus of my essay is the intersection of Criminal law and behavioural economics in the sphere of biases influencing the participants in criminal proceedings. The measure of compulsory treatment in the cases of mentally ill offenders serves as an illustration: the application of the sanction, as well as the review procedure aimed at deciding whether an already applied sanction could be ceased and the treated person should be released. Outlining this measure is justified by the fact that the potential considerations and evaluations of mentally ill offenders cannot be taken into account as those of sane perpetrators (who are in no state of impairment of the mind). This places an even greater responsibility on the rest of the procedural participants – especially judges and experts – to deliver well-reasoned decisions by eliminating the eventual negative consequences of their generally less reflected mental distortions that could pose further detriments to the mentally ill. As a closure, I am referring to certain ways and means that can potentially reduce the role of biases in the criminal proceedings and thus contribute to fairer jurisdiction for the mentally ill.*

KEYWORDS *heuristics, similarity and availability bias, hindsight bias, omission bias, overconfidence bias, status quo bias*

1. Introduction

One of the most debated areas within the scope of the economic analysis of law even today is Criminal law and Criminal justice. It is worth mentioning though that one of the starting points of the field of science was exactly made by the works of Cesare Beccaria in the 18th century and its development in the 20th century was facilitated by the law enforcement related research of Gary Becker. Within the economic analysis of law, the original idea of neoclassical economy on complete rationality was challenged by the behavioural economic approach, which essentially reflected on the limitations of rationality, self-interest, and willpower in the situation-assessment and decision-making of the

offenders, victims, and the rest of the participants in the criminal justice system. The concept of bounded rationality was introduced by Herbert Simon in the 1950s, who emphasised that decision-makers cannot step over the boundaries of their calculation, logic, and remembrance. His related significant suggestion was that such discrepancies from the neoclassical economic model can be predicted and by exploring them it becomes possible to draw conclusions for the shaping of the (criminal) justice system.[1] Another cornerstone in the development of the field was the work of Daniel Kahneman, a Nobel Prize winning economist who described two basic levels and ways of the functioning of the human mind in *Thinking, Fast and Slow*. The first level is automatic, and it is where simplifying techniques or *heuristics* are functioning in terms of our everyday choices. They make our decision-making easier, however, they can just as easily result in mental distortions, also known as *biases*. Therefore, there is a need for a second, conscious level that exercises control over the first, and counterbalances the negative effects of biases.[2] As a simple illustration: on the automatic level a judge may have an initial conviction at the beginning of the procedure about whether the defendant is guilty or not, yet, this conviction can change substantially in the course of the evaluation of the pieces of evidence on the second level throughout the proceeding.

For the purposes of further analysis I consider it advisable to make a difference between the mental distortions affecting the offenders and those influencing the rest of the procedural participants – the ones in decision-making position – since the legal system can reflect on their empirically founded biases in different ways and to a different extent. While it is possible to deal with the first category by shaping the system of sanctions in general, and within the framework of sanctioning the perpetrator specifically, the latter category generally remains unrecognised in the legal practice, and there are absolutely no or only vastly limited chances for counterbalancing it through sanctioning. In the current examination, I will introduce the second, less researched group of biases, and I will demonstrate the threats and the negative effects it represents through the practice of the compulsory treatment of mentally ill offenders. On the one hand, this is justified by the fact that in the cases of the mentally ill, no such situation-evaluation and consideration can occur as in the cases of sane perpetrators, therefore, such potential attitudes can and shall be excluded from the scope of analysis. On the other hand, in order to facilitate procedural fairness and unbiased jurisdiction for vulnerable individuals, it is required to put even greater emphasis on reducing the mental distortions influencing the rest of procedural participants. These could otherwise have an additional negative

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[1] Bálint Esse, „Gondolkodásegyszerűsítő stratégiák hatékonysága," *Vezetéstudomány* 42, special no. 1 (2011): 80.

[2] Daniel Kahneman, *Gyors és lassú gondolkodás* (Budapest: HVG Könyvek, 2013), 48–50.

effect on the outcome of the process and lead to the infringements of the rights and interests of the mentally ill. Further on, I will look through the most significant biases that may play a role in the decisions made by the experts and the judges, besides referring to some of the potential means for their reduction.

2. Experts' Biases

In terms of the biases affecting experts when examining mentally ill offenders, the analysis is structured according to the logic of the application of compulsory treatment and the review of the already applied treatment in the Forensic Psychiatric and Mental Institution (hereinafter: Institution), taking place every 6 months, aimed at deciding whether the given individual could be released.[3] The conditions of the application which require the involvement of experts are that the offender cannot be prosecuted due to his mental condition and there is reason to believe that he will commit a similar act (risk of reoffending).[4] As for the latter requisite, the Regional Court of Appeal of Pécs declared that it is not sufficient if the risk is merely abstract and theoretical, instead, it needs to be concrete and properly founded.[5] It is worth mentioning at this point that these questions are ambiguous in nature as the judge has the opportunity to diverge from the expert opinion, it is even possible for the judicial decision to contradict the expert opinion, however, the actual competency and background knowledge that would be necessary for this are missing on most of the occasions. The lack of specific psychological and psychiatric knowledge on the side of the judges compels them to become excessively risk-averse in practice and to accept the expert opinions even in cases of reasonable doubt, which contributes to the spread of the phenomenon of *experts' jurisdiction*.

One of the most common mental distortions influencing both experts and judges is the availability bias, which I will henceforth refer to as *similarity and availability bias* for greater precision.[6] On the one hand, it may occur through the exaggeration of the risk of reoffending due to the fact that an expert can recall this possibility fast or faster than the rest.[7] On the other hand, related to the distortion caused by reconstruction processes, it happens regularly that the given expert relies solely on the pieces of experience gained and the opinions delivered in previous cases. Separate reference shall be made to the review

[3] Act CCXL of 2013, Section 69/B, para. (1)
[4] Act C of 2012, Section 78, para. (1)
[5] *Nagykommentár a Büntető Törvénykönyvről szóló 2012. évi C. törvényhez*, ed. Krisztina Karsai (Budapest: Wolters Kluwer Hungary, 2019), 208. *and* judicial decision no. PIT-H-BJ-2013-33.
[6] Daniel Read and Yael Grushka-Cockayne, "The Similarity Heuristic," *Journal of Behavioral Decision Making* 24, no. 1 (2007): 23–24.
[7] Gábor Kovács, "Az ítéletalkotás csapdái," in *Sic itur ad astra Ünnepi kötet a 70 éves Blaskó Béla tiszteletére*, eds. Sándor Madai, Anikó Pallagi, and Péter Polt (Budapest: Ludovika Egyetemi Kiadó, 2020), 288.

procedure in which it is examined whether the treated person has recovered, the risk of reoffending naturally needs to be taken into account, as well as whether the further treatment can be deemed unnecessary from the perspective of the protection of society.[8] Experts are under significant pressure throughout the review procedure not to let potentially still dangerous individuals get released back to the society. The eventual commission of another criminal offence by the released person – through the excessively negative reaction of the media and the public to such cases and the loss of citizens' trust in the criminal justice system – ignites further risk-aversion on the side of the experts and apart from really rare exceptions, they stand for the exclusion of the possibility of release even when substantial arguments and factors are supporting it. When a released individual commits another offence, the *hindsight bias*[9] can distort the evaluation of experts and judges as well. It refers to the tendency to overestimate the probability with which they could have predicted the outcome of an event, since the occurrence of the result reinforces their assumptions.[10]

Although the protection of society undoubtedly needs to be a prominent principle, the majority of expert opinions in the review procedures are prepared with minimal differences in content, occasionally lacking in a deeper analysis of the factors of the case, which hinders individualisation. The literature indicates the phenomenon when the general norm becomes *not* to act as *omission bias*. As a result, the individual generally chooses not to differ from the norm even when there are reasonable arguments and factors for acting otherwise. The line of thinking on personal and professional responsibility in these cases is that if the person acts in accordance with the norm and it does not lead to the awaited result, the negative perception caused by this would still be lesser than in the case when he/she chooses to differ from the norm and a negative outcome occurs as a result of the "disobedience".[11] This is supplemented by the *overconfidence bias*, the extensive, often unjustified belief in the righteousness of one's opinion, as well as by the *status quo bias*, the insistence on one's reference point and on the current state of affairs, which – combined with the strikingly low number of releases – further decrease the chance for giving an opinion distinct from the general tendency and/or the previous opinions the expert gave in the actual case.

3. Judges' Biases

Regarding the analysis of biases affecting the judges, similar logic is used as for the experts: first, the decision on the application of the sanction is examined, then I am referring to the periodic review procedure and the possible release of the offender. Judges are also widely influenced by the *similarity and*

[8] Opinion of the Criminal Division of the Supreme Court no. 30/2007.
[9] Zita Paprika Zoltayné, *Döntéselmélet* (Budapest: Alinea Kiadó, 2005), 91.
[10] Angéla Gábri, "Kognitív tudományok az ítélkezési tevékenység szolgálatában," *Pro Futuro* 10, no. 1 (2020): 126.
[11] Kovács, "Az ítéletalkotás csapdái," 289.

availability bias, which is indicated by the exclusive and tendentious insistence on the decisions made in previous, analogous cases. The obvious intent of the legislator to shorten the criminal procedures and its manifestation in the criminal justice system supplemented by the excessive caseload hinders the individualisation further. When it comes to the judges, the effect of the similarity and availability bias is added to that of the *expert bias* and the *anchoring effect*[12]. The previous one can be described as the unconditional acceptance of authority, and in extreme cases both cognitive illusions may lead to the given judge disregarding his/her own professional conviction, the acceptance of questionable decisions and evaluations and thus the institutionalisation and internalisation of even inaccurate practices of higher judicial forums.

The application of the previously relatively determined duration of compulsory treatment in the cases of juvenile offenders serves as an example for such improperly acknowledged legal practices. While the duration of the sanction is currently undetermined[13] – as the treatment and the related deprivation of liberty within the framework of the criminal justice system can last as long as it is deemed necessary, without foreseeability –, there was a temporary change in the regulation between 2010 and 2013, which – in my view – represented a progressive approach. According to this, the measure could not exceed the maximum term determined by the Criminal Code (then in force) for the offence and 20 years in case of a crime punishable with whole life imprisonment.[14] Within this time limit that served as a legal guarantee the duration was still determined by the necessity criteria examined by experts in the review procedure. Besides, the civil psychiatric system was to take care of those few offenders whose treatment proved to be necessary after the maximum term as well, so there was no chance and risk of releasing potentially still dangerous individuals. Concerning juvenile offenders, the key question was whether the maximum term shall be determined with regards to the special, less severe rules of the Criminal Code (then in force) for their sanctioning, or the provision on the maximum term of the measure shall be applied and interpreted in the same way as in the cases of adult perpetrators, without the opportunity for taking into account the more favourable rules. The Supreme Court remarkably yet arguably stated that no difference can be made between adult and juvenile offenders[15], and when coming to this conclusion it relied on a strictly textual analysis of the regulation. This represents the effect of *framing*[16] in the decision-making process, which basically indicates that the way the options are presented substantially determines their evaluation, as well as that of the underlying case, and the level of risk-aversion of the participants. In this case,

[12] Kahneman, *Gyors és lassú gondolkodás*, 198–199. *and* Gábri, "Kognitív tudományok," 122.
[13] Act C of 2012, Section 78, para. (2).
[14] Act LXXX of 2009, Section 25.
[15] EBH2011. 2303. (BH2012. 2.)
[16] Gábri, "Kognitív tudományok," 124.

the judicial body did not consider the contextual and teleological perspective properly, not to mention the basic principles of Criminal law, including the fact that a mentally ill individual cannot suffer more severe consequences because of his act than a sane perpetrator who can be held responsible under Criminal law. When it comes to a punishable juvenile, the special, more favourable provisions would be applied, which means that these rules must pertain to a mentally ill offender as well. Also, when an issue arises in the legal practice that cannot be decided unequivocally, that solution must be chosen which results in a less disadvantageous outcome for the defendant.

Similarly to experts, judges are also regularly influenced by the *overconfidence bias*. There have been a number of research projects to empirically verify its effect, and one remarkable example is the work of Badeau and Radelet in the United States who examined 350 murder cases in which a judicial error occurred. They got to the conclusion that only in 5 cases did the judicial body realise the mistake before the final verdict while in 139 cases death penalty was imposed – from which 23 was actually executed –, in another 139 cases the defendant was sentenced to life imprisonment, and for 67 individuals imprisonment of 25 years was imposed.[17] In the procedures targeting mentally ill offenders specifically, the distortion of overconfidence seems to be reduced by conducting the review procedure, still, its actual effectiveness in this regard is questioned by the more and more automatic nature of the process both on the side of judges and experts.

The other common mental distortion affecting judges and experts as well is the *hindsight bias*. Generally, it may play a role in the sphere of information that are or have become irrelevant and excluded pieces of evidence, for instance, a confession made under force, the result gained through an unauthorised search of a suspect's home or an unlawful gathering of secret intelligence.[18] Although such evidence should not be taken into account in the procedure, there have been various researches to demonstrate that judges are in fact incapable of ignoring them completely throughout their decision-making, and they can have a substantial influence on the outcome of the proceeding. This bias is most commonly tested in practice in a way that the participants of the experiment are presented with different potential outcomes of an event, the leaders of the research priorly outline one which seems to have a greater probability, and the subjects then need to make their own suggestions for the outcome. An example of this was the analysis carried out by Guthrie, Rachlinski, and Wistrich in the Netherlands with the involvement of 167 judges.[19] The subjects got divided into 3 groups, the same fictive case and 3 alternatives for the decision of the higher court were introduced to all of them. The options were repeal, ordering a new procedure to be conducted by the court of first instance, and approval. However, the researchers made a different

[17] Zoltayné, *Döntéselmélet*, 191.
[18] Gábri, "Kognitív tudományok," 129–130.
[19] Chris Guthrie, Jeffrey Rachlinski, and Andrew Wistrich, "Inside the Judicial Mind," *Cornell Law Faculty Publications* 86, no. 4 (2001): 799., 801–803.

prediction in each group in terms of the potential decision of the higher court while also informing the participants that regardless of the prediction made by them, each result may occur with equal probability. The presumption of the researchers was that their implication shall not necessarily affect the decision of the participants. Now, let us see the conclusions they have come to.

- Among those who were informed of the approval of the case, 81.5% stated that they would have made the same decision.
- Among those who were told that the higher court repealed the verdict, only approximately 27.8% declared that they would still have approved it.
- Finally, among those who received information that the court of first instance had to conduct a new procedure 40.4% would have approved the verdict.[20]

Thus, it was established that the judges attributed a lot greater probability to the outcome which was predicted or implied by the examiners. In short, their knowledge of the Higher Court's decision significantly influenced how they evaluated the underlying case and evidence. Hindsight bias in the review procedures targeting the mentally ill – as it could be seen in the case of experts as well – is connected to the release of the treated individual and becomes especially characteristic on those occasions when another offence is committed after the release. The pressure on judges and experts in this regard further decreases the chance for supporting the release and increases the automatic nature of the process.

4. Practical Considerations for the Review Procedure of Compulsory Treatment

In connection with the review procedure it is worth outlining certain issues and considerations to improve the legal practice. The Act on the Execution of Punishments, Measures, Certain Coercive Measures and Confinement for Petty Offences declares that the prosecutor, the attorney, and – if his/her state makes it possible and there is a capacity to exercise his/her rights – the treated person shall be heard. Nonetheless, the decision whether the treated individual is in a suitable state for appearing in front of the court depends entirely on the discretion of the director of the Institution.[21] In this regard there is no system of criteria or control mechanism, therefore, the risk of arbitrariness occurs. It is undeniable that the bringing of the treated person to court and the criminal procedure itself represent an increased psychological pressure on the individual as the required security measures are differing excessively from the open departments and the comparatively free movement within the Institution. In addition, they create additional costs for law enforcement. To eliminate these unfavourable factors changing the procedures' venue to the Institution shall be considered, which would make it possible for the judge to hear the patients in

[20] Gábri, "Kognitív tudományok," 126–128.
[21] Act CCXL of 2013, Section 69/B, para. (3).

their usual, less stressful environment. This element of gaining a more realistic picture of the offender's current state is also relevant because the judge may not have all the relevant information about the rest of the factors and circumstances of the case to deliver a well-founded decision about the question of release. One of the most common reasons for this is that the forensic medical expert who provided an opinion and the physician of the treated person are generally not present at the hearing, and in the lack of a related requirement the judge would have to adjourn the trial if he/she wanted to ask questions from them in the process. I note that according to the pertaining research of the Center for the Rights of the Mentally Ill in which approximately 60 cases were examined, there was no instance of adjournment.[22] To avoid the merely formal nature of the procedure and to enable the judge to get informed about all the relevant factors of the case – even without specific psychological and psychiatric expertise –, it is advisable to integrate the requisite of the participation of the above mentioned professionals in the hearing into the legal regulation.

Another issue leading to a lack of balance and sufficient information among the procedural participants is that expert opinions are forwarded automatically only to the court but not to the treated person and his/her attorney, therefore, they may not get to know their content before the trial. However, receiving the opinions in advance would be of essential importance in order to be prepared for the procedure and acquire the potential (counter)evidences, since without this key legal guarantee and requirement, the equity of arms cannot prevail. This was outlined by the European Court of Human Rights as well in *Nikolova v. Bulgaria* along with the fact that the procedure targeting the lawfulness of the deprivation of liberty must always be contradictory in nature. The Court emphasised that the legal representative needs to be provided with access to the files of the investigation and all the other relevant data to be able to debate the lawfulness of the deprivation of liberty effectively.[23] In the cases of the mentally ill such information is mostly contained by the expert opinions, so it can be inferred that they shall be forwarded to the treated person and the attorney in due course. Besides, in terms of the right to *effective* defence the Court's approach is worth mentioning as it reflects on the difference between the official appointment of the attorney and effective legal counselling. In other words, the violation of the Convention may take place even in the case of an official appointment when the involvement of the attorney in the procedure remains purely formal, and it does not contribute substantially to the protection of the rights and the assertion of the interests of the treated person.[24]

[22] Központ a Mentális Sérültek Jogaiért Alapítvány (MDAC), *Megvont szabadság. Emberi jogi jogsértések a kényszergyógykezelés felülvizsgálata során Magyarországon* (Budapest, 2004), 28.

[23] Nikolova v. Bulgaria, 30 September 2004, Grand Chamber, case no. 40896/98. https://kuria-birosag.hu/hu/ejeb/nikolova-bulgaria-elleni-ugye-3119596.

[24] Pereira v. Portugal, 26 February 2002, Grand Chamber, case no. 44872/98. https://kuria-birosag.hu/hu/ejeb/magalhaes-pereira-portugalia-elleni-ugye-4487298)

The adequate representation of the interests of the mentally ill is also hindered by the fact that the attorneys are rarely consulting with them before the trial.[25] Instead of an obviously stressful environment created by a court hearing, a prior meeting with the legal representative would be more favourable for the treated person. Although the Act on Legal Practice generally states that the appointed defender is obliged to contact the defendant or, if the nature of the case permits it, the represented individual – without any delay[26], and the attorney commits a disciplinary infraction if the obligations arising from pursuing the activity stipulated in legal regulations or ethical code are unfulfilled, related disciplinary proceedings are not taking place in the legal practice.[27] While the stipulation of this expectation in the form of obligatory provisions could be problematic, greater emphasis shall definitely be put on its realisation, for example, through the more thorough professional supervision of defenders and the creation of a system of complaint for the treated persons.[28]

5. Remarks on the Potential Ways for the Reduction, Elimination of Biases

In the present part of my study I will reflect on the two main ways – based on my own categorisation – for reducing biases, and I refer to certain concrete means within these main categories. On the one hand, as it has already been indicated in the previous chapter, there is a regulatory way (in a broader sense) to compensate the occasional lack of sufficient information of procedural participants. For instance, the judge can deliver a more well-founded decision if the professionals having specific knowledge and expertise – the forensic medical expert and the physician of the mentally ill individual – are present at the review hearing to answer the occurring questions. The provision of sufficient time for evaluation and reasoning for judges and the properly considered assignment of cases in court to decrease institutional pressure could contribute to the reduction of the negative effects of simplifying techniques in the line of thinking. According to Thaler and Sunstein[29], decision-makers can and shall also be oriented by setting up guidelines based on the *nudge* theory.[30] These leave the discretion of the decision-makers intact and thus, there is no such risk of resistance on the side of the professionals that could occur in the case of introducing binding rules of acts and decrees, which limit their

[25] Központ a Mentális Sérültek Jogaiért Alapítvány (MDAC), *Megvont szabadság*, 24.
[26] Act LXXVIII of 2017, Section 36, para. (2).
[27] Id. Section 107.
[28] Központ a Mentális Sérültek Jogaiért Alapítvány (MDAC), *Megvont szabadság*, 38.
[29] Ian Marder and Jose Pina-Sánchez, "Nudge the judge? Theorizing the interaction between heuristics, sentencing guidelines and sentence clustering," *Criminology & Criminal Justice* 20, no. 4 (2020): 400., 403., 410.
[30] Richárd Szántó and Levente Dudás, "A döntési helyzetek tudatos tervezésének háttere – A nudge fogalma, módszerei és kritikái," *Vezetéstudomány* 48, no. 10 (2017): 399.

capacities.[31] I make the remark here that this theory is applicable to the experts, for instance, in the form of methodological letters and guidelines issued regularly by the Hungarian Chamber of Forensic Experts.

On the other hand, the knowledge and information on biases could and should be integrated into the training of professionals. Without such training, there is a risk of committing the same mistakes in the decision-making all over again, for example, the failure to identify – or to memorise and recall – all the relevant information, the inconsistent evaluation of contradicting facts and pieces of evidence, the exclusion of a relevant information when reflecting on the factors of the case, and the selective examination of the potential options for the decision. Further on I am taking the judicial sphere as a reference point due to the unified structure, the transparent rules, and the outstanding responsibility of judges throughout the proceedings. The Charter of the European Judicial Training Network (hereinafter: EJTN) declared that the constant improvement and widening of the scope of judges' knowledge does not only serve the purpose of conducting the procedures faster, but it is also a key guarantee of judicial independence, since properly prepared judges will be a lot less prone to accepting the questionable or debatable decisions of higher forums and/or the prosecutor instead of establishing and maintaining their own conviction.[32]

In the framework of planning and structuring the training, the constant assessment of demands is an essential prerequisite. The committee deciding on the training shall also be composed with the involvement of professionals with diverse expertise, including the sphere of psychology and economics, to be able to comply with a more and more interdisciplinary approach to (legal) decision-making. The Supreme Court's Legal Practice Analysis Group stated in its summarising opinion in 2017 that an educational material shall be prepared on the most relevant psychological background knowledge from the perspective of the judicial work specifically, in an easy to understand manner, after which courses and consultations shall take place to facilitate the internalisation by the participants.[33] I take the view that such a comprehensive training material shall be compiled which – beyond the overview of biases – indicates the appearance and the negative effects of mental distortions in the judicial practice through the results of empirical research, and demonstrates their functioning in the different areas of law respectively, as did the present analysis in the cases of mentally ill perpetrators.

In the EJTN Handbook, moving away from the merely ex cathedra presentations and favouring interactivity, as well as a combination of the different methods – especially presentations and groupwork – appear as crucial

[31] Gábri, "Kognitív tudományok," 131.

[32] Amnesty International Magyarország, *Fortélyos félelem – Erősödő kontroll a magyar bíróságok felett* (Budapest, 2020), 34.

[33] Kúria Büntető-Közigazgatási-Munkaügyi és Polgári Kollégiumai Joggyakorlat-Elemző Csoport, *Összefoglaló vélemény – Az ítéleti bizonyosság elméleti és gyakorlati kérdései* (Budapest, 2017), 27–28.

objectives.[34] Among others, the research of Gaeth és Shanteau reflected on the significance of interactive training when they examined the effectiveness of two methods aimed at decreasing the negative influence of information that have become irrelevant in the procedures. One training only contained traditional frontal lecturing, while the other also entailed interaction and practical tasks. The researchers could verify that the first way was suitable for changing the anchored mental distortions, however, its effect was only for the short term and was solely attached to the specific field and issues which the training dealt with, so, it was vastly limited both in time and scope. By contrast, it proved to be a lot more efficient when the participants of the research project needed to reflect on what error could have occurred in their decision-making and had to bring up arguments both for and against their conviction and opinion.[35] The training methods involving active participation encourage individuals to question their presumptions by critically examining their pieces of experience in the judicial system. Through this progress, the unfavourable effect of the *groupthink* phenomenon can be reduced as well, which is specifically characteristic in hierarchic structures and refers to rather rigid, institutionalised approaches[36] with which there is generally an implicit – sometimes even explicit – expectation towards the members of the organisation to comply.

6. Summary

In my study – primarily with the intention of introducing an innovative, interdisciplinary field of research – I examined certain intersections of Criminal law and behavioural economics in the field of biases affecting the decision-makers in the criminal procedures targeting mentally ill offenders. Besides, I referred to a number of potential means for reducing the negative effects of mental distortions in the proceedings. At the beginning I discussed the basic concepts of behavioural economics regarding the bounded rationality, willpower, and self-interest of individuals in comparison to the former presumption of complete rationality within the neoclassical economic approach. The criminal justice system can reflect on the empirically founded assumptions of behavioural economics on biases in various ways and to a different extent when it comes to the offenders and the rest of the procedural participants, therefore, I made a differentiation between these two categories. The latter largely remain unnoticed in the legal practice, and the chance to counterbalance them through sanctioning is limited. I demonstrated their negative effects through the example of the compulsory treatment of mentally ill perpetrators as their mental state and related vulnerability places an even greater responsibility on the decision-makers, specifically judges and experts, in the procedures. The

[34] European Judicial Training Network, *Handbook on Judicial Training Methodology* (2016), 3., 15–16.
[35] Gábri, "Kognitív tudományok," 131.
[36] Eric Ip, „Debiasing regulators: The behavioral economics of US administrative law," *Common Law World Review* 46, no. 3 (2017): 176.

specific factor about this analysis was that I presented the functioning of biases – mainly the similarity and availability, the hindsight, the omission, the overconfidence, and the status quo bias – in the complete course of a measure: from its application through its review to the potential release of the treated person.

It was my conclusion that the mental distortions of (legal) professionals could be reduced by certain regulatory means, for instance, by integrating the knowledge on biases into the methodological letters and guidelines for experts, placing greater emphasis on the expectation regarding the (active) participation of experts and defenders in the review procedure, or ensuring sufficient time for evaluation and reasoning for judges in court proceedings. The other main path is to incorporate the information on biases into the training of the professionals. In this regard there is a demand for preparing a comprehensive training material and a more significant role shall be attributed to interactive educational means, such as the analysis of verdicts, groupwork, and trial simulations. These means have the potential to facilitate a prejudice-free approach to prejudiced human decisions and thus contribute to a fairer, more reasonable, and less biased system of sanctioning and jurisdiction. As a closing remark, I recall the renowned idea of Alvin Toffler: "The illiterate of the 21st century will not be those who cannot read and write, but those who cannot learn, unlearn and relearn".[37]

[37] Alvin Toffler, *Future Shock* (New York: Bantam Books, 1984), 272.

Transnational Organized Crime and Future Threats in Bangladesh: Comparative Combating Measures

JAHAN, BUSHRAT

ABSTRACT *Bangladesh is a South Asian country having become independent recently and confronting countless crimes, and transnational coordinated crime is one of them. With the proliferation of criminal associations and the accessibility of present-day digitalization, the level of transnational danger has increased in an alarming way, where just a coordinated and elevated degree of globally approved cooperation can resolve the issue. Transnational organized crime increases border tensions and danger also. In this paper, I will focus on a few explicit transnational crimes occurring in Bangladesh and how those can be a future danger to the existence of this country. Border hostility, arms dealing, drug trafficking, and illegal human exploitation have been persistent security dangers to the country. I will likewise concentrate on some combating measures taken by the EU to control transnational organized crimes and a comparative discussion of how Bangladesh ought to step up measures to control such crimes in the future.*

KEYWORDS *transnational organized crime, arms smuggling, drug dealing, human trafficking, combating measures*

1. Introduction

Crime has been an unsolvable issue starting from the dawn of human culture. Since the ancient period till the advancement of the state idea, crime has had many appearances and transnational organized crime is one of them. From the term transnational, it tends to be expected that it is movement including different nations and various legal jurisdictions. It was begun with the introduction of the idea of state security which is the securitization of the state's residents and their assets against foreign and internal dangers.[1] Notwithstanding, this new security threat is called transnational organized crime, which is not just a security issue it has also turned into a 'fundamental' issue for the world.

In 1990, researchers and policymakers stood enough to be noticed on transnational crime and security when huge political and monetary

[1] David A. Baldwin, *Theories of International Relations*, (London: Routledge publication; 2008), 481.

advancements were starting to begin after the lengthy impact of the cold war.[2] In the Asian subcontinent nations, the transnational security issue has turned into a difficult problem for legislators and policy-makers.[3] Transnational organized crime has the nature of being carried out cross-border. Illegal exploitation, arms dealing, human trafficking, and different types of transnational security dangers are present which has raised tensions all over the world.

Transnational or cross-border violations essentially influence the security of the borders. Furthermore, they obliterate the improvement of the market and economy as well as hamper political solidness, and promote corruption. This creates transnational security dangers as a result of limitations at public level regulation and furthermore, the absence of transnational cooperative endeavors to provide the required managerial and lawful component. For instance, drug dealing issues in Latin America have a huge impact on the USA and other kinds transnational organized crimes in South Asia are both a shocking danger to the locale as well as to the world.[4]

Bangladesh is a South Asian state and it is connected with different nations along its boundary. There are constantly so many unlawful cross-border instances of unlawful activities along the BD-Myanmar border.[5] These are illegal exploitation, drug dealing, and smuggling of products which are expanding the dangers to the security of the country. In the past few years, threats of unlawful narcotic trade have risen in the border regions, since the drug use rate is expanding decisively in Bangladesh, which poses a colossal danger to the young generation as well as public safety and national security. For mitigating security dangers, Bangladesh should take quick measures, otherwise the fate of this nation will potentially be put into potential harm's way. In the most recent couple of years, Bangladesh has adopted public official legislation to diminish such crimes, in 2000 Bangladesh entered into a global convention for cooperation in combating organized crime, namely, the United Nations Convention Against Transnational Organized Crime (Palermo Convention). This paper is primarily planned to concentrate on the security dangers that emerged from transnational crimes and their effect on Bangladesh and further measures that ought to be taken by the legislature of Bangladesh associated with European and other global instruments for combating organized crime. The main aim of this study is to focus on the already risky situation of Bangladesh because of its geographical position in terms of border crimes and

[2] David Felsen and Akis Kalaitzidis, "A Historical Overview of Transnational Crime," in *Handbook of Transnational Crime & Justice*, ed. Philip Reichel (London: SAGE publication, 2005), 3–19.

[3] Daniel K. Inouye, "Transnational Security Threats in Asia-Pacific Region", Asia Pacific Center for Security Studies, August 12, 2005, https://apcss.org/archived-publications-n/.

[4] Caroline Ziemke-Dickens, *Asian Transnational Security Challenge: Emerging Trends & Regional Visions* (Sydney: Macquarie University press, 2010).

[5] Crime Statistics at Bangladesh Myanmar Border, Teknaf Police Station, Cox's Bazar, Bangladesh, (2014–2015).

what future dangers would be awaiting the country if those crimes were not handled firmly. The study is also aimed at discussing the steps already taken by the Bangladesh government to fight transnational crimes and to what extent they are successful with a comparative discussion of measures that the EU is already using to handle those crimes. Therefore, there will be some suggestions based on the author's opinion on what the Bangladesh government should do to get rid of this future risk.

2. What is Transnational Organized Crime

Transnational organized crime is an issue firmly connected with security, peace and lawfulness. The United Nations (UN) has characterized transnational crime "as offenses whose origin, avoidance and direct or indirect impacts include more than one country".[6] The crime can be isolated from the other international crimes. Simultaneously, worldwide regulation could be applied to recognize and prosecute transnational crimes and the culprits. Such crimes include, the intersection of the boundaries of any state unlawfully, operating unlawful organizations for tax evasion, showing dangers to the law enforcing offices, narcotics, and arms dealings alongside illegal human trafficking.[7] Transnational crime is characterized in numerous ways, for example, it includes the endeavor of committing many crimes along the borders and disregarding the guidelines of state administrations and regulation authorizing organizations. Thus, these violations cause danger at the national level and worldwide.

According to United Nations Convention Against Transnational Organized Crime, there are four special characteristics of crimes that render them transnational crime. They are the following- a) the crime is committed in more than one state, b) the crime is committed in one state but a substantial part of its preparation, planning, direction, or control is organized in a different state, c) the criminal or criminals commit the crime in one state but come from some active criminal group from another or several other states, d) although the crime is committed within it has a substantial impact on another state's borders or questions the sovereignty of another state.[8]

Basically, crime means any action or inaction which is a violation of the legal regulation and entails an obligatory punishment. Transnational crime incorporates every type the component of general crime, however, extraordinarily, it incorporates infringement of various state regulations and

[6] Paul J. Smith, *Terrorism and Violence in Southeast Asia: Transnational Challenges to States and Regional Stability* (New York: Routledge publication, 2005).

[7] Md. Harun Or Rashid, "A Critical Study on Transnational Organized Crime Along the Bangladesh-Myanmar Border,*" International Journal of Sciences: Basic and Applied Research* (IJSBAR), https://www.gssrr.org/index.php/JournalOfBasicAndApplied/article/view/11395.

[8] United Nations Convention Against Transnational Organized Crime: adopted by UN general assembly, 8 January 2001, A/RES/55/25, http://www.refworld.org/docid/3boof55bo.html.

guidelines. Transnational crimes are an infringement of regulation that include more than one country in their preparation, execution, or effect. These offenses are different from other crimes in their worldwide effects by nature of their workings.[9] Transnational organized crime can sabotage a democracy of government, disturb unrestricted economies, diminish public resources, and restrain the improvement of stable social orders. In doing so, national and worldwide criminals compromise security and become threats to nationals.

The nature and patterns of transnational crime are unique in relation to international crime as it fundamentally and definitely incorporates financial advantage. It plainly contrasts with different types of crimes. for instance, transnational crimes are identified from international crimes which include violations against humanity that might or might not include multiple nations. Security dangers that emerged from transnational organized crime likewise vary from the para-military or local army exercises over the borders. Transnational security issues can be characterized as non-military dangers across borders and either undermine the political and social trustworthiness of a country or the security of that country's occupants.[10]

Transnational crimes can be assembled into three general classifications i) ones including any arrangement of illegal products like drug dealing, dealing with stolen property, arms dealing, and money laundering, ii) unlawful operations like sex business and human trafficking, and iii) invasion of business and government, such as misrepresentation, racketeering, tax evasion, and corruption influencing various nations.[11] In view of the above, it may be very well defined that transnational organized crime is a borderless crime which essentially incorporates illegal trades, such as pirating and smuggling of specific products and objects.

3. Drug Dealing

Drug dealing is a global issue nowadays on each side of the world. Indeed, even developed nations of Europe or the USA have to deal with issues of such crimes. In South Asian countries consuming narcotics by the youth generation is an enormous danger to the future country. In the past few years, drug dealing has been the most serious transnational problem in South Asian nations.[12]

As a South Asian country, Bangladesh is also experiencing the crime of drug dealing. Drugs are such substances that can seriously endanger the entire

[9] Jay Albanese, *Transnational Organized Crime* (London: Oxford University Press, 2009).

[10] Daniel K. Inouye, "Transnational Security Threats in Asia-Pacific Region", *Asia Pacific Center for Security Studies*, August 12, 2005, https://apcss.org/archived-publications-n/.

[11] Albanese, *Transnational Organized Crime*.

[12] Emmers Ralf, "The Threat of Transnational Crime in South Asia: Drug Trafficking, Human Smuggling and Sea Piracy," *UNISCI Discussion Papers*, no. 2 (May 2003): University of Madrid, Spain, 1–11.

country with their gradual influence, from which it is not even possible to recover quickly. Topographically, Bangladesh consistently stands in a hazardous position due to its boundary regions. The border with Myanmar and India made it an exceptionally alluring point for drug dealers to enter into the trans-border business sectors. The boundary was utilized for dealing with marihuana, opium, heroin, ganja, pethidine, Yaba, and other psychotropic substances like methamphetamines and different kinds of narcotic drugs.

Due to low border security, powerless checkpoints at the port regions, and low specialized help to identify and detect smuggled items in Bangladesh, the area has turned into a significant route for dealers to carry their drugs into global business sectors. After the Rohingya emergency issue in 2017, drug dealing has risen immensely on the Bangladesh border. Bangladesh has already gained critical headway in drug control from the Department of Narcotic Control from 2005 to 2007. In 2018 the Bangladeshi government passed a new amendment to the Narcotics Control Act 2018 with some corrections from the Act of 1990 in order to diminish such drug dealing crimes within the border region or any part of Bangladesh. Customs authorities alongside Special Forces and police have implemented immense border control measures at the passageway and exit points of the country. As Bangladesh is located at a truly weak point, which is in the middle of the two significant routes of pirating, therefore preventing transnational organized crime is quite hard for the country on her own. A joint endeavor of help activity through common agreement and measures can assist with decreasing the danger.

4. Smuggling of Fire Arms

Bangladesh is a newly born country, in 1971 it gained freedom from Pakistan. Topographically and politically Bangladesh is a vital point for transnational organized criminals as they utilize this country as the passageway for their illegal purpose. One of the reasons is that Bangladesh is a South Asian state encompassing a border with India and Myanmar in the east, west, and north and another reason is that the southern piece of this country is free and open with the wide Bay of Bengal to the main ocean.

Moreover, the border of Bangladesh is not enough to secure the boundary security which can obstruct dealers in moving drugs and arms across the border. The ocean in its south part gave an open way to criminals as the Golden Triangle point containing Thailand and Myanmar for arms carrying. For an alternate reason, the arms dealers have been utilizing the land route for dispatching their items. small arms dealing through this country has been focused on exercises in the Northeast piece of India, Sri Lanka, and some parts of Myanmar.[13]

[13] Caroline Ziemke-Dickens and Julian Droogan, *Asian Transnational Security Challenge: Emerging Trends, Regional Visions*, (Sydney: Macquaire University Publication, 2010).

Arms dealing has been prompting brutality through customary and modern contentions in the communities. Arms dealing used to be considered a local threat before growing into a transnational crime by today. An expanded measure of unlawful arms raises the issue of increases in abuses of human rights both at the national and global levels, and frequently these arms are utilized to cause fear, kill people, they are used as a tool of torture, and there is an approach to engage kids in this phenomenon.

Because of the uncontrolled ethnic and religious issues in the region, the utilization of small arms and explosives in South Asia has been considered as a difficult problem. Social distinction and strict fundamentalism are frequently engaged in furnished struggle around here. It has ended up in a financial and political crisis that has no indication of mitigating itself. In particular, in Bangladesh, the political party striving to acquire rule over the other political group generally utilizes different unjustifiable means for their craving for power, which really causes social insecurity.

Arms dealing at the district level of Bangladesh has been kept up by the volunteer armies named, Tripura-based All Tripura Tiger Force (ATTF), the National Liberation Front of Tripura (NLFT), and the United Liberation Front of Asam (ULFA). The pirated guns in Bangladesh are mostly made in China and in different other countries like India, the Czech Republic, and the USA. The arms incorporate shooter guns, sawn-off rifles, light machine guns, pistols, and Indian arms like pipe guns, revolvers, pistols, and so forth. Arms dealing by unlawful means causes public danger to the nation and the adjoining nations also.[14]

5. Human Trafficking/ Slavery

Since the early history of human culture and, later, with the development of the idea of state, individuals have been searching for better chances to relocate themselves to a better place. The journey goes on because individuals facing poverty and difficulty in their lives. Dealers exploit the needs of such needy individuals who really need to get rid of their poverty and they benefit from taking advantage of them in various barbaric ways. The human rights associations have characterized illegal exploitation as any activity which incorporates transportation, selling of a person through double-dealing, force, snatching, abducting or some other means and takes advantage of them in a way which abuses basic human rights with the aim of acquiring financial advantage.

Illegal trafficking has been viewed as an unspeakable atrocity, which may also be named asslavery. Since the independence of Bangladesh, it has been quite gravely experiencing illegal exploitation as human trafficking. Bangladesh has encountered various types of illegal exploitation like dealing for sexual

[14] Md. Istiaq Ahmed Talukder, "Transnational Organized Crimes and Security Threats in Bangladesh," *Journal of Social Sciences and Humanities* 7, no. 2 (June 2021), https://www.researchgate.net/publication/353162404_Transnational_Organized_Crime_and_Security_Threats_in_the_Context_of_Bangladesh.

double-dealing, forced prostitution, child labor, organ dealing and different types of double-dealing. During the ten years from 1999 to 2009, around 300,000 Bangladeshi youngsters (both male and female) between the ages of 12 and 30 have been traded to adjoining India and other countries.

The most common type of human trafficking in Bangladesh is used for sexual abuse, or forced prostitution, where a large part of those targeted are kids and young women. The girls who are being traded for sex ventures in Asia are generally under 18 years of age and sold for around 1000 US dollars each. There are countless cases in Bangladesh and India where the actual guardians sold their daughter/ward because of their insatiability for cash. Another explanation is wanting sons more than daughters and thinking about girls as an item, which is another reason contributing to the trafficking of girls even by their guardians. This can reflect the entire virtue of any country and such a circumstance is very dangerous for any country's future as a whole. In 2000, the Bangladeshi Parliament passed a regulation named Prevention of Violence Against Women and Children 2000. This Act amalgamated all arrangements distinguishing offenses and abuses committed against women and children and, furthermore, it lays down punishments for the trafficking of women and children for financial benefit.

The human trafficking market is frequently covered through human piracy, which influences the social and financial condition of any country. Like other transnational crimes, human trafficking is also difficult to tackle for Bangladesh without a joint effort. However, 70% of the world's 4.8 million sex dealing casualties are from Asia, and the Pacific area. Different global associations have detected Bangladesh as a supplier for dealing with unlawful migrants to Europe and other countries. Consistently, a huge number of individuals, especially women and children are traded from Bangladesh.[15]

In 2012 Bangladesh has endorsed the worldwide instrument of the United Nations Convention Against Transnational Organized Crime known as the Palermo Convention by announcing to make a successful move to combat transnational crime like human trafficking, punish traffickers, and safeguard the basic freedoms of humans.[16]

6. Transnational Monetary Crimes in Bangladesh

The term Financial Crime conjures up various ideas relying upon the jurisdiction and on the specific circumstance. Generally, monetary crimes are not violent crime but rather bring only a monetary benefit to the perpetrators and economic loss to other people of the state. It incorporates a scope of

[15] Prevention of violence Against Women and Children Act, 2000 (Act No. VIII of 2000).

[16] UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15th November 2000, https://www.refworld.org/docid/4720706c0.html.

criminal operations like corruption, for example, bribery, financial extortion for example mortgage, insurance fraud, credit card fraud, fake notes, money laundering, tax avoidance, circumvention of trade limitations, and illegal cross-border reserve transfer.[17]

Bangladesh is considered a safe place for monetary crime. Hundi or black market cash trade strategy is usually involved in the method of cross-border money transfer. Bangladesh has countless networks living in Europe and different countries of Asia. A section of these non-residents utilizes the informal channel of Hundi to dispatch cash back to the home country by non-lawful means, by which no trace is actually left of the transaction. Due to Hundi, the Government loses an enormous sum in potential income profit every year, which becomes a monetary danger.[18]

Money laundering is one more transnational monetary crime in Bangladesh during the ongoing time frame. Terrorist groups also utilize the method for funding and assailant exercises. It is consistently accounted as gigantic measures of assets raised for the sake of charity and the asset raiser frequently does it for illegal tax avoidance. For diminishing this crime Bangladesh adopted the Money Laundering Prevention Act 2002 on April 5, 2002, and the principal parts of this act provide for the foundation of a money laundering court and proper investigation and implementation of punishment for infringement of the regulation.

7. Combating Transnational Organized Crime: EU Measures

Organized criminal groups in Europe are active in various crimes, like drug dealing, property-related crime, misrepresentation, human trafficking, and illegal migration. Organized criminals are the greatest danger to the security of any state. They are exceptionally proficient and prominent in transnational crimes. There should be a few measures for combating organized crime. In the past few years, the EU has taken some methodologies expecting to handle organized crime by helping law enforcement with legal collaboration, tackling organized crimes by considering them as high-priority crimes, eliminating criminal benefits, and providing innovative responses to modern improvements for progressing organized crimes. The EU has introduced methodology to reinforce European policing of both the physical and the computerized world.

i) Boosting law enforcement and judicial cooperation:

Organized criminals active in the EU come from different ethnicities, and effective legal policing and judicial cooperation across the EU is the main and most effective way to prevent organized crime. The policing framework across

[17] Phil Williams, "Transnational Criminal Organisations and International Security," *Survival: Global Policy and Strategy* 36, no. 1 (Spring 1994), https://www.tandfonline.com/doi/abs/10.1080/00396339408442726.

[18] The Daily Star, 30th May, 2007, https://www.thedailystar.net.

Europe requires collaboration regarding rulebooks. The EU has modernized and built up subsidizing for the European Multidisciplinary Platform Against Criminal Threats (EMPACT), which collaborates with all European and public specialists to recognize priority crimes and address them all together. To ensure that law enforcement agencies can work better together, an EU Police Cooperation Code has been proposed which will establish multi-horizontal collaboration arrangements. Security in border interoperable data frameworks will help to detect and combat high-priority crimes such as transnational organized crimes. For better handling of criminal organizations working globally, the EU is intending to begin arranging a cooperative agreement with Interpol.[19]

ii) More Effective Investigation to Disrupt Organized Crime

To ensure a useful reaction to diminishing explicit types of crimes, the EU will set up rules for counterfeiting and drug-related crimes. It will likewise adopt measures to address the illegal trade of social merchandise. The European Commission is likewise proposing a Strategy committed to combatting illegal exploitation by human trafficking and other organized crime.

iii) Disrupting Criminal Finances

The majority of criminal groups in the EU take part in corruption and unlawful businesses for financing their further activities, however, very few of those criminal resources have been seized. Disrupting criminal funds is a vital way to reveal, detect and punish criminals. The European Commission will propose confiscating criminal benefits, fostering the anti-money laundering rules of Europe, advancing investigation, and evaluating anti-corruption rules. These measures also help to battle against infiltration into the legal field and the economy.

iv) Making Law Enforcement and the Judiciary Fit for the Digital Age

In this technology-based 21st century, most of the time criminals act through web networks and perpetrate online crimes with no barriers or boundaries. Law enforcement and the legal executive need to utilize current innovation and be furnished with apparatuses and abilities to stay aware of present-day online-based crimes. The European Commission will examine potential ways to deal with data protection methods and analyze a way to address a legitimate and lawful acceptance of encrypted data with regard to criminal examinations and investigations that would safeguard the security and secrecy of confidential databases.

8. Steps Taken by Bangladesh Government Regarding Transnational Crimes

Among all South-Asian countries, Bangladesh shares its border with the most countries, such as India, Nepal, and Myanmar, which surround this

[19] EU Strategy to Tackle Organized Crime, European Commission Press Release, Brussels, 14th April, 2021.

country on every side. And the South part of this country is bordered by the sea, therefore, using this way, organized crimes related to piracy are easy to commit. As result, almost every border region is affected by human trafficking and migrant smuggling. The global demand for low-wage workers makes Bangladeshis accessible for migrant smugglers.

Bangladesh's government has made so many attempts to prevent organized crime by its own state law and through cooperation with the global arena. In January 1990, Bangladesh passed the Narcotics Control Act 1990, which empowers law enforcement to arrest and seize any narcotics, drugs, psychotropic substances, or any such product found in anyone's possession.[20] In 2002, through the amendments, this Act became more powerful regarding the matter of consumption, buying and selling of such narcotic substances and, also, strict provision for penalties were added.

For controlling money laundering crime, the Money Laundering Act 2002 was adopted. Under this Act, every illegal financial transfer or remitting transfer, concealing or investing moveable/immovable property acquired through illegal means, and any violation of the freezing order of any account were defined as a crime.[21]

Very recently in 2012, the Prevention and Suppression of Human Trafficking Act 2012 was adopted by the Bangladesh government. This Act specifies in its preamble that "this Act make provisions to prevent and suppress human trafficking, to ensure the protection and rights of victims of the offense of human trafficking, and to ensure safe migration."[22]

In the arena of international cooperation to prevent organized crime, Bangladesh headed on with other states. A bilateral agreement for preventing the trafficking of illegal drugs and psychoactive substances, has been signed between Bangladesh and Myanmar. The SAARC Convention on Narcotic Drugs and Psychotropic Substances of 1990 has the Bangladesh government as a signatory.

Most significantly, on 13 July, 2011 Bangladesh signed and ratified the United Nations Convention Against Transnational Organized Crime. This convention is considered as the main international instrument to fight against organized crime and Bangladesh became a member state of this convention by signing it and so the country has gained an advantageous position for all cooperative activities under UN policy. In addition, three other protocols, such as- the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; the Protocol against the Smuggling of

[20] The Narcotics Control Act 1990, Act No. XX of 1990, https://bangladesh.justiceaudit.org/wp-content/uploads/2018/07/Narcotics-Act-1990.pdf.

[21] The Money Laundering Prevention Act 2002, Act No. V of 2012, http://bangladeshcustoms.gov.bd/download/Money_Laundring_Prevention_Act_2012-English_Version.pdf.

[22] The Prevention and Suppression of Human Trafficking Act 2012, Act no. III of 2012, https://www.refworld.org/pdfid/543f75664.pdf.

Migrants by Land, Sea, and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms are attached to the Convention and focus on particular aspects and manifestations of organized crime. The main purpose of this convention is to govern international cooperation among law enforcement and judicial authorities of member states by sharing evidence, and to guide the member states with rules in updating their legislation, investigation and prosecution of the criminals of organized crime.[23] Furthermore, according to Article 16 of the UN Convention Bangladesh also has an extradition agreement for criminals of organized crime.

In spite of having so many schemes and accomplishments, the Bangladesh government is not able, by itself, to ensure the transparency and accountability of law enforcing officials. Even in 2018, after declaring war against drugs by making strict penal laws for the possession or selling of illegal drugs, there were lots of cases reported of extrajudicial killing against the law enforcing agencies, which were considered as a human right violation and noticeably lacked a high level of transparency.[24]

Over the last decade, Bangladesh has taken numerous kinds of steps against organized crime. But still, there is no specific legislation for protecting children from child marriage, prostitution, and exploiting by criminal gangs. In 2020, Bangladesh has established seven special anti-trafficking courts for dealing with human trafficking cases more efficiently. Yet there are some legislative gaps in terms of illicit trading and human trafficking, which are still beyond the control of the authorities. Delays in the judicial proceeding because of the case burden on overloaded courts result in a low rate of conviction. In spite of taking all the above measures, Bangladesh is not being able to show any significant reduction rate of organized crimes even in its prospering area. There is a lot to do for further preventing these organized crimes and for being relieved from their undetermined future threats.

9. What Further Measures Should Be Taken by Bangladesh for Preventing Future Threat

As per the above conversation, Bangladesh has already adopted some measures inside of its own legal sectors and also on the international arena. But it is yet to resolve the security risk of transnational organized crime. There is no choice for Bangladesh but to adopt some further preventive measures for combating organized crimes for mitigating future threats. The Bangladesh government- through its regulation of law enforcing agencies should become able to control the rising risks of transnational organized crime by enforcing severe obstructions in the border areas.

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[23] Ian Tennant, "Fulfilling the Promise of Palermo? A Political History of the UN convention Against Transnational Organized Crime" *Journal of Illicit Economies and Development* 2, no. 1 (2021), https://jied.lse.ac.uk/articles/10.31389/jied.90/.

[24] Global Organized Crime Index Africa, Criminality in Bangladesh, <https://ocindex.net/country/bangladesh.

The EU has put in place measures to boost the law enforcement agencies, but inside Bangladesh, there is a lot lacking because of the non-transparency and non-accountability regarding the measures. Basically, the law-enforcing agencies of Bangladesh comprising the Bangladeshi police, the Border Guard Bangladesh, and the Coast Guard are battling against border security violations. The Bangladeshi police are working on policies to prevent such serious crimes that threaten the future existence of the country. Additionally, the Border Guards and Coast Guards are there to prevent crimes from occurring in the border and marine regions. The Border Guards generally keep an eye on the boundary regions to detect any suspicious activities or crimes. The Coast Guard of Bangladesh is constantly monitoring the marine ways of the ocean close to the border to prevent pirating and smuggling along these routes. The public authority should provide increased logistic help to the Border Guard of Bangladesh (BGB), Bangladeshi Police, the Coast Guard, and local government to enable working more productively and effectively to prevent border or transnational crimes. Local administrations should coordinate their efforts with the local leaders and make a consolidated team for controlling organized crime.[25] If the local authorities monitor the activities of police and other law enforcement then it may help to boost up their functions.

Executive officers and magistrates are also the facilitators for the law enforcing organizations in the local area. Executive officers consistently organize different public awareness programs for controlling the violations in the region of the border locality. The local inhabitants of the border areas are extremely ignorant about transnational organized crimes and their future impact on the overall country. The impact of drugs on the young generation and the risks of human trafficking should be emphasized in such public awareness programs. For instance: banners and leaflets, public announcements, showing public pictures or films about the adverse consequences of human trafficking can be effective in raising local shields to prevent organized crimes in the locality.

Collaborative measures with the adjoining countries should be taken to obstruct the commission transnational organized crime, as the Bangladeshi government can take cooperative measures with the Myanmar government and the United Nations High Commissioner for Refugees (UNHCR) to embrace a productive resolution for solving the issue of the Rohingya community for Myanmar. Likewise, Community policing exercises can guarantee neighborhood security which may be useful for preventing cross-border crimes. Because of the absence of the political intent of cooperation and participation, South Asian countries have been over and again unsuccessful in the effective battle against transnational security issues. Political collaboration between

[25] Jubeda Chowdhury, "The Requirements of Military Diplomacy Between Bangladesh and Myanmar", *Pakistan Defence Forum*, 28th March 2022, https://defence.pk/pdf/threads/the-requirements-of-military-diplomacy-between-bangladesh-myanmar.738520/.

states in South Asia will create the opportunity to make essential changes in this respect.

In addition, Bangladesh endorsed the United Nations Convention Against Transnational Organized Crime but there is a further need for full implementation of these preventive measures as per the convention, specifically in the border areas and Bangladesh should enter more into cooperation in the international field for getting the help of the international community in this perspective. Following EU measures Bangladesh needs to focus more on disrupting criminal finances and funding.

The European Union has already adopted digitalization measures in order to fit in with the digital age. As the world is pursuing a digital era even in legal segments, so many South Asian countries like Bangladesh are lagging behind. Digitalization in the scope of legislative and executive data protection methods needs to be adopted for monitoring the online-based web network of organized crimes.

Transnational organized crime is a global issue nowadays and Bangladesh is faced with security hazards and its future is in danger. However, it is hard to battle against transnational crime solely in Bangladesh, this fight requires global collaboration of the international community. For that reason, Bangladesh also needs to adopt useful measures which help it to reduce the future security risk of border crimes. Most importantly, the proper implementation of the measures which have already been taken should be ensured. Only adopting measures cannot be the solution without a proper way of implementation and the Bangladesh government needs to work hard on that practical part.

10. Conclusion

Transnational organized crimes are basically those types of crimes that can affect more than one country's sovereignty and economic condition. Such crimes have been expanded in Bangladesh and the South Asian region. Terrorism, human trafficking, arms dealing, and different types of transnational security dangers have raised tension among strategy creators due to multiple factors. Drug dealing in Latin America or transnational organized crimes in South Asia have created critical financial, social, and political insecurity. It is an extremely challenging issue for Bangladesh to battle against organized crime in regions along the boundary mainly because of its geographical position. As India and Myanmar have a border with Bangladesh and it is easy to expand criminal activity across the borders, so Bangladesh is at risk if not able to control such expansion strictly.

In the above study, some organized crimes and their nature have been discussed, which are reasons for suffering. Drug dealing is gradually destroying the young generation and human trafficking is the most heinous organized crime which is run by criminal groups and exploits mainly children and women. Kidnapping and abduction crimes also increase resulting in this human trafficking racket. Public authorities are doing their best attempting to combat

the crimes level. But due to the weak economic structure, delicate political democracy, and social fracture, it has become very challenging for Bangladesh to dispose of these transnational security dangers all alone. The transnational nature of the dangers additionally requires an aggregate and comprehensive effort to deal with and face the difficulties.

The Bangladesh government has already taken some steps to fight against transnational organized crime. Among them, being a signatory to the UN Convention is the biggest initiative, which opens the door to international cooperation and mutual help to prevent organized crime from the root. In spite of such significant steps, the successful reduction rate of organized crime is yet to be achieved by the government of Bangladesh. The European Union has some measures which can be followed to cover up the slight gaps still existing in Bangladeshi adjudications.

The rising tension due to organized crimes is becoming terrible around the entire world. So many legal instruments are accessible that could be utilized for preventive purposes. The global community and local agenda settled on a lawful instrument to improve worldwide collaboration to tackle the common threats of transnational organized crime. The need to combat transnational organized crime over the world has become a top global political priority. This has brought about genuine progress in supporting legal collaboration and the advancement of regulation all over the world.

To establish a common deliberation to fight against transnational crimes endangering security a few measures must be taken. Initially, each State should impose significance on building and reinforcing institutional capacity with the object of confronting the difficulties in an effective way. In combating transnational security crime in Bangladesh as well as in the entire world, the requirement for a coordinated methodology is essential. In this approach, common dangers and interests among the countries should be recognized and an extradition mechanism should be introduced to improve opportunities for mutual cooperation.

The Historical Development of the Hungarian Plea Bargain

KELEMENNÉ CSONTOS, LAURA

ABSTRACT *The new Criminal Procedure Code entered into force on 1 July 2018. Based on the experience of the last four years, the settlement has not been popular, but confession at the preparatory session has become favoured. Hungarian academic literature considers the settlement to be the institution closest to the American plea bargain. In addition to the two new legal institutions, the Criminal Procedure Code contains several simplifier options. Both the previous and the current Criminal Procedure Code provide successful simplifier tools (e.g., penalty order), however, neither the settlement nor its predecessor — the waiver of trial — could break through. In my PhD study I am looking for the answer to why the Hungarian plea bargain cannot break through, for which purpose I examine the antecedents of the settlement from a historical point of view. A fundamental shortcoming can be observed: similarly, to German criminal procedure law, the principle of consensus as a legitimizing principle is missing from Hungarian criminal procedure. It would be worthwhile to examine the results that the introduction of the consensus principle would lead to. In addition, it would be important to examine the different simplifier institutions in relation to each other, i.e., to which groups of cases and how they are applied. It is possible that the aim of speeding up procedures may be reached more conveniently by the authorities by other simplifier solutions.*

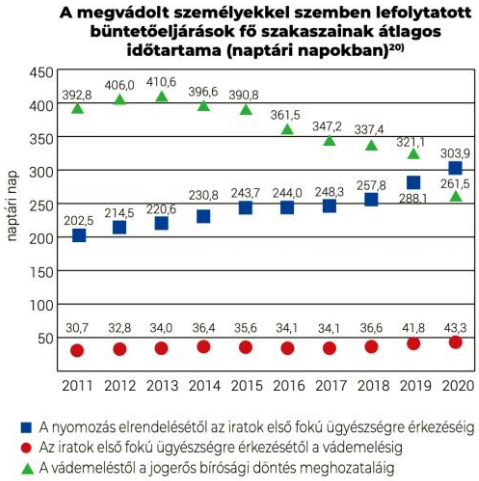
KEYWORDS *plea bargain, agreement, settlement, preparatory session, Hungary, criminal procedure law*

The new Criminal Procedure Act (Act XC of 2017) entered into force on July 1, 2018. Based on the experience since its entry into force, one of the reformulated legal institutions of procedural law, the agreement, has not brought breakthrough success, but the confession at the preparatory session has become popular. Hungarian academic literature regards the agreement as the institution being closest to the plea bargain. In addition to the two new legal institutions, Criminal Procedure Law also contains several simplification and acceleration options. In both the previous and current criminal procedural law codes, we find successful simplification and acceleration tools (e.g., penal court decision), but neither the agreement, nor its predecessor - the waiver of trial - was able to make a breakthrough in the dispensation of justice.

According to the ministerial explanation of the law, "The basic concept of the law is that, in addition to providing the guarantees that are the elements of a fair procedure, it creates an opportunity to simplify and speed up the procedures. To this end, the law created a complex system of cooperation with the defendant, one form of which fits into the framework of the investigation and is related to the prosecutor's activity "Agreement on confession of guilt" (Chapter LXV). However, the agreement between the prosecutor and the accused can only be established for the purpose of conducting a specific procedure according to this chapter (Chapter XCIX), since the final decision is based on the approval of this agreement and only the court is authorized to do so. [1]

The need for simplification and acceleration arose earlier, as already Act XXXIII of 1896 on the Code of Criminal Procedure (I. Bp.) contained the penal order, which was regulated by Legislative Decree 8 of 1962 (I. Be.) as the imposition of a fine by non-trial procedure and then Act IV of 1987 shortened the name of the institution to non-trial procedure, after that Act XIX of 1998 renamed the 'non-trial procedure' as 'penal order' and the currently operative Be. knows it as 'penal court decision'.

The graph published by the Hungarian Prosecutor's Office shows that since the Be. entered into force, the duration of the court phase has decreased (green triangle), while the length of the investigative phase has increased (blue square). The reduction in the duration of the court stage may be justified by the introduction of confession at the preparatory session. A direct cause-and-effect relationship cannot be drawn between the duration of the investigation phase and the failure of the settlement, but it can be assumed that if the settlement were a more frequently used legal institution, the duration of the investigation phase would also be shortened.



Source: Website of Hungarian Prosecutor's Office

[1] Ministerial justification for the Criminal Procedure Act, 264.

In my PhD thesis, I am looking for the answer to why the agreement is not more widely used: as a sub-study for this research, I am examining the antecedents of the plea agreement from a historical point of view.

1. Waiver of trial

"The preparation of the new criminal procedure code began in 1991, one of the basic objectives of which was to increase citizens' trust in efficient justice, which is easier to achieve with simple and quick procedures." [2]

The waiver of the trial is a consensual procedure which was incorporated into the Criminal Procedure Act I of 1973 by Act CX of 1999. At the end of the 90s and the beginning of the 2000s, the institution of waiving the trial was the closest to the American plea bargain and, also, to its type of sentence bargaining, as it showed several similarities: the accused waived his right to a trial ensured in Section 57 (1) of the Hungarian Constitution and in Section 3 of Be., and where appropriate, also undertook to limit his right of appeal, for which in return he could participate in a specific simplifier procedure enriched with guarantees, during which the penalty range was reduced.

1.1 International antecedents

Recommendation No. R (87) 18 of the Committee of Ministers of the Council of Europe[3] serves as a precedent to the introduction of the waiver of trial, which was designed to simplify criminal justice in the participating member states. [4] The current regulation of Be. corresponds to the recommendation published by the Council of Europe in 1981, which urged the introduction of simplifying legal institutions based on the principle of opportunity. Recommendation No. R (87) 18 on the simplification of the criminal procedure was adopted by the Committee of Ministers on September 10, 1987 at the 410th meeting of the ministerial commissioners.[5] The Recommendation proposed decriminalization, the use of summary procedures and the introduction of plea agreements with regard to minor and mass crimes. [6] Both in the European Union and outside the borders of the Union at the time, including in our country, simplification procedures had already been known and applied before the recommendation. Act XCII of 1994 on the Amendment of Criminal Procedure introduced modifications regarding the Convention.

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[2] Andrea Czédli-Deák, "A beismerő vallomás szerepének változása," *De iurisprudentia et iure publico* 14, no. 1 (2015): 12.

[3] Recommendation No. R (87) 18 on the simplification of criminal justice.

[4] Attila Szilvágyi, "Vádalku jellegű jogintézmények a büntetőeljárásban," in *Büntetőjogi Tanulmányok IV*, ed. Frigyes Kahler (MTA Veszprémi Területi Bizottsága: Veszprém, 2004), 77.

[5] European Council Homepage: http://www.europatanacs.hu/pdf/CmRec(87)18.pdf.

[6] Noémi Mészáros Molnárné, "Gondolatok a tárgyalás mellőzéséről," *Büntetőjogi Szemle*, no. 1 (2014): 21.

Article 14.3 c) of the International Covenant on Civil and Political Rights should be mentioned as another source of international law, according to which the states parties to the covenant are obliged to provide everyone with a full and equal right to a trial without undue delay in the event of an accusation. In Hungary, the treaty entered into force on March 23, 1976. It was incorporated into Hungarian law by Law-Decree 8 of 1976.

The international antecedents also include Article 6 of the European Convention on Human Rights, which provides for guarantees in judicial proceedings under the right to a fair trial, and in this context highlights the requirement of reasonable time in point 1. The European Court of Human Rights (ECHR) has a mature jurisprudence regarding the observance of the requirement of reasonable time and has also condemned Hungary countless times for violating this requirement. In proceedings before the ECHR, violations of reasonable time are most often cited, which the Court finds to be well-founded in the majority of cases. As a result, simplifying and speeding up the procedures is of concern to both the profession and politics. [7] In Hungary, the Convention has been applied since November 5, 1992. It was ratified by Act XXXI of 1993.

1.2 The idea of the summary procedure

First, the idea of a so-called summary procedure was raised by Árpád Erdei in his study 'The reign of the dethroned queen, or the sacred cow of proof' published in the 4th issue of Magyar Jog[8] in 1991, which idea was understood by several critics. The proposal served to fulfil the Recommendation of the Council of Europe, which aimed to introduce confession-based procedures in points 7 and 8.

After explaining the non-trial procedure (previously a penal order, now penal court decision), the author discusses the details of the proposal in section III of the study. Instead of the felony and misdemeanour proceedings at that time, he would have considered it justified to distinguish between ordinary and summary proceedings. The condition for a summary procedure is the factual and legal simplicity of the case, as well as the confession of the accused. The summary procedure combines the elements of bringing to judgment and non-trial. The summary procedure makes it possible to avoid lengthy court proceedings, the written accusation is simplified and the material of the file created during the investigation is also narrower. The prosecution brings charges based on the incriminating confession made during the investigation phase and other evidence. At the hearing before the court, the representative of the prosecution presents the charge, and then the court warns the accused of the consequences of the confession, which is followed by the statement of the accused. If the accused repeats the testimony of the previous confession, the

[7] Dániel Antali, "Az ésszerű időn belüli tárgyaláshoz való jog és az új büntetőeljárási törvény külön eljárásai," *Eljárásjogi Szemle,* no. 3 (2018): 23.
[8] Hungarian Law Journal.

evidentiary procedure is cancelled and the court basically establishes the criminal liability of the accused based on the confession and imposes a reduced sentence. Before a sanction is imposed, the trial judge hears the representatives of the prosecution and the defense. Based on the hearing and the contents of the investigative documents, an immediate penalty is possible. In terms of legal remedies, in addition to the relative prohibition of aggravation, the second-instance court has reformatory decision-making powers, while in the third-instance court, in addition to the absolute prohibition of aggravation, reformatory powers only apply to questions of law. Based on the proposal, reversal could only take place in the absence of the conditions for a summary procedure or a serious procedural error. This practicably means that the judgment can only be contested in the scope of the punishment.

Árpád Erdei formulated several criticisms of his own proposal, in which he drew attention to the fact that "the continental legal tradition finds it difficult to accept the application of very serious consequences in a very simple procedure. This is not even helped by the various simplification interests and guarantees provided to the defendant. It is likely that giving up consistency of thought offers a sensible compromise." [9]

Regarding the point of the Recommendation that the introduction of confession-based procedures is recommended if the constitutional and legal traditions allow this, he saw no obstacle, which was also supported by the later practice of the Constitutional Court.

The proposal has been criticised several times. In 1992, Péter Kántás expressed his concerns about the proposal in his work "Question marks of a simplification experiment" published in the 8th issue of the journal "Magyar Jog" [Hungarian Law]:

a) confession would require strong motivation,

b) for the new form of procedure, it should be known what content, what group of offenders and what categories of crimes it would be applicable to,

c) it is not enough to change the law to reach an agreement, as the profession insists on the principle of legality.

In 1992, the lawyer Péter Balla came up with an idea different from the proposal described above in the 11th issue of "Magyar Jog" entitled 'Penal order instead of prosecution'[10]: he saw the solution to meet the needs of the Council of Europe in the further development of the penal order. Against the idea of a summary procedure, he argued that the solution introduced in the Italian criminal procedure code did not fulfil the hopes attached to it, "because the material foundations of their application were not taken care of." [11] He compared Árpád Erdei's summary procedure to the solution of the Italian criminal procedure, which he called a "carrot-method" solution, since the guilty plea is not motivated by the promise of a reduced sentence. He also pointed out

[9] Árpád Erdei, "A trónfosztott királynő uralkodása, avagy a bizonyításelmélet szent tehene," *Magyar Jog*, no. 4 (1991): 98.
[10] Péter Balla, "Vádalku helyett büntetőparancs," *Magyar Jog*, no. 11 (1992): 669–671.
[11] Balla, "Vádalku helyett büntetőparancs," 669.

that instead of the 2-to-8-year sentence for robbery, the judge starts with a sentence of 2-5.5 years in the case of a confession. Based on judicial practice, the punishment is found to be below average, and even in the case of failure to confess, they do not usually impose a punishment more severe than 3-4 years.

Regarding the adoption of the plea bargain, he took the position that the entire legal system would have to be reformed and legal roles redefined, so he did not see a realistic chance for the successful introduction of the plea bargain in the near future.

In comparison, the non-trial procedure was a successful legal institution[12], so he saw in this a solution in accordance with European standards. He would have extended the application of the non-trial procedure to all cases, since at that time it could only be used during misdemeanor proceedings.

1.3 Government Decision of 1994

After the regime change, in the mid-1990s - as a result of the amendments - the criminal procedure law was transformed, however, Act I of 1973 still carried socialist features, so the development of a new criminal procedure law began.[13] The objectives of the new code are set out in Government Decision 2002/1994. (I.17.), which included, among other things, the establishment of simplified procedures and the stronger enforcement of the parties' right to disposition.

After the government decision was adopted, a Codification Committee was established to create the new code, which submitted its bill to the Minister of Justice in the summer of 1997. The Act XIX of 1998 on criminal procedure was adopted by the Parliament in March 1998, however, it had to wait until July 1, 2003 for its entry into force due to the different ideas of the new government established in 1998. [14]

This is how it happened that, prior to entering into force, the finished law was revised based on Parliament Decision 102/1999 (XII.18). The bill was implemented by Act I of 2002 on the amendment of Act XIX of 1998 on criminal procedure, which changed the original concept with reference to speeding up the procedure, among other things. The Criminal Procedure Act underwent numerous amendments after that as well. [15]

The institution of waiving the trial was introduced into Act I of 1973 by Section 131 of Act CX of 1999, which entered into force on March 1, 2000. Act CX of 1999 reflected the objectives of Government Decision 2002/1994.

After the later entry into force of the code, the legal institution was regulated by chapter XXVI of the 1998 Law. Based on the reasoning of the legislator, the

[12] In 1991, 52,512 cases were concluded with final court decisions, of which 11,136 were decided without a trial. In: Balla, "Vádalku helyett büntetőparancs," 670.
[13] András Kristóf Kádár, "A tisztességes eljáráshoz és a védelemhez való jog húsz éve Magyarországon," *Fundamentum,* no. 4 (2009): 69.
[14] Ibid.
[15] Ibid.

introduction of the waiver of trial was carried out in order to speed up the proceedings and relieve the court.

1.4 More important court decisions

Prior to the introduction of the legal institution of the waiver of trial, several court decisions were made that laid the groundwork for the subsequent installation, settled legal theoretical issues and can be considered guiding principles to this day.

The Constitutional Court in its Decision 9/1992. (I.30.) dealt with the issue of procedural justice for the first time. As the main function of the court proceedings, it indicated the establishment of the formal truth and not that of the material truth, which was in force at the time and which should be kept in mind even now. The decision is significant because it declared that the disclosure of the material truth does not appear as an inalienable right in the Constitution, since "there are no corrective techniques that can adequately solve the limitations of legal discovery, which is a necessary element of it. The Constitution gives the right to a procedure that is necessary for the enforcement of material justice and is suitable in the majority of cases." [16] It should be noted that the Constitutional Court decision was not included in the 1998 Act, as to clarify the factual situation in accordance with reality is the task of the courts, not their obligation.[17]

Constitutional Court Decision 49/1998 (XI.27.) examined the issue of simplification and acceleration in relation to the constitutional guarantees and came to the conclusion that the constitutional guarantees take precedence over the constitutional interests related to the need for simplification and acceleration, so fundamental rights of the person subject to criminal proceedings and procedural guarantees must be prioritized.

One of the most important guarantee elements of fair trial is the right to a trial, however, in criminal proceedings based on an agreement, as a general rule, the court decides at the preparatory session whether the criminal liability of the accused can be established, so a trial does not take place.

In its Decision 422/B/1999/AB, the Constitutional Court dealt with the issue of the right to a fair trial. The legal institution of waiving the trial was contested before it entered into force, with reference to the violation of the right to a public trial, in view of the fact that, based on the rules of Criminal Law[18], a lighter sanction must be imposed upon the accused who has waived his or her right to a trial than upon a person who, exercising his or her right guaranteed by the Constitution, has not waived his or her right to a trial, which leads to the voiding of the fundamental right. The Constitutional Court rejected the motion, which was justified by the fact that the waiver of the trial does not violate

[16] 9/1992. (I.30.) AB határozat.
[17] Viktor Bérces, *A büntetőeljárás reformja és a bizonyítás alapkérdései* (Budapest: ELTE Eötvös Kiadó, 2021), 44.
[18] Criminal Law.

Section 57 (1) of the Constitution, as the accused does not waive the right to have the charges brought against him judged before an independent and impartial court, the accused merely waives that the court should decide on the charge based on the conduct of the full evidentiary procedure, after evaluating the pieces of evidence individually and as a whole. Accordingly, the accused waives his right to complete proof, which is not one of the absolute basic constitutional rights, such as the presumption of innocence or the right to a fair trial.

In its Decision 14/2004 (V.7.) the Constitutional Court dealt with the requirement of a reasonable time, in the framework of which it examined the simplification procedures. During the investigation, the Court took the position that the state's constitutional obligation to society is the enforcement of the criminal law claim without delay, which can be derived from the normative content of the rule of law and the right to a fair trial.

1.5 The 2003 amendment

There were several problems with the application of the institution of the waiver of trial. To solve one of these problems, Act II of 2003 repealed Section 72 and Section 87/C a) and b) of the Criminal Code, with a view to the promotion of the legal institution.

Based on Section 72 of Criminal Code, probation could not be used during the special procedure for waiving the trial, which was justified by the legislator by the fact that even in the case of a crime punishable by no more serious than 3 years' imprisonment, probation is a sanction that can only be used in cases that deserve special consideration, so he did not consider reasonable extension of the application of the measure. Due to a similar argument, based on Section 87/C points a) and b) of the Criminal Code a suspended prison sentence could not be imposed. It is obvious that if the application of a suspended prison sentence or probation is ruled out, then waiving the trial cannot be more favourable for the defendant. In response to the legal anomaly, the Hajdú-Bihar County Court, as a court of second-instance, filed a motion to amend the law in a specific case, since the number of crimes affected by the contradiction was high. [19]

1.6 The 2009 amendment

Due to the unpopularity of the waiver of trial, the legislator reconsidered the rules of the legal institution: compared to the original ideas, the institution of waiver of trial was changed and its regulations were broadened in the summer of 2009.[20] The change was based on Section 47 of Draft Law T/9553 and the new rules were enacted by Act LXXXIII of 2009 in order to improve the

[19] Ágnes Pápai-Tarr, "A vádalku – az amerikai és a magyar valóság" 17., *Jogelméleti Szemle'*s Homepage: http://jesz.ajk.elte.hu/papai45.html.2011.

[20] Ádám Békés, "Az egyezség közelről," in *Tanulmányok Bánáti János 75. születésnapjának tiszteletére*, ed. Zsolt Gábor (Budapest: HVG-Orac, 2019), 18–31.

timeliness of criminal proceedings. Academic literature believed in the success of the modified legal institution, but a breakthrough did not take place even then. The use of waiving the trial continued to show a result of less than 1% across the country. [21]

During the re-regulation in 2009, the legislator kept the original concept of waiving the trial, to which he added a new rule: the requirement of a written agreement between the parties. The agreement not only had to be in writing but based on Section 534 (1) of the Act on Criminal Proceedings, it also had mandatory content elements. Among the mandatory content elements was the description of the act admitted by the defendant, its classification according to the Criminal Code, the statement of the prosecutor and the accused about the type, duration and extent of the punishment as well as measures, which the court was to take note of. The lower and upper limits of the punishment, as well as the extent and duration of the measure, had to be fixed. [22] As a result, in contrast to the previous regulation, during the imposition of the penalty, the court was no longer able to decide within the framework of the penalty range set by law, but on the basis of the range included in the settlement - which was proposed by the prosecution in the indictment. However, the accused could still receive material legal benefits. An important innovation was that it was not only possible to agree on the scope of the sanction, but the prosecutor and the accused could also agree on the facts and the legal classification of the act.[23]

The 2009 regulation also added that the application of the waiver of trial is excluded if the crime was committed in a criminal organization or caused death. At that time, the obligatory decision within the framework of the legal institution about civil action within criminal proceedings was also introduced, which supports the victim.

1.7 The 2011 amendment

Act LXXXIX of 2011 entered into force on July 13, 2011, and changed the institution of waiver of trial again, which meant a significant step back. Pursuant to Section 534 (1)-(2) of the Act on Criminal Proceedings, the written settlement remained necessary only in the case of the cooperating defendant. In all other cases, the court could impose a penalty based on the facts and classification matching the indictment, taking into account the rules for reducing the lower limit of the penalty, which it had the option to do anyway. In contrast to the 2009 amendment to the Act, the 2011 amendment no longer included the fact that the lower and upper limits of the sanction must be determined by the parties entering into the agreement. [24]

[21] Boglárka Juhász Miskolcziné: "Gondolatok a tárgyalásról lemondás intézményéről," *Büntetőjogi Szemle*, no.1 (2017): 63–68.
[22] Pápai-Tarr, "A vádalku – az amerikai és a magyar valóság," 18.
[23] Czédli-Deák, "A beismerő vallomás szerepének változása," 14.
[24] Czédli-Deák, "A beismerő vallomás szerepének változása," 14.

2. Agreement

The waiver of trial was not taken over by Act XC of 2017 on criminal procedure. Instead, the Act introduced a new legal institution: the agreement. The concept of an agreement is similar but not identical to the legal institution of a waiver of trial.

Act XC of 2017 generally provides the defendant with the right to waive the trial, which creates the possibility for the court to decide on his criminal liability already at the preparatory session. In the event of an agreement, the procedure is a specific procedure based on the defendant's commission and waiver of the right to a trial. It is possible to enter into an agreement until the charge, after filing the indictment it is excluded according to the law. If an agreement is reached between the parties during the investigation phase, the prosecution will press charges in addition to the agreement and the accused will also plead guilty and waive trial at the preparatory session held according to the rules for the special procedure. There are no restrictions regarding the type of case or crime, an agreement can be made in the case of any crime. The subject of the agreement is the confession of guilt and its consequences. In order to reach an agreement, the agreement of the accused, the defense and the prosecutor is necessary, since the initiative of either party must be accepted by the representative of the other side and the agreement included in the suspect interrogation report must be countersigned by all three parties. The court is bound by the facts and classification determined by the prosecutor, as well as the legal consequences determined by the parties. As a result, the legal remedy that can be filed against the decision of the first-instance court's decision is also limited.

The agreement is usually called ‘plea bargain’ but it is not the same as a plea bargain, despite the fact that it shows similarities in several points. In contrast to the American plea bargain, the settlement can only be concluded until the filing of the indictment with the court, and the participation of the court is excluded. Another difference is that the facts and classification cannot be the subject of the agreement, only the legal consequences can be negotiated. A confession is definitely necessary for an agreement - and in Anglo-Saxon plea bargains, not only pleading guilty but also 'nolo contendere' can serve as a basis for the plea bargain.

2.1 BH.2020.353. (BT.515/2020/5)

At the preparatory session of the first-instance court, the representative of the prosecution used a 'sentencing motion' in the case of the defendant's confession, in which he proposed a prison term of six months. The accused admitted the crime in accordance with the indictment and waived his right to a trial. The trial court affeered the defendant's criminal liability and sentenced him to three months in prison. Against the verdict, the prosecutor filed an

appeal at the defendant's expense - for an increase in the length of the prison sentence, and the defendant filed for a reduction.

The second-instance court changed the verdict of the first-instance court and increased the term of imprisonment imposed on the defendant to ten months.

The chief prosecutor filed for legal remedy against the court's verdict in the interests of legality. The Supreme Court of Hungary[25] found the legal remedy request well-founded, with reference to Section 565 (2) of Be.: if the court accepted the guilty plea at the preparatory session, it may not impose a more severe penalty or apply a more severe measure than that contained in the indictment or the sentencing motion presented at the preparatory session.

2.2 The 1st amendment

A significant part of the new Criminal Procedure Act, which entered into force on July 1, 2018, was changed by Act XLIII of 2020 on the amendment of criminal procedure and other related laws. Several issues arose in the application of the agreement, which were settled by the first amending Act.

Based on Chapter LXV 'Agreement on confession of guilt' of Be. and the prosecutor's reminder attached to Section 407 of Be.[26], the legal institution of the agreement was not applicable in the case of the defendant who had already admitted the crime. The first amendment clarified this question of law enforcement and Section 407 Section (1) was added to Be. with the following permissive rule: there is no obstacle reaching an agreement if the suspect has admitted to committing the crime. With this amendment, the previously disputed question of application became obvious, the law allows the agreement even in the case if the defendant admitted the crime before the initiation of the case. It should be noted that the amendment is inconsistent with the title of Chapter LXV.

The first amendment also expanded the scope of absolute procedural requirements' breach: if the first-instance court accepted the confession made at the preparatory session in the absence of the conditions specified in Section 504 (2), it is no longer a relative procedural requirement breach but an absolute procedural requirement breach according to the amendment, thus it leads to a cassation decision.

Section 271 point 99 of the amendment was reflected in the decision Bt.515/2020/5. of the Hungarian Supreme Court which pointed out that the scope of the term disadvantageous used in Section 565 Section (2) of Be. is wider than the prohibition of aggravation. Accordingly, the rule has been amended: if the court has accepted the declaration of guilt at the preparatory session, - with the exception contained in Subsection (3) - it cannot impose a more severe punishment or apply a more severe measure than that specified in

[25] The decisions of the Hungarian Supreme Court are to be separated from the Hungarian Constitutional Court decisions as in Hungary the two systems are not interwoven like in the United States of America, for example.

[26] Péter Polt, "Az egyezség," *Magyar Tudomány* 181, no. 5 (2020): 629-644.

the indictment or that the sentencing motion contains according to Section 502 (1) of Be. This rule applies if the defendant acknowledges his guilt and waives his right to a trial at the preparatory meeting. If the defendant confesses later, during the trial, the court is not bound by this rule.

2.3 More important court decisions

In the decision of the Constitutional Court 26/2021 (VIII.11.), the enforcement of the requirement of judicial impartiality was examined in relation to the defendant who admitted his guilt at the preparatory session, or who did not admit his guilt and was referred for trial.

In its decision, the Constitutional Court referred to the 25/2013. (X.4.) decision, which stated as a principle that "the requirement of impartiality appears on the one hand as a requirement concerning the behavior and attitude of the judge. On the other hand, however, it also sets a standard for the legal environment. According to this standard, the procedural rules must strive to avoid a situation that may raise legitimate doubts about the judge's impartiality. It means that in the specific case, the judge not only has to judge objectively, but also has the task of preserving the appearance of impartial judgment."

The Constitutional Court also referred to the practice of the European Court of Human Rights and quoted from the case Delcourt v. Belgium (2689/65), according to which external appearance also plays a significant role in the issue of judicial impartiality: "Accordingly, in those cases in which doubts arise regarding the judge's impartiality, the doubt of the person brought under the procedure is important, but the decisive factor is whether this doubt can be justified by objective criteria, i.e. whether the judge's impartiality appears doubtful." [27]

Using an objective test, the Constitutional Court examined whether the judge performs several different functions during the same criminal proceedings, when he decides on the criminal liability of an accused who confesses at the preparatory session, and one who does not confess. The Constitutional Court came to the conclusion that the court does not fulfil several different roles in the case described above, so there is no objectively justifiable doubt regarding the impartiality of the judge. Based on the decision of the Constitutional Court, if the preparatory session and the trial were to be conducted by different judges, the legislative purpose of the preparatory session, namely, the concentrated preparation of the trial would not be enforced.

The Constitutional Court added to its decision that in the event that the non-confessing accused believes, regardless of everything, that the trial judge cannot be expected to judge the case impartially for other reasons, based on Section 14 (1) point e) of Be. he can initiate the exclusion of the judge. In this case, the defendant has the opportunity to assert his right to an impartial court by

[27] Ágnes Czine, "Tükörkép a bírói függetlenségről és pártatlanságról az Alkotmánybíróság gyakorlatában," *AB Szemle*, no. 2 (2018): 7.

applying the subjective test of impartiality in the specific case or in the case of a constitutional complaint, both in a subjective and objective approach.

In its Decision 19/2021 (V.27), the Constitutional Court dealt with the ex officio extension of the review. The council of the second-instance court appealed to the Constitutional Court on the basis of Section 590 (5) of Be. and requested the declaration of unconstitutionality and annulment with respect to Section 607 Section (1) and Section 608 Section (1) of Be. The prosecution later commented on the appeal pronounced against the defendant, in which it explained that the court acting at first instance violated a procedural rule: according to the trial records of the testimony held on December 13, 2018, the defendant was not warned about Section 185 (1) of Be. and the court did not instruct him on the nature of the confession and its legal consequences. Thus, it was in the absence of the legal condition written in Section 504 (2) point a) of Be. that the court accepted the confession, and after that, it took the evidence in violation of Section 521 Section (1) of Be. According to Section 609 (2), points a) and e) of Be., these procedural violations are considered to be relative, however in regard to Section 590 (3) and Section (5) point a) of Be. they are outside the scope of review, so they cannot result in the annulment of the judgment. Procedural violations identified by the prosecutor affect the conduct of the procedure, the determination- and the classification of guilt, so they should lead to the setting aside of the decision.

Both the prosecutor's and the defense's appeals were aimed only at the imposition of the sentence, therefore based on Section 590 (3) of Be., the court of second instance could conduct only a limited review, during which the court did not have the opportunity to extend its procedure to relative procedural violations, since the Be. allowed this only in the case of absolute procedural rules.

As I mentioned in the analysis of the 1st amendment, the legislator has in the meantime widened the scope of absolute procedural violations, so if the court accepted the confession in the absence of the conditions listed in Section 504 Section (2), setting aside of the judgment shall follow. In the present case, however, the Constitutional Court examined several issues, so the interim amendment of the law did not render its proceedings irrelevant.

The Constitutional Court found that the challenged legal provision, Section 590 (5) Point a) "on the basis of Section 607 (1) and Section 608 (1)" of Be., by not allowing the ex officio extension of the review in the case of all procedural violations that may result in a significant and, secondarily, unavoidable error in the judgment, implements a disproportionate limitation of the right to a fair trial (point 99).

In view of the above, the Constitutional Court acting ex officio found: the Parliament caused an unconstitutionality manifesting itself in an omission by regulating Section 590 Section (5) of Be- against the constitutional requirements arising from Article XXVIII Section (1) of the Constitution (point 105).

2.4 The 2nd amendment

Act CXXXIV of 2021, the second major criminal amendment after the entry into force in 2018 was published on December 17, 2021, and the amendments on criminal procedure entered into force on March 1, 2022. [28] Regarding the matter, the most important amendment was the changing of Section 590. Constitutional Court Decision 19/2021 described above necessitated the further amendment of the Criminal Procedure Law. Since the Constitutional Court found Section 590 (5) incompatible with fair trial, the 2nd penal amendment changed Subsection (5) and inserted Subsection (5a). Pursuant to the amendment, from March 1, 2022, the ex officio examination will also cover the relative procedural violations, if such can be identified, without examining the unfoundedness of the judgment, if a non-absolute violation of procedural law that cannot be remedied in the second-instance proceedings occurred, which had a significant impact on the conduct of the proceedings, the question of guilt, the classification of the crime, imposing the penalty, and applying the measure.

3. Summary

The Hungarian plea bargain was first mentioned in the last century - at least from a comparative legal point of view. The penal order was introduced by the I. Bp., which was later renamed several times and is currently used successfully as a penal court decision. Despite the amendments, the waiver of trial was used no more than in 1% of the cases. The reason for its failure was explained by several factors in the literature:[29] there was a lack of social demand for the introduction of the legal institution, the concept was opposed to the requirement of material truth, legal practitioners took and used the principle of legality as a basis, the accused did not receive a real material legal benefit, the procedure was unpredictable and partly contradictory. We can record a similar failure in connection with the agreement. The reasons for failure are similar to the ones in the case of waiver of trial.

Based on the history of the Hungarian plea bargain so far, it can be seen that the institution's frequent modifications and judicial practice have not led to results either. In my opinion, the insistence on the material truth cannot serve as a reason for failure, since other accelerating institutions - such as the penal court decision and the preparatory session - are successful, and confession in an accelerated procedure is not the same as letting go of the material truth. The principle of directness, orality and publicity can also be justified in the same way: as long as the other accelerating legal institutions are popular, the failure of the agreement cannot be traced back to the basic principles. At the same time, a fundamental deficiency can still be observed: similarly, to German criminal procedure law, Hungarian criminal procedure also lacks the principle

[28] Antecedent: T/17438 bill.
[29] Czédli-Deák, "A beismerő vallomás szerepének változása," 15.

of consensus as a legitimizing principle. It would be worth examining what kind of result the introduction of the principle of consensus would lead to. In addition, an important aspect would be the comparative examination of the various accelerating institutions, i.e., to which case groups and how they are applied. It can be assumed that the goal of speeding up the procedure is achieved more easily and more conveniently by the authorities by other simplification solutions.

Environmental sustainability regulatory and policy practices and actions of telecoms regulatory authorities

MESTER, MÁTÉ

ABSTRACT *Creating climate-neutral electronic communications is a shared responsibility for the industry and urgent action is needed in the face of warming trends due to global climate change. Despite this, environmental sustainability has just started to receive attention in the regulation of the electronic communications sector. The national telecoms regulatory authorities overseeing the sector in the different countries are key in driving related policy and regulation. However, as to date, hardly any paper has dealt with their respective practices in a comparative manner. Therefore, the aim of this paper is to fill this gap, to review the relevant environmental sustainability regulatory and policy practices and actions of telecoms regulatory authorities, in order to provide a comprehensive and high-level comparison of sustainability initiatives in the electronic communications sector. It is hoped that this will serve as a starting point for launching a discourse in the industry and for properly positioning the green transition in electronic communications regulation.*

KEYWORDS *sustainability; carbon neutral; environment; telecommunications; climate change; emissions; net-zero targets*

1. Introduction

This paper will review the relevant environmental sustainability regulatory and policy practices and actions of telecoms regulatory authorities, thus providing a comparison of sustainability initiatives in the electronic communications sector.[1]

Sustainability or sustainable development is a broad concept, lacking a clear definition. The 2012 UN Resolution 66/288 describes sustainable development as the development towards *an economically, socially and environmentally sustainable future for our planet and for present and future generations*[2]. This may include the protection of the environment, climate, fair trade, biodiversity, public health, or animal welfare. Sustainability in general means choosing

[1] Manuscript finished on 30 June 2022.
[2] UN General Assembly, Resolution A/Res/66/288 of 27 July 2012, RIO + 20.

actions today that do not limit the economic, social and environmental opportunities of future generations.[3]

Over the past few years, attention to climate change and sustainable development has risen dramatically among policymakers and lawyers, as well as in society as a whole. For example, in 2015, the Paris Climate Agreement was signed[4] and seventeen Sustainable Development Goals were set[5]. In late 2021, the COP26 conference[6] agreed on two main initiatives, the Glasgow Climate Pact and the Paris Rulebook. The Glasgow Climate Pact, a series of decisions and resolutions that build on the Paris accord, set out what needs to be done to tackle climate change. The Paris Rulebook, on the other hand, gives the guidelines on how the Paris Agreement is delivered. A key focus of COP26 *was to secure agreement between all the Paris signatories on how they would set out their nationally determined contributions to reduce emissions.*[7]

It is no wonder that environmental sustainability is an increasingly pressing issue in electronic communications as well.

The operation of electronic communications networks and services consumes a lot of energy and resources, so energy (and operational) efficiency is a key factor in service design. According to the laws of physics, a certain amount of energy is required to transmit a unit of data, and transmitting the data itself typically consumes more energy than processing that data.[8] The energy efficiency ("EE") of a communication link is usually expressed in terms of the ratio of the maximum data rate achievable to the energy required (bit per joule) (Hou, 2022, 3).[9] The more favourable this ratio is, the more energy efficient a technology is, and operators will prefer the most energy-efficient solutions.

Despite energy and operational efficiency being in the genes of the industry, the green transition is beginning to be seen as an explicit policy criterion and regulatory objective. Recently, there have been a growing number of regulatory initiatives specifically addressing the environmental sustainability of the electronic communications sector. The electronic communications industry, and digitalisation in the broader sense, are playing a key role in the environmental

[3] Gro Harlem Brundtland, *Report of the World Commission on Environment and Development: Our Common Future. United Nations* (Oslo, 1987). https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf.

[4] Paris Climate Agreement, 12 December 2015, Treaty Series 2016, no. 162 (to combat man-made climate change).

[5] The 2030 Agenda for Sustainable Development, A/RES/70/01, United Nations.

[6] "COP26: Together for our planet" – Climate Actions, United Nations, https://www.un.org/en/climatechange/cop26.

[7] Dominic Carver, "What were the outcomes of COP26?," January 27, 2022. https://commonslibrary.parliament.uk/what-were-the-outcomes-of-cop26/#:~:text=The%20COP26%20international%20climate%20conference,degrees%20of%20warming%20within%20reach.

[8] Andrew S. Tanenbaum, David J. Wetherall, *Computer Networks* (Prentice Hall, 2010): 100.

[9] Yanqiao Hou, *Evaluation of energy efficiency in mobile cellular networks using a fluid modeling framework* (Université Paris-Saclay, 2022). 3.

transformation of other industries and are facing further significant growth. However, this growth may even increase the overall environmental burden, making it particularly critical to strike the right balance in related policies. Nevertheless, current decisions already determine the environmental burden that will escalate by 2030 and beyond, due to the overall life cycles of electronic communications infrastructures, so making electronic communications climate-neutral is a responsibility shared among the industry, and global warming trends require urgent action.

Several major countries have already included sustainability as a goal into their strategic plans for the following years. Relevant examples include the Spanish NRA CNMC, which has included multiple sustainability objectives in its Strategic Plan (2021-2026) and Action Plan (2021-2022), or the UK, which mentions sustainability actions and importance of communications actors in reaching its net-zero carbon targets multiple times in its most recent Action Plan (2022-2023).

Other authorities, such as the Hungarian NRA NMHH, are planning to include environmental questions in their 2021 annual online consumer survey and are considering a workshop and consultation with stakeholders[10]. Furthermore, on the potential of partnering up with other institutions, the Maltese authority MCA has already consulted a number of stakeholders including the Maltese Environmental Authority (ERA) with whom it discussed possible future collaboration, once there is a more developed holistic strategic direction on environmental matters[11]. However, several countries' telecom regulators, such as that of the Czech Republic, Romania, Cyprus, Estonia or Greece do not seem to have yet taken any major or concrete actions towards incorporating sustainability as a key priority in their strategies or plans of actions.

It is also worth noting that at European level, in 2020, BEREC started to develop its knowledge regarding the topic of environmental sustainability within the digital sector. As most National Regulatory Authorities were confronted with this new experts' topic, BEREC created a forum where NRAs can learn from each other, develop a knowledge base and deepen their insights on the subject, to acquire a high level of expertise. As a result, the Body has recently adopted a draft report which has also been submitted for public consultation.[12] Nevertheless, the study also suggests that there are a number of potential regulatory measures that can be used to take meaningful action: raising awareness among consumers and network operators, developing codes of conduct with stakeholders, promoting eco-design and recycling programmes,

[10] BEREC, "Draft BEREC Report on Sustainability: Assessing BEREC's contribution to limiting the impact of the digital sector on the environment," March 10, 2022.
[11] Ibid.
[12] Ibid.

encouraging research on sustainability in the ICT sector and promoting sustainability solutions.[13]

BEREC's Strategy 2021-2025 spells out that it will assess ways to contribute constructively to environmental sustainability, both internally (in the running of BEREC as an organisation) as well as externally (by assessing the possible impact we can have as regulators).[14]

Given this context, this article will look at national regulatory agencies that did adopt sustainability-focused measures and explore varied types of commitment of their telecom regulatory agencies. Considering the regional reach and general scope of BEREC, as well as the fact that its work is reflecting national initiatives, it will not explore the actions taken by this particular institution, but will focus solely on national level actions.

After this introductory section, the paper reviews the various relevant environmental sustainability regulatory and policy practices and actions of telecoms regulatory authorities. After outlining the situation in each of the selected countries, the paper concludes by briefly comparing their actions and then suggests possible directions for regulatory action.

2. Overview of the approach of national regulatory authorities

2. 1 United Kingdom (Ofcom)

As declared on their website in the section dedicated to „Environmental policy", the regulator of the United Kingdom (Ofcom) has a strong commitment to protecting the environment: *Ofcom understands that we are in challenging times in terms of global environmental impacts. We all have a part to play in addressing threats to our planet natural systems and biodiversity. Ofcom is therefore committed to assessing, understanding, and finally improving its environmental performance.*[15]

This commitment is reflected in the actions taken at legislative level, with environmental legislation and Government policies on Environmental best practices to be adopted. This includes fighting pollution and adoption of policies to minimize the environmental impact for the life cycle (including disposal) of materials, products, vehicles, equipment, and any other physical assets under their control. Ofcom also pledged commitment to setting up environmental objectives and targets and review their negative environmental impacts.

[13] Ilsa Godlovitch, Aurelie Louguet, Dajan Baischew, Matthias Wissner, Anaelle Pirlot, *Environmental impact of electronic communications* (Bad Honnef: WIK-Consult, 2021) https://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/10206-external-sustainability-study-on-environ_0.pdf, 9–12.

[14] Ibid.

[15] Ofcom, "Environmental Policy," published May 3, 2022. https://www.ofcom.org.uk/about-ofcom/policies-and-guidelines/environmental-policy.

The regulator has also implemented policies and procedures to ensure a high degree of sustainability of its operations, in its aim to *develop, implement, and maintain a compliant ISO14001:2015 Environmental Management System (EMS)*[16] as well as part of its *Reduce, Reuse, Recycle initiative*.[17] Relevant examples include a more prominent environmental management within the strategic direction of the organisation, as well proactive initiatives against actions that are harmful for the environment, such as sustainable resource use and climate change mitigation.

At a strategic level, Ofcom has included the topic of sustainability within its annual work programme for 2022/2023. The plan mentions the COP26 conference[18] in November 2021, where world leaders gathered to address the critical issue of climate change, including setting ambitious net-zero carbon targets. The UK's net-zero carbon target is a goal towards which Ofcom vouches to continue its collaboration with companies from all sectors of activity.

In the document, Ofcom recognized the role that communications services, both fixed and wireless services, play in *enabling the reduction of carbon emissions* and the transition to net-zero carbon *as we aim for a more sustainable society*. This can be done through reducing travel, and increasing network durability, or enabling services such as smart meters in homes or satellites to monitor climate change.

Moreover, in order to have networks and services that are fit for the long term, the document states that communications companies need to continue to invest in long-term sustainable policies, which is something that many of them have already pledged to do. This enables the UK *to become more efficient, productive and empowered to tackle the broader environmental challenge.* In that spirit, Ofcom pledges to *continue to engage with industry on sustainability matters and to prioritize efforts towards achieving the UK's net-zero carbon target*.[19]

Last but not least, Ofcom announced that is planning to publish a paper on this topic.[20]

2. 2 The Netherlands (ACM)

The Netherlands has adopted a strong position towards sustainable policies which were reflected in its legislative actions early on, currently being of the key priorities of the telecom regulator. In 2019, the Dutch government adopted

[16] Ibid.
[17] Ofcom, "Ofcom's Plan of Work 2022/23," March 25, 2022, 53.
[18] Website of UN Climate Change Conference UK 2021 https://ukcop26.org/
[19] Ofcom, "Ofcom's Plan of Work 2022/23," March 25, 2022, 30.
[20] "Draft BEREC Report on Sustainability: Assessing BEREC's contribution to limiting the impact of the digital sector on the environment," March 10, 2022, 16.

the Dutch Climate Act,[21] which set as objectives a 49% reduction of greenhouse gas emissions by 2030, a 95%-reduction by 2050, and a 100% carbon neutral energy production in the Netherlands by 2050. In addition, the Supreme Court of the Netherlands in late-2019 ruled that the State of the Netherlands is obliged to make sure that greenhouse gas emissions will have been reduced with 25% by late-2020 compared with 1990.[22]

The Dutch NRA and competition authority ACM published draft Guidelines in January 2021 concerning sustainability agreements and the implications for competition.[23] In these guidelines, sustainability is named as one *of the key priorities*, the NRA recognizing that *agreements between undertakings can contribute in an effective manner to the realization of public sustainability objectives* and *strengthen the support for the efforts that are needed for the realization of those objectives*.[24] In the document, the ACM offers a *practical explanation of the application of competition rules on sustainability agreements*, explaining what type of sustainability agreements are allowed, and how ACM deals procedurally with questions about sustainability agreements. Besides case studies and concrete examples, the Guidelines also enable undertakings to conduct *self-assessments* of their planned sustainability agreements.

In 2021, the chairman of the Authority also delivered a speech[25] about the agreement reached in European Climate Law which had the goal of reducing green-house emission with 55% by 2030. He suggested that for certain types of agreements the fair share test is met if the benefits to society as a whole outweigh the negative effects to consumers, as opposed to the proposal spoken about, which would be that the benefits to consumers at least compensate them for the negative effects. He emphasized the goals and content of the newly proposed sustainability guidelines, specifically that all agreements must fulfill three criteria:

1. The agreements must reduce environmental damage (reduce negative externalities);
2. The government has set a goal for this reduction or the agreement helps in complying with a legal requirement;
3. The proposed measure to achieve the reduction is cost-efficient.

[21] Act of 2 July 2019, establishing a framework for the development of policy aimed at reducing irreversibly and progressively the Dutch greenhouse gas emissions in order to limit global warming and climate change, Bulletin of Acts and Decrees 2019, 253. Entry into effect on 1 September 2019, Bulletin of Acts and Decrees 2019, 254.

[22] Supreme Court of the Netherlands, State of the Netherlands v. Urgenda Foundation, ECLI:NL:2019:2006 dated December 20, 2012.

[23] Authority for Consumers and Markets, "Sustainability Agreements. Opportunities with competition law," https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf.

[24] Ibid.

[25]Martijn Snoep, "GCR Connect: Sustainability and Cooperation," April 28, 2021. https://www.acm.nl/nl/publicaties/speech-duurzaamheid-en-samenwerking-martijn-snoep-gcr-connect-28-april-2021.

2. 3 France (ARCEP)

Considered a world leader in sustainability, France has approached a multi-layered position to sustainability, including commissioning studies, publishing articles and position papers, and taking legislative actions.

Part of BEREC - The Body of European Regulators for Electronic Communications, telecom regulator of France, ARCEP, the Electronic Communications, Postal and Print media distribution Regulatory Authority is on a mission to promote sustainability in the telecom sector, being a staple in Europe for their approach regarding environmental consciousness. The digital environmental footprint in France is one of ARCEP's area of concerns, commissioning multiple studies on the impact of certain technologies on the environment and dedicating resources to fulfill France goals of achieving carbon neutrality. BEREC even describes ARCEP as one of the pioneering telecoms regulators in terms of digital sustainability.

As part of their long-term plan and to prove their mission in ensuring sustainability in the telecom sector, ARCEP started a cycle of reflection in September 2018 with a 5- to 10-year time horizon to forecast network evolution. The goal is to anticipate the difficulties that may arise in the regulation of exchange networks and to plan ahead accordingly. ARCEP has assembled a Scientific Committee made up of 10 experts representing various fields of knowledge from the academic, business, and industrial worlds to carry out this task.[26] In 2019, as part of the same strategy, in the context of a multi-player cycle of thoughts entitled "Future networks", ARCEP issued a study addressing the environmental impact of digital technology.[27]

In August 2020, the Ministry for the Ecological Transition and the Ministry for the Economy, Finance and the Recovery assigned ADEME and ARCEP with a joint 18-month task, to measure the digital environmental footprint in France and identify levers of action and best practices to reduce the carbon footprint. In order to meet the 2030 and 2050 environmental targets of the European Commission, which the French Government takes very seriously, they have tasked ARCEP with measuring the digital environmental print.

As a result, ARCEP published a report[28], an environmental impact assessment of the digital sector in France and courses of action to be taken. The key courses of action identified by ARCEP relate to:

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[26] ARCEP, Future networks, "Digital tech's carbon footprint: Arcep publishes a new brief as part of its reflection process on future networks," October 23, 2019. https://en.arcep.fr/news/press-releases/view/n/future-networks-3.html.

[27] ARCEP, "Réseaux du futur - Note n° 5 - L'empreinte carbone du numérique," October 21, 2019. https://www.arcep.fr/uploads/tx_gspublication/reseaux-du-futur-empreinte-carbone-numerique-juillet2019.pdf.

[28] Yasmine Aiouch (Deloitte), Augustin Chanoine (Deloitte), Léo Corbet (Deloitte), Pierrick Drapeau (Deloitte), Louis Ollion (Deloitte), Valentine Vigneron (Deloitte), avec les contributions de Caroline Vateau (APL-datacenter), Etienne Lees Perasso (Bureau Veritas), Julie Orgelet (DDemain), Frédéric Bordage (GreenIT.fr) et Prune

- the need for more in-depth knowledge of the impacts, for data collection and paving the way for the creation of public databases on this issue;
- the need for reliable data to fine-tune the modelling of digital's different components;
- the need to take action to curb the environmental footprint of "equipment" and "hardware" (extending the life of digital equipment, repairability, durability, reuse, refurbishing, functional and repair economies) without overlooking the interdependence of networks, data centres and devices;
- the need to involve every stakeholder, in other words:
- the businesses that design digital services, hardware and software, to move towards sustainable design;
- consumers and business users who need to be made more aware of responsible and sober use of digital services.

As an outcome of ARCEP's reports, consultations and sessions involving experts from various fields, the French regulator published a series of recommendations based on ARCEP's findings in the field of digital sustainability: *Strengthening public policymakers' capacity to steer digital technologies environmental footprint, Incorporating environmental issues into ARCEP's regulatory actions* and *Increasing incentives for economic, private and public sector stakeholders as well as consumers.* The findings were also taken into account and transposed in the Digital RoadMap published by the French government in 2021.[29]

The 2021 RoadMap of France aims for responsible digital services and an ecological transition.[30] The roadmap is developed along three lines: *develop knowledge of the digital environmental footprint, support a more sober digital environment* and *make digital technology a lever for the ecological and solidarity transition.* The French executive also plans to address the environmental costs and lifecycles of producing digital equipment, given that the amount of electronic waste in Europe is growing by 2% per year and that less than 40% of it is recycled.

Esquerre (IDATE). 2022. Evaluation de l'impact environnemental du numérique en France et analyse prospective, Etat des lieux et pistes d'actions. https://www.arcep.fr/uploads/tx_gspublication/etude-numerique-environnement-ademe-arcep-volet01_janv2022.pdf.

[29] FRENCH DIGITAL COUNCIL, Roadmap on the environment and digital technology - 50 measures for a national and European agenda on responsible digital, i.e. sober and at the service of the ecological and solidarity transition and sustainable development goals, Press kit of the report submitted to the Minister for the Ecological and Inclusive Transition and the Secretary of State for Digital Affairs, July 2020. Available online at: https://cnnumerique.fr/environnement_numerique.

[30] Digital Roadmap and Environment, April 27, 2022. https://www.ecologie.gouv.fr/feuille-route-numerique-et-environnement.

On November 2, 2021, the French Senate approved Law No. 2021-1485[31] aimed at reducing the environmental footprint of digital technology, creating an obligation for French telecoms operators to disclose to the public what actions they have taken to reduce their carbon footprint. A report[32] commissioned by the French Senate shows that the digital sector could account for 6.7% of greenhouse gases emitted by 2040, currently the percentage being at 2% in 2019.

The report, based on the findings made by the Regional Planning and Sustainable Development Commission was commissioned in order to show the impact of digital technologies on the environment and to serve as a basis for legislative action in order to reduce the impact by enacting responsible policies. The report shows the importance of balancing the environmental gains made possible by digital technology and its direct and quantifiable effects in terms of water use, energy consumption and greenhouse emissions. The report shows important figures and draws attention to the challenges faced by the telecom industry regarding sustainability, calling for action in France to reconcile the digital transition and ecological transition. Reports like this helped to pass the November 2 law which emphasizes several important points, such as increasing knowledge of how digital technology affects the environment and promotes digital sobriety. It also aims to discourage virtuous digital practices by supporting data centers and networks that are more energy-efficient, reducing the amount of energy used, as well as by introducing the idea of software obsolescence in particular. The law requires telecom operators to publish and be transparent about key indicators on their policies to reduce their environmental footprint.

The Bill includes several provisions aimed at making digital users aware of their environmental impact, provisions that limit the renewal of terminals, which are the most responsible for the digital carbon footprint, provisions for migrating to less energy-intensive data centers and networks and rules that promote the development of ecologically friendly digital habits.

France is also taking steps in assessing new technologies and implementing policies that help maintain sustainability. In addition to the "Achieving digital sustainability" (Pour un numérique soutenable) - a joint work of BEREC members including ARCEP on the main issues and ways of action on digital sustainability - platform's work, ARCEP published a study[33] on January 14,

[31] Law n° 2021-1485 of November 15, 2021 published in JO n° 266 of November 16, 2021. http://www.senat.fr/dossier-legislatif/ppl20-027.html.

[32] Information report no. 555 (2019-2020) by MM. Guillaume CHEVROLLIER and Jean-Michel HOULLEGATTE, made on behalf of the commission for regional planning and sustainable development, filed on June 24, 2020. http://www.senat.fr/rap/r19-555/r19-555_mono.html.

[33] Information report no. 555 (2019-2020) by MM. Guillaume CHEVROLLIER and Jean-Michel HOULLEGATTE, made on behalf of the commission for regional planning and sustainable development, filed on June 24, 2020. https://www.arcep.fr/fileadmin/cru-

2022, conducted by mobile technical experts, comparing, with identical data consumption trends, energy consumption and greenhouse gas emissions produced by the current scenario of 4G network deployment and 5G (in the 3.5 GHz band), with that of the "Achieving digital sustainability" European platform. The study's aim is to lead to an understanding of the impact that the introduction of 5G will have on the consumption of energy.

ARCEP is active in ensuring sustainability in the telecom sector even holding workshops, an example being the: "How to integrate the environmental issue into the frequency allocations of the 26 Ghz band (which will host 5G)?" workshop organised in November 2021, their purpose being to discuss and develop ideas that are meant to support the legal framework and to be forwarded to the government with the scope of helping them enact the appropriate policies.

In addition to setting up workgroups, workshops, issuing reports and assessments, providing consultation and awareness all relating to sustainability in the telecom sector, ARCEP is expected to be involved in creating an assessment of the environmental footprint of the audio-visual sector in 2022, issuing recommendations to content service provider and TV broadcasters and creating eco-design guideline together with the audio-visual regulator.

2. 4 Finland (Traficom)

The Finnish government stated that sustainable development is a priority for Finland which was ranked number 1 in 2021 in an annual official ranking made by the UN and the Bertelsmann Foundation, an international sustainable development comparison. This shows that Finland is close to achieving the UN Sustainable Development Goals related to poverty alleviation, health, education, water, energy, reducing inequality, peace, and the rule of law.[34]

Finland is implementing this global Agenda for Sustainable Development by means such as the national Society's Commitment to Sustainable Development which include goals like obtaining a carbon neutral society and a lifestyle respectful of the carrying capacity of nature.[35] By 2030, Finland is confident it will downsize its dependency on imported fossil fuels by 50% and will totally ban the use of coal in power generation. However, there are still challenges

1656326264/user_upload/grands_dossiers/environnement/etude-environnement-4Gvs5G-resume-executif-comite-expert-mobile_janv2022.pdf.

[34] Government Communications DepartmentMinistry for Foreign Affairs, "Finland ranks first in international sustainable development comparison," June 14, 2021. https://valtioneuvosto.fi/en/-//10616/finland-ranks-first-in-international-sustainable-development-comparison.

[35] Prime Minister's Office, "Towards the Finland we want by 2050. The state of sustainable development in 2020 in light of indicators and comparative studies," https://sustainabledevelopment.un.org/content/documents/26264VNR_2020_Annex_2.pdf.

imposed in terms of energy use which could also expand due to the emergence and growth of new technologies in the ICT sector.

As part of its responsibilities, Traficom is responsible for *promoting climate and environment issues and related strategic programmes*. The regulator is also in charge of *coordinating planning and the implementation of the climate and environment issues* as well as *builds, develops and maintains networks dealing with climate and environment issues.*

Focusing on telecom sustainability, Finland's regulator, Traficom, has conducted a series of studies and reports on the assessment of the environmental impact of transport or emerging technologies as well as the interest of consumers into using environmentally friendly technologies. However, the environment section of the publications on the official website is scarce and contains only a few studies, making the activity of Traficom in the field of sustainability quite limited when compared to Finland's leading role in sustainable development.

In 2020, Traficom published a report[36] on the impact of emerging technologies in the ICT sector on the environment and climate change. As a part of the ICT climate and environment strategy carried out by the Finnish Ministry of Transport and Communications, the study focused on examining and mitigating the effects of certain new technologies on climate and environmental change in 2020 and by 2035, and to suggest possible ways to mitigate the negative effects.

A survey report[37] on consumers which shows the consumers' views on environmental impacts of information and communication sectors' devices and services, usage of internet services, replacement intervals of devices, and recycling of devices is also published by the regulator. The study revealed a need for a better understanding of the environmental impact of IT equipment and services in Finland by consumers and it showcased the desire of Finnish consumers to become a more sustainable consumer in the future, if more information is provided. The survey was commissioned as part of a strategy to reduce harmful environmental impacts and guarantee energy efficiency, and is part of a larger effort of Finnish authorities to ensure that the ICT sector, which contributes to a greater deal of emission and energy consumption will prove to be sustainable and will benefit from all the tools needed to ensure its development into an environmentally friendly and limited or neutral in terms of emissions.

[36]Deloitte, "Selvitys ICT - nousevien alan teknologioiden vaikutuksista ympäristön ja ilmastonmuutokseen," 224/2020. https://tieto.traficom.fi/sites/default/files/media/publication/ICT_ilmastovaikutukset_selvitys_Traficom_julkaisuja_244_2020_17.8.20.pdf.

[37]Traficom, "Kuluttajat kiinnostuneita ympäristöystävällisestä netin käytöstä," November 10, 2022. https://www.traficom.fi/sites/default/files/media/publication/Tiivistelma-ymparistokuluttajatutkimus-marraskuu-2020.pdf.

In November 2019, the Ministry of Transportation and Communications established a working group to create a climate and environmental strategy for the ICT sector. The strategy's goal was to create consensus regarding the sector's impact on the environment and offer suggestions for further action. The working group was composed of numerous organizations, including telecom providers, academic institutions, research centers, consumer unions, media companies, environmental groups, and different public sector entities. The final strategy[38] was released in March 2021 and contains a lengthy list of suggestions, including some for government agencies, data centers, and telecom carriers. The goals of the National Strategy for the ICT Sector is to advance environmentally responsible digitalization and aid in the fulfillment of related policies and developments that support achieving the results. As Traficom is also the transport regulator, they also publish studies[39] on the sustainability of the transport sector.

2. 5 Ireland (ComReg)

The Irish Government is committed to the 2030 UN Agenda for Sustainable Development and to fully achieving the Sustainable Development Goals by 2030. The government is actively working on introducing sustainable policies in all aspects of society in order to move to a future that protects the natural resources and environment.[40] Ireland has mobilised all aspects of its society, from government, businesses as well as individuals to work together to achieve the goals imposed by the UN agenda by 2023[41], including its telecom regulator, ComReg.

Ireland's Telecom Regulator, ComReg, is devoted to ensuring sustainability and is taking steps into understanding how the electronic communication industry can reduce its own carbon footprint and how it can change and develop sustainably with the environment. Some measures proposed include tele-working and using videoconferencing to reduce greenhouse gas emission from transportation, to develop IoT technologies that can increase agricultural productivity and energy consumption. ComReg is aware that encouraging the

[38] Ministry of Transport and Communications, "Climate and Environmental Strategy for the ICT Sector," March 9, 2021. https://julkaisut.valtioneuvosto.fi/handle/10024/162912.

[39]Traficom, Heidi Auvinen, Anu Tuominen, Esko Lehtonen ja Fanny Malin, "Kestävän liikkumisen toimien kulkutapavaikutukset", Traficomin tutkimuksia ja selvityksiä Traficoms forskningsrapporter och utredningar Traficom Research Reports 13/2020. https://www.traficom.fi/sites/default/files/media/file/Kest%C3%A4v%C3%A4n_liikkumisen_toimien_kulkutapavaikutukset_Traficom_13_2020.pdf.

[40]Environmental Protection Agency, "Ireland's Environment: Sustainable Economy," https://www.epa.ie/our-services/monitoring--assessment/assessment/irelands-environment/sustainable-economy/.

[41] Government of Ireland, "17 Goals to Transform our World. Highlighting Ireland's progress towards achieving the United Nations Sustainable Development Goals," https://irelandsdg.geohive.ie/.

sector to support a more sustainable and inclusive economy is necessary in order to be in line with the goals, priorities and policies imposed by the European Green Deal.[42]

In its 2021-2023 Strategy Statement[43], ComReg includes sustainability as one of its main goals, acknowledging that the *ECS sector can play an important role in creating a more sustainable economy. The carbon footprint of the sector is changing as new networks get deployed.* In their Strategy, ComReg is described as an organisation that values environmental sustainability. In accordance with industry standards, ComReg has implemented a variety of green initiatives and is committed to reducing the carbon footprint of its offices and operations.

ComReg published a Call for Inputs[44] in 2019 to learn more about the connection between connectivity and decarbonization. Several important projects and commitments in this plan are shaped by the lessons learned from that Call for Inputs. The Connectivity and Decarbonisation call for inputs served as a way to learn more about how the electronic communications industry interacts and affects climate change, including how it can help the economy become decarbonized, how to lower its own carbon footprint, and how to adjust to a changing environment. The report highlighted four ways to reduce emission: transportation (such as traffic optimization), agricultural (such as precision farming and using new technologies), power (such as smart grids), and industrial (such as the use of machine-to-machine (M2M) and Internet of Things).

In 2019, The Irish Government released its "Climate Action Plan 2019"[45] in response to the threat of climate change, which plots a route toward challenging decarbonization goals. The Climate Action Plan emphasizes the significance of government and public bodies acting to achieve Ireland's decarbonization targets and acknowledges that Ireland must scale up its commitments to address climate disruption. ComReg has taken steps towards making sure it supports decarbonization.

In the 400 MHz Award procedure, ComReg allocated radio spectrum rights of use specifically for the supply of Smart Grid, recognizing the critical role of Smart Grid as an enabler in the reduction of Greenhouse Gas ('GHG')

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[42] European Commission, "A European Green Deal," https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

[43] Commission for Communications Regulation, "Electronic Communications Strategy Statement 2021 to 2023," https://www.comreg.ie/media/2021/12/ComReg-ECS-Strategy-Statement-English-Dec-7-Final-Web.pdf.

[44] Commission for Communications Regulation, "Call For Inputs Connectivity and Decarbonisation," December 20, 2019. https://www.comreg.ie/media/dlm_uploads/2019/12/ComReg-19126.pdf.

[45] Department of the Environment, Climate and Communications; Department of the Taoiseach, "Climate Action Plan 2019," June 17, 2019, last updated June 2, 2022. https://www.gov.ie/en/publication/ccb2e0-the-climate-action-plan-2019/.

emissions.[46] In order to reduce carbon emissions and the effects of climate change, smart grids have been highlighted as a crucial enabler and are included as part of the action plan set by Project Ireland 2040, Ireland's National Strategic Framework that promotes a transition to a low carbon energy future.[47]

As part of their work in the Department of Communications, Climate Action & Environment, ComReg has launched a project[48] on *Climate Change Impact and Adaptation of Electronic Communications Networks in Ireland*, supporting the evaluation of the impact made by the electronic communications sectoron the environment. As part of the project and their strategy, ComReg is interested in ascertaining what can be done to reduce the carbon footprint of the electronic communications industry.

In addition, ComReg is interested in the view of consumers on sustainability in the telecom sector, by launching a 'Confidence and Awareness' consumer survey[49]. The questions addressed were a way to find more about consumer's attitudes and opinions on the environmental impact (such as carbon footprint) and long-term viability of mobile devices manufacturers and service providers.[50] More recently, in April 2022, ComReg held a webinar under the title "Towards a more sustainable Telecommunications ecosystem"[51] which emphasized ComReg's action and devotion to a more sustainable future.

In the upcoming future, ComReg plans a series of initiatives in order to ensure sustainability: they aim to continue to put in place the necessary measures in order to reduce its Carbon Footprint, in line with the government Climate Action Plan and other initiatives and intends to develop a project that will support flexible and remote working which has been found to improve emissions and has an overall positive environmental impact.

2. 6 Hungary (NMHH)

While making significant progress in the field of environment in the last decade, Hungary is still below the EU average on the Eco-Innovation score and their environmental and resource management activities achieve extremely low

[46] Commission for Communications Regulation, "400 MHz Band Spectrum Award," https://www.comreg.ie/industry/radio-spectrum/spectrum-awards/400mhz-band-spectrum/.

[47] Government of Ireland, "Project Ireland 2040 - Building Ireland's Future," https://assets.gov.ie/7335/7692660a70b143cd92b1c65ee892b05c.pdf.

[48] Department of Communications, Climate Action & Environment, Annual Report 2019

[49] ComRegWebinar, "Towards a more sustainable Telecommunications ecosystem," https://www.comreg.ie/media/2022/05/ComReg-2239.pdf p. 8.

[50]Commission for Communications Regulation, "ComReg issues Electronic Communications Sector Quarterly Report for Q4 2021," March 10, 2022. https://www.comreg.ie/comreg-issues-electronic-communications-sector-quarterly-report-for-q4-2021/.

[51] ComRegWebinar, "Towards a more sustainable Telecommunications ecosystem," https://www.comreg.ie/media/2022/05/ComReg-2239.pdf.

results. [52] Hungary still faces significant challenges as they are heavily dependent on fossil fuels, the energy efficiency is low and there is no strong governmental response to environmental decision making. While being committed to the 2030 UN Agenda[53] and stating that *the environmental pillar has always been the centre of the concept of sustainability in the country*, Hungary is far from achieving the environmental goals laid by the Agenda.

While facing financial barriers as a main challenge in implementing their goals, Hungary's government announced the Climate and Environmental Protection Action Plan in 2020.[54] Eight action points are suggested, including waste management, environmentally friendly technologies for businesses, renewable and carbon-neutral energy production, energy efficiency, reforestation based on newborn babies (10 trees/baby), increased access to and use of reasonably priced electric cars, the launch of the green bus program, and the introduction of green government bonds. In addition to these, in 2020, a dedicated climate protection law was introduced in Hungary aiming to decrease the carbon emission of the country by 40% (to the base of 1990).[55] Following that, a National Clean Development Strategy was adopted.[56]

Hungary's telecom regulator, The National Media and Infocommunications Authority (NMHH) however, has not taken any important steps in ensuring the goals for carbon-neutral energy productions and how energy efficiency will be met. The steps taken are limited and only refer to the corporate social responsibility of the regulator itself taking action such as purchasing modern vehicles for their office in order to reduce their footprint.[57]

What could be seen as a way of enquiry about sustainability in the telecom sector, the NMHH has included a question about the importance of sustainability in its 2021 annual survey report[58] to consumers using mobile

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[52] European Commission, "Eco-innovation Action Plan: Hungary," https://ec.europa.eu/environment/ecoap/hungary_en.

[53] UN Sustainable Development Goals: Hungary, "Main messages of Hungary," https://sustainabledevelopment.un.org/memberstates/hungary#:~:text=The%20environmental%20pillar%20has%20always,furthering%20sustainable%20development%20and%20peace.

[54] Ministry for Innovation and Technology, "2020. Climate and environmental protection action plan," https://2015-2019.kormany.hu/download/5/07/c1000/Climate%20and%20environmental%20protection%20action%20plan_EN.pdf.

[55] Act of XLIV of 2020 on Climate Protection.

[56] Nemzeti Tiszta Fejlődési Stratégia 2020-2050 (National Clean Development Strategy) https://cdn.kormany.hu/uploads/document/5/54/54e/54e01bf45e08607b21906196f75d836de9d6cc47.pdf .

[57] NMHH, Corporate social responsibility. https://english.nmhh.hu/responsibility-sustainability.

[58] NMHH, "Sustainability is less important when buying mobile devices," February 16, 2022. https://english.nmhh.hu/article/226947/Sustainability_is_less_important_when_buying_mobile_devices.

services. As part of a research aiming to gain a better understanding of the state of the electronic communications sector in Hungary, the survey found that Hungarian consumers do not consider sustainability when using or buying mobile devices and would prefer a device that is cheaper rather to an environmentally friendly device. As a step forward in the right direction, the NMHH also published an article [59]based on the findings of a report on the short lifespan of mobile devices in which they mention it would be *important for consumers to take sustainability into account when using and buying devices.*

NMHH implemented the "Netre fel!"[60] programme which allows the replacement of outdated devices that are unable to connect to the 4G network with a subsidy from the state. Within the scheme, devices handed to retailers are recycled. The programme offers a 20.000 HUF (apx. 50 EUR) support for turning in a 2G or 3G device and switching to a 4G device.

However, no recent reports focus on any sustainability policy and there are few actions taken by the NMHH in the development of new carbon neutral technology, environmental impact of technologies or consumer's sustainability views. The strategic goals imposed by the 2018-2022 NMHH strategy[61] do not refer to sustainability or environmental consciousness.

2. 7 Spain (CNMC)

The Spanish regulator incorporated sustainability at a strategic level by formulating clear objectives in its Strategic Plan (2021-2026)[62] and Action Plan (2021-2022)[63]. In the former, the CNMC vouched to integrate the Sustainable Development Goals (SDGs) in its decision-making process. Thus, its activity will be oriented towards the achievement of the goals of the 2030 Agenda, identifying in the development of its functions the areas of action that contribute to the achievement of these objectives. In particular, promoting and fostering the ecological transition and digitization and fostering competition, which has the potential to drive growth through its impact on productivity and, therefore, stands as a long-term driver of well-being.

In the latter, the CNMC mentioned placing the energy consumer at the center of all the tasks of the CNMC. Thus, on the one hand, promoting the active role of the consumer and guaranteeing access to sustainable energy options; and on the other, trying not to leave anyone behind in the face of the new ecological transition, with adequate consumer protection measures, with

[59] NMHH, "Why is the life of mobiles so short?," January 28, 2022. https://nmhh.hu/cikk/226447/Miert_olyan_rovid_a_mobilok_elete.

[60] NMHH, "Support is already available for 2G devices!," https://netrefel.hu/.

[61] NMHH, NMHH Strategy 2018-2022. https://english.nmhh.hu/document/195890/nmhh_strategy_2018_2022.pdf.

[62] CNMC, Strategic Plan 2021 - 2026, January 22, 2021. https://www.cnmc.es/en/node/386291.

[63] CNMC, Action Plan 2021-2022, in force as of January 22, 2021. https://www.cnmc.es/consultas-publicas/cnmc/plan-actuacion-2021-2022.

special attention to vulnerable consumers, and those consumers with insufficient knowledge of the market, which at the same time could avoid distortions of the market. The CNMC also vouched to encourage through regulation the decarbonization of the economy and renewable energy certification processes. Earlier this year, the Spanish telecom regulator also held a meeting focused on Sustainability.[64]

2. 8 Austria (RTR)

Austria's telecom regulator has not posted any position paper, report or article about sustainability until now. However, Austria's focus on sustainability is reflected on the actions of other institutions: on June 1, 2022, the Austrian Federal Competition Authority published its draft Sustainability Guidelines[65] to provide guidance for assessing ecological/environmental sustainability agreements under the new sustainability exemption recently introduced in Austrian antitrust law[66].

2. 9 Denmark (Danish Business Authority)

The Danish Business Authority, Denmark's telecom regulator, is committed to creating growth in Denmark through a world class ICT-infrastructure. The mission of the Danish Business Authority for the foreseeable future is *to contribute to a responsible and sustainable economic development, in order to improve competitiveness around the country*[67], which is why sustainability has been an integral part in the regulator's strategy in recent years. On its website, the regulator makes available multiple analyses and case studies[68] provided to show the potential in the green transition and circular economy in Denmark.

[64] CNMC, "Ad-hoc virtual DGs Meeting – Sustainability," published January 26, 2022. https://www.cnmc.es/sobre-la-cnmc/actividad-institucional/ad-hoc-virtual-dgs-meeting-26th-january-2022-sustainability.

[65] Federal Competition Authority, "Draft guidelines on the application sustainability-agreements," published June 1, 2022, https://www.bwb.gv.at/en/news/news-2022/detail/afca-publishes-draft-guidelines-on-the-application-sustainability-agreements-asking-for-comments.

[66] Viktoria H. S. E. Robertson, "The New Sustainability Exemption in Austrian Competition Law," *Journal of European Competition Law & Practice (Forthcoming)*, October 29, 2021. https://ssrn.com/abstract=3957551 or http://dx.doi.org/10.2139/ssrn.3957551.

[67] Danish Business Authority, "Mission and Vision," https://danishbusinessauthority.dk/mission-and-vision.

[68] Danish Business Authority, "Green transition and circular economy," https://danishbusinessauthority.dk/green-transition-and-circular-economy.

2. 10 United States (The National Telecommunications and Information Administration, Federal Trade Commission)

In 2018, the National Telecommunications and Information Administration requested comments regarding the development of a long, comprehensive national spectrum strategy[69]. This came after a Presidential Memorandum, *Developing a Sustainable Spectrum Strategy for America's Future,* was issued and demanded recommendations to:

- Increase spectrum access for all users, including on a shared basis, through transparency of spectrum use and improved cooperation and collaboration between Federal and non-Federal spectrum stakeholders;

- Create flexible models for spectrum management, including standards, incentives, and enforcement mechanisms that promote efficient and effective spectrum use, including flexible-use spectrum licenses, while accounting for critical safety and security concerns;

- Use ongoing research, development, testing, and evaluation [RDT&E] to develop advanced technologies, innovative spectrum utilization methods, and spectrum sharing tools and techniques that increase spectrum access, efficiency, and effectiveness;

- Build a secure, automated capability to facilitate assessments of spectrum use and expedite coordination of shared access among Federal and non-Federal spectrum stakeholders;

- Improve the global competitiveness of United States terrestrial and space-related industries and augment the mission capabilities of Federal entities through spectrum policies, domestic regulations, and leadership in international forums[70].

Furthermore, in 2019 the Assistant Secretary of Commerce for Communications and Information released a statement that the Institute for Telecommunication Sciences (ITS) was conducting tests of two innovative technologies, the SAS (spectrum access systems) and ESC (environmental sensing capability sensors). The ESC sensors are designed to alert the associated spectrum access systems when Federal radar systems are operating in the band, so that the SAS can take immediate action to prevent interference[71].

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[69] National Telecommunications and Information Administration, "Developing a Sustainable Spectrum Strategy for America's Future," *Federal Register* 83, no. 245, December 21,2018. https://www.ntia.doc.gov/files/ntia/publications/2018-27690_3.pdf.

[70] Memorandum for the Heads of Executive Departments and Agencies, *Developing a Sustainable Spectrum Strategy for America's Future*, 83 FR 54513, Oct. 30, 2018. https://www.gpo.gov/fdsys/pkg/FR-2018-10-30/pdf/ 2018-23839.pdf.

[71] National Telecommunications and Information Administration, "Remarks of Assistant Secretary Redl at the Free State Foundation 11th Annual Telecom Policy Conference," March 26, 2019. https://www.ntia.doc.gov/speechtestimony/2019/remarks-assistant-secretary-redl-free-state-foundation-11th-annual-telecom.

Later in 2020, a Report on the Presidential Memorandum on Developing a Sustainable Spectrum Strategy for America's Future[72] was issued. The purpose of the report was to weigh if the US was optimized for a new implementation of a spectrum strategy and whether or not a new structure was needed. The report did not raise serious issues, rather it emphasized a series of changes in the agency and its structure.

At the beginning of 2021 the second annual report on the status of spectrum repurposing came out. The focus remained on repurposing mid-band spectrum[73] in order to support commercial wireless services and the conclusion reached was that great progress had been made. However, no concrete actions have yet been taken to prioritize sustainability in telecommunications.

Nevertheless, the Federal Trade Commission (FTC) has adopted sustainability as a principle that governs all its operations, which is reflected in the existence of Green Guides, which apply to all industries in which FTC operates. They are *designed to help marketers avoid making environmental claims that mislead consumers.* The Green Guides were first issued in 1992 and were last revised in 2012 and provide guidance which includes: *1) general principles that apply to all environmental marketing claims; 2) how consumers are likely to interpret particular claims and how marketers can substantiate these claims;* and *3) how marketers can qualify their claims to avoid deceiving consumers.*

The most recent update of the Guides is designed to make them easier for companies to understand and use. The changes include new guidance on marketers' use of product certifications and seals of approval, claims about materials and energy sources that are "renewable," and "carbon offset" claims[74].

Surprisingly, the Federal Communications Commission (FCC) mainly responsible for overseeing the telecommunications sector has not yet dealt with the topic of environmental sustainability in its policymaking.

2. 11 India (TRAI)

In India, the most relevant and recent approach to sustainability was released in 2017, as *Recommendations on Approach towards Sustainable Telecommunications*[75]. In this report, the main focus was on calculating the

[72] Report on the Presidential Memorandum on Developing a Sustainable Spectrum Strategy for America's Future: Governance, April 22, 2020. https://www.ntia.gov/files/ntia/publications/csmac_sc1_presentation_april_22_2020.pdf

[73] National Telecommunications and Information Administration, "Second Annual Report on the Status of Spectrum Repurposing," December 2020. https://www.ntia.doc.gov/files/ntia/publications/second_annual_ntia_spectrum_repurposing_report.pdf, 3.

[74] FTC, "Environmentally Friendly Products: FTC's Green Guides," https://www.ftc.gov/legal-library/browse/federal-register-notices/guides-use-environmental-marketing-claims-green-guides

[75] Telecom Regulatory Authority of India, "Recommendations on Approach towards Sustainable Telecommunications," October 23, 2017.

carbon footprint in order to reduce it and achieve the objectives of Green Telecom[76], an initiative raised to resolve some issues faced by India, especially in the rural part, where grid power is not available everywhere or it is located very far away.

However, the report showed that at the time, none of the renewable technology could be specifically recommended for implementation across the networks, but there were a few technologies of storage devices which could store energy for a longer duration, resulting in less dependency on diesel generators, such as Lithium Ion Batteries[77].

In the end, the methods for reducing the carbon footprint were listed as:

- In new mobile tower installations, the backup power to grid shall be based on Energy Efficient solutions/ RET power to the extent feasible such as to make the site diesel free.

- In urban areas, the outdoor BTS installations should be made diesel free to the extent feasible with required capacity of efficient storage battery backup and RET systems.

- The Non-EB (Non- Electricity Board) sites & the sites having grid power availability up to 8 hours and DG set more than 5 years old may be converted to RET.

- Use of outdoor DAS (Distributed Antenna Systems) in uncovered, isolated, scattered and small locations including buildings.

- Active sharing of network infrastructure, which involves the sharing of antenna systems, backhaul transmission systems and base station equipment.

- Adoption of cluster based, long term agreements indexed to Total Cost of Operation (TCO) wherever implementation of RET is through Renewable Energy Service Companies (RESCOs) or power management companies to make the RET adoption sustainable.

The point made by the stakeholders giving these recommendations was that the primary focus of the Green Telecom policy should be reduction in carbon footprint, as opposed to the direction issued by DoT in 2012 stating that 75% of rural towers and 33% of urban towers should be hybrid powered by 2020.

One of the biggest points of interest concerned the recommendation that the service providers would adopt a Voluntary Code of Practice encompassing energy efficient Network Planning, infra-sharing, deployment of energy efficient technologies and adoption of Renewable Energy Technology (RET), which would be submitted to TRAI within three months from the date of issue of the direction.

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https://trai.gov.in/sites/default/files/Recommendation_Green_telecommunication_2310 2017.pdf.

[76] Government of India, Department of Telecommunications, "Green Telecom," https://dot.gov.in/green-telecom.

[77] Government of India, Department of Telecommunications, "Approach towards Sustainable Telecommunications," January 2019. https://dot.gov.in/sites/default/files/Sustainable%20Tekecommunications_1.pdf?download=1, 2.44.

Another direction was that the service providers should evolve a „Carbon Credit Policy" having as ultimate objective the achievement of maximum 50% over the carbon footprint levels of the base year in rural areas and of 66% by 2020. TRAI made recommendations on this policy in April 2011 and no other comments were made. The last recommendation made by the Authority was that service providers should set the target for reduction in Carbon Emission to 30% by 2019-2020 (base year 2011-2012) and by 40% by the year 2022-2023.

Later, in 2019, the *Approach towards Sustainable Telecommunications*[78] was issued. The Government of India assessed the recommendations and agreed to them, suppressing the previously applicable framework.

3. Comparative summary of sustainability measures

Country/ Criterion	Sustainability policy or action launched (if yes, which year)	Partnerships with peer institutions	Public consultation launched	National metrics proposed/under construction	Cooperation with industry members (joint working groups, etc.)	Own sustainability measures of the regulator implemented
UK	YES – 2021			YES		YES
France	YES – 2021	YES		YES	YES	YES
Finland	YES		YES	YES	YES	
Ireland	YES – 2021	YES		YES		
Hungary	YES		YES		YES	
Spain	YES – 2021	YES	YES	YES		
Austria				YES		
Denmark	YES				YES	
US			YES	YES	YES	YES
India			YES	YES		YES

Dedicated regulatory action	Public awareness	Data collection
UK	YES	
France	YES	YES
Finland	YES	YES
Ireland	YES	
Hungary	YES	
Spain	YES	YES
Austria		
Denmark	YES	
US	YES	YES
India	YES	

[78] Ibid.

4. Conclusions

Although the environmental sustainability regulatory and policy practices and actions of telecoms regulatory authorities are recent, there are several available tools that can be used for effective action by regulators aiming to introduce green policies.

To this end, it would be worthwhile to choose a regulatory policy direction (and, if possible, a measurement methodology) that is aligned with the environmental sustainability of the sector (through taking best practices into account. Since ARCEP of Franceis explicitly at the forefront of sustainability initiatives, its activities could serve as a model for any regulator. It should also be remembered that industry players are much further ahead in understanding environmental sustainability challenges on which they must build. In addition, particular attention needs to be paid to raising consumer awareness, based on international examples (and the image of a national regulator committed to green transformation can send a positive message to consumers anyway).

It would be at least as important not only to follow and necessarily replicate other countries' processes with a phased lag, but also to go a little further and take local action. This could be, for example, organising a dedicated industry consultation or workshop on environmental sustainability issues; setting up an expert working group to assist the telecoms regulatory authority in its work; developing partnerships with relevant peer institutions; integrating sustainability considerations into policy and regulatory strategy, spectrum management, licensing processes and data collection; assessing the environmental status of domestic networks and services; commissioning studies; launching consumer awareness programmes and actions as highlighted above; and exploring related regulatory instruments and legislative options or needs (either at statutory or regulatory level). In any case, a general principle of sustainability must apply here too: if everyone does just a little for the future, we can make a significant impact. We hope to see more and more such minor steps in the regulatory and industry actions of the electronic communications sector. We may be just in time.

Comparative Legal and Economic Analysis of Franchising

NAMSRAI, BATTULGA

ABSTRACT *Franchising is a business model that has been converting dozens of intangible assets into tangible in the history of mankind. Thus, nowadays it by itself covers a wide range of institutional aspects of law and economics.*
Besides, a franchise runs according to Nash's Equilibrium theory. A player can achieve the desired outcome by not deviating from their initial strategy. For this purpose, the franchisor provides an amount of assistance to the franchisee in starting and managing the business activities.
De facto, principles of equality are slightly different for franchise contracts. This is because the results of the contract cannot be achieved without the strict supervision and advice of the license holder.
Therefore, this short comparative research has considered legal and business issues relating to franchise, including the main contract law requirements, the disclosure obligation, patent protection, vertical restraints, and the general economic outcome of franchising in some countries.

KEYWORDS *Patent, Disclosure Act, Vertical Restraints*.

1. Background

The franchise is not only an administrative process of licensing. Instead, it is an effective system for introducing intellectual property to the market. However, these concepts were co-existent in past times. Namely, the first franchise license in Australia under royal privilege was granted by Governor Macquarie in 1809. In the United States, trademark and product franchising developed when the 'Singer' sewing machine company was formed in 1851. Gradually, local municipalities started granting franchises to utility companies for water, gas, and electricity.[1]

The next stage in the renewing of franchising came around the turn of the 20th century when oil refinery companies and automobile manufacturers began to grant the right to sell their products. Moreover, international franchising such as chain restaurants, hotels, fast food, and consumer goods services had their beginnings in the 1960s.[2] The lack of legal arrangements for franchise agreements had led to disputes over licenses and compensation. Hence, the first

[1] Kevin M. Shelley, and Susan H. Morton, "Control in Franchising and the Common Law," *Franchise Law Journal* 19 (2000): 119.
[2] OECD, "Competition Policy and Vertical Restraints," 1993, 117.

U.S. Federal Trade Commission Franchise Rule[3] was originally adopted in 1978.

After that, Australia, Canada, France, and Spain among other 30 countries, have enacted disclosure laws. For instance, France introduced franchise legislation, known as the 'Doubin' law[4] in 1989. The law is essentially a consumer protection act that requires a franchisor to provide certain information to a franchisee candidate. Similar legislation has been implemented in Belgium, Italy, Sweden, and Romania.[5]

Today, the franchise market is expanding in Asia, with China, Japan, and Singapore leading the way. Thus, Asian countries are intending to reform intellectual property and contract law to adapt it for this type of business.

China's original regulation of franchising was enacted in 1997. The subsequent law of 2004 has been renewed in line with international practices. In Japan the first patent act of 1885 was enacted. Japan's regulatory treatment of franchising dates back to 1983 when the Japan Fair Trade Commission issued guidelines. In Mongolia, the first detailed legal framework for franchise is enshrined in the 2002 Civil Code and franchising is legalized as a form of contract law.

2. Contract law overview, and disclosure requirements

As business models, franchise and distributorship have similarities. Because both of them directly distribute products or provide services. But a franchise is based on a more sophisticated policy and procedure. The provisions that are acceptable in franchise agreements differ from the provisions in exclusive or selective distribution contracts.[6] In particular, legal frames are applicable in either pre-contractual or contractual and post-contractual stages.[7] For instance, in Europe, franchisors must have had a successful business concept in the relevant market for at least one year before they may offer franchises and must provide full disclosure of all material facts to prospective franchisees.

The European Union has a flexible policy that respects the legal advantages of member states' contract law. One example is that, pursuant to Article 6 of Regulation 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations, whenever a business directs its activities to consumers in another Member State, it has to comply with the contract law of that Member State.

[3] "See also", The Federal Automobile Dealer Franchise Act. Public Law 1026, U.S.C.A

[4] Raphaël Mellerio, "Franchise Law Review: France," in *The Franchise Law Review*, ed. Mark Abell (London: Law Business Research Ltd, 2021), 254. https://www.aramis-law.com/wp-content/uploads/2021/04/France-Franchise-Law-Review-2021.pdf.

[5] John Goodhardt, "How to Franchise in France." 2019, https://www.global-franchise.com/news/how-to-franchise-in-france.

[6] OECD, "Competition Policy and Vertical Restraints," 1993, 20.

[7] European Franchise Federation, Code of Ethics, 2016. 5.6.

Disclosure of potential profit and actual risk is the main requirement of the agreement between the parties. Hence, these principles are specifically legislated by countries. If one of the parties misled the other before concluding the contract, the court will settle the dispute and compensate for the damage.

"The franchisor's pre-contractual disclosure duty is the subject of extensive case law in France, in circumstances where the franchisee's business is unsuccessful and the franchisee alleges that he or she has been misled by the franchisor on the financial prospects of the franchised business."[8] Under the Civil Code and labor law, franchisors are required to inform the social dialogue committee of decisions likely to affect the volume or structure of the workforce, work duration, and conditions of hiring. Moreover, courts may "rebalance" the terms of franchise agreements or remove from contracts a term that creates an imbalance.[9]

In German and Austrian law there is a general duty of information in accordance with general principles of contract law.[10] "Pre-contractual disclosure obligations are imposed based on the principle of *culpa in contrahendo*, which is codified in Section 311(2) of the Civil Code. Franchise agreements that contain pre-emptive rights relating to the acquisition of real estate property or shares in a GmbH must be contained in a notarial deed executed in German before a German notary to be enforceable. A German notary will review and notarize those provisions only if they comply in all regards with German laws."[11]

In Belgium, the country has implemented a new law (B2B). The aim of the new legislation is to balance the position of the contracting parties, with direct application to franchise agreements. This means it applies to all franchise agreements where the territory of responsibility is located in Belgium, irrespective of the franchisor's or franchisee's location or of any foreign governing law clause of the franchise agreement. In accordance with the law, the franchisor is obliged to provide the franchisee with a pre-contractual disclosure document at least one month before the conclusion of the franchise agreement.[12] For instance, a 'pre-contractual information document' and so on. "Under the law, the purpose of any pre-contractual disclosure is precisely to

[8] Mellerio, "The Franchise Law Review: France," 255, in https://www.aramis-law.com/wp-content/uploads/2021/04/France-Franchise-Law-Review-2021.pdf

[9] Carl Zwisler, *Global Franchise Regulation Update* (Washington, DC: Gray Plant Mooty firm 2019), 6. https://www.franchise.org/sites/default/files/2019-05/%5BPUB%5D%20Global%20Franchise%20Regulation%20Update%204844-9080-8395%20v.25.pdf.

[10] Reiner Schulze and Fryderyk Zoll (eds.), *The Law of Obligations in Europe* (Munich: Sellier European Law Publishers, 2013), 174.

[11] Ned Levitt, Kendal Tyre, and Penny Ward, *Controlling Your International Franchising System* (San Diego: American Bar Association, 2010), 21.

[12] Pieter Jan Aerts, Karolina Cotronei, and Babette Märzheuser-Wood, "New Franchise Law in Belgium – How Should Your Template Franchise Agreement Change?" May 19, 2021, https://www.martindale.com/legal-news/article_dentons-sirote-pc_2547610.htm.

establish a certain balance and transparency between the contracting parties. It ensures that the franchisee has access to all the relevant information about the franchise proposition, has an opportunity to assess the business model, make inquiries, and potentially walk away at this preliminary stage if they consider the proposed obligations to be too onerous."[13]

> "Belgium's 2006 regulation of franchising has two parts: the first regards disclosure of significant contractual provisions, and the second addresses 'facts contributing to the correct appreciation of the agreement.' Within two years of executing the franchise, the franchisee can request nullification on the basis of asserted non-compliance with the disclosure requirements."[14]

The Hungarian Civil Code has provisions such as the licensing of copyright, intellectual property rights, the franchisor's obligation and supervisory rights, and rules on the termination of contracts. The franchisor shall, for the duration of the contract, ensure that the franchisee is able to exercise continuously and without disturbance the rights of exploitation and use necessary to operate the franchise.[15] There is no specific franchise law in Hungary, but the legal regulation of contracts is sufficient.

Under the Polish Civil Code, contract law focused on the questions of the liability of the parties and good faith requirements in the process of negotiations. There are some general rules that Polish law recognizes, such as the pre-contractual principle of good faith and certain other rules of contract law.[16]

As regards the pre-contractual stage, the statutory period for information disclosure is on average one month or more in the different countries. For instance, according to the Italian Franchise Act,[17] a franchisor is obliged to supply information to the franchisee at least 30 days before the established agreement. Although local courts will recognize a choice of foreign law in a franchise agreement for all aspects not regulated by the Franchise Law, apart from issues such as labor and consumers' rights, the rules contained in the Italian Franchise Law apply in any case, on a merely territorial basis, consisting of the pursuit of business in Italy. Franchise law provides for a minimum three-year duration of the franchise contract.[18]

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[13] Ibid.

[14] Reinhard Zimmermann and Simon Whittaker, "Good faith in European contract law: surveying the legal landscape," in *Good Faith in European Contract Law*, eds. Reinhard Zimmermann and Simon Whittaker (Cambridge: Cambridge University Press, 2000), 24.

[15] Péter Rippel-Szabó, Bettina Kövecses, and Péter Sziládi, "The Franchise Law Review: Hungary," in *The Franchise Law Review*, https://thelawreviews.co.uk/title/the-franchise-law-review/hungary.

[16] Schulze and Zoll, *The Law of Obligations in Europe*, 104.

[17] IT, *Law N129.*

[18] Valerio Pandolfini, "How franchising is regulated in Italy," 29 November, 2022, https://franchisinginitaly.com/how-franchising-is-regulated-in-italy/.

"Spanish law obliges franchisors to be transparent in their dealings with potential franchisees in two ways: by imposing upon them a duty to provide certain pre-contractual information and by requiring them to register in the franchisor registry. In Spain, sectoral laws offer a very broad definition that relates entirely to the rights granted by the franchisor and apparently contain the use of the words: 'franchisor' and 'franchisee'.[19] It is not necessary to record the contract in writing, although the existence of documentary proof is usual. Apart from some specific aspects, such as pre-contractual disclosure, there is no statutory regulation for this type of contract, and the parties may insert such clauses into the contract as they deem necessary."[20]

For countries with a common law system, court precedents and classical principles are proposed rather than detailed statute law. But de facto, the traditional and long-standing position under English law was that a good-faith clause was not ordinarily binding, or capable of being enforced. In England, the majority of laws that regulate business activities are part of Civil law. Accordingly, franchisors and franchisees have the right to enter into an agreement and terminate it as provided for in the franchise agreement itself or as governed by the common law.[21]

Therefore, the British Franchise Association (BFA) Code to some extent enshrines best and recommended practices in relation to pre-contractual disclosure requirements. Members of the BFA are required to disclose certain information in writing to prospective franchisees within a reasonable (not defined) period prior to the signature of the franchise agreement. As a minimum, the franchise agreement should include an appropriately worded grant of rights clause defining the extent and limits of the franchisee's right to use the franchisor's intellectual property rights.[22]

Franchising in the United States is regulated at both the federal and state levels. Therefore, it is imperative for a business considering expansion into the United States to determine whether its business arrangement constitutes a 'franchise' or 'business' opportunity and, if it is a franchise, to comply with all applicable federal and state laws. Located in the United States, the International Franchise Association has supported state laws that confirm franchisees and franchisors are independent contractors. As a result, 18 states have passed such laws.[23] All franchisors must abide by the rules and regulations contained in a

[19] Mark Abell, "The Regulation of Franchising Around the World," in *The Franchise Law Review*, https://thelawreviews.co.uk/title/the-franchise-law-review/the-regulation-of-franchising-around-the-world.

[20] Jaume Martí, "Spanish Legal System on Disclosure in Franchise Network," *European Business Law Review* 25 (2014): 943.

[21] Aldo Frignani and John Pratt, "Termination and Non-renewal of Franchise Agreements in the European Union," *Franchise Law Journal* 37 (2017): 16.

[22] Graeme Payne, "The Franchise Law Review: United Kingdom," in *The Franchise Law Review*, https://thelawreviews.co.uk/title/the-franchise-law-review/united-kingdom.

[23] Robert Emmerson, "Franchising and the Collective Rights of Franchisees," *Vandarbilt Law Review* 43 (1990): 1523.

federal law called the Franchise Rule. This is a long and detailed law, containing provisions on every aspect of franchising and judicial practice.

Federal law requires all franchisors to give prospective franchisees a disclosure document, also called a Uniform Franchise Offering Circular. This is an important component of franchising and gives prospective information such as fees to be paid, the obligations of parties, territory, dispute resolution methods, and financial statements. In addition to contractual or common law requirements limiting rights to terminate, franchisors must also satisfy any applicable statutes.[24]

In addition, the Federal Trade Commission (FTC) regulates franchising at the federal level under the Franchise Rule. The FTC rule governs franchise offerings in all US territories. Federal and state franchise laws impose pre-sale disclosure obligations and restrictions. First, the FTC Rule and most states require franchisors to provide prospective franchisees with the Franchise disclosure document upon reasonable request by the prospective franchisee, and no later than 14 calendar days before any agreement is signed or any money is paid.[25]

Canadian franchise laws contain various provisions addressed at preventing parties from contracting outside of the legislation. Waivers or releases of franchisees' statutory rights are void, as are contractual terms that purport to change the governing law of the franchise agreement or change the venue for disputes to that of a jurisdiction other than where the franchise is operated.[26] Canadian British Columbia Disclosure Law[27] is similar to franchise laws in the five other provinces. Some of the regulatory frameworks indicated under the provincial disclosure in Ontario and Alberta are aligned with those of the U.S. This regulation subjects the franchisor to certain conditions that must be met before any business contract is signed by the potential investors.[28]

In Australia, franchise legislation is found in the trade practices regulations 1998, 2015 and is known as the franchising code of conduct. The Code applies to a franchise agreement that concerns the distribution of goods or services in Australia. This agreement can take the form, in whole or in a part, of a written, oral, or implied agreement. The Australian Fair Work Act of 2009 Amendment makes franchisors jointly liable for workplace contraventions committed by franchisees when franchisors are aware of the infractions or should have been aware that they would occur, and fail to stop or prevent them.[29]

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[24] Deborah Coldwell, "Franchise law," *SMU Law Review* 65 (2016): 1066.

[25] U.S Federal Trade Comission, 16 CFR Parts 436 and 437.

[26] Evan Thomas, "Recent Developments in Canadian Franchise," *Franchise Law Journal* 35 (2020): 401.

[27] Carl Zwisler, *Global Franchise Regulation Update* (Washington, DC: Gray Plant Mooty firm 2019), 6, https://www.franchise.org/sites/default/files/2019-05/%5BPUB%5D%20Global%20Franchise%20Regulation%20Update%204844-9080-8395%20v.25.pdf.

[28] Philip Zeidman, "Observations on the International Regulation of Franchising," *Stanford Journal of Law* 19 (2014): 250.

[29] The Fair Work Act, AUS, N28. 2009.

Under Chinese law, there are specific commercial franchising regulations that stipulate among other items, franchise-specific pre-contractual disclosure, and contract requirements. These regulations apply to both foreign-invested and local Chinese franchisors.[30] A franchisor should positively disclose in writing to the franchisee, at least 30 days before signing the franchising contract, certain information about itself.

Good faith in the contract and transparency of the franchise agreement has governed in accordance with articles 17, 42, and 60 of the Civil Code of the country. Chinese civil law jurisdiction and the requirements in the Franchise measures regarding disclosure are simply a clarification of the general principle regarding pre-contractual negotiations as set out in Article 42 of the Contract law. In this regard, it is very similar to modern civil code contractual principles in Western jurisdictions.[31]

In Japan, the 2002 replacement of concerned guidelines, together with the Medium and Small Retail Commerce Protection Act, addresses both disclosure and relationship aspects. There are unusually detailed aspects including business hours, business days, the structure of the business, and indemnification in the event the business is not profitable.[32] There is no mandatory clause required to be included in a franchise agreement. Parties are free to negotiate the terms of the deal.[33]

"Singapore's legal framework has been modeled closely after the common law and statutory instruments of the United Kingdom. Contracting parties are prohibited from offering, selling, or promoting the sale of any franchise, product, or service by means of any explicit or implied representation that has a tendency to deceive or mislead prospective purchasers of such a franchise, product, or service. The franchisor is required under the Code of Ethics to disclose to the franchisee at least seven days prior to the execution of the franchise agreement its current operations, the investment required, performance records, and any other information reasonably required by the franchisee that is material to the franchise relationship."[34]

Whereas under the Civil Code of Mongolia[35], a franchisor shall undertake to transfer a license, obtained according to established procedures and allow the use of nonmaterial property, to a franchisee, and the latter shall undertake to conduct activities in accordance with structures and a cooperation program

[30] Sven-Michael Werner, "The Franchise Law Review: China," in *The Franchise Law Review*, https://thelawreviews.co.uk/title/the-franchise-law-review/china.
[31] Paul Jones, "The Regulation of Franchising in China and the Development of a Civil Law Legal System," *2 U. Pa. E. Asia L. Rev.* 78 (2006): 87.
[32] Zeidman, "Observations on the International Regulation of Franchising," 252.
[33] Kentaro Tanaka, "The Franchise Law Review: Japan," in *The Franchise Law Review*, https://thelawreviews.co.uk/title/the-franchise-law-review/japan.
[34] Steven Anderman, *The Interface Between Intellectual Property Rights and Competition Policy* (Cambridge: Cambridge University Press, 2007), 375.
[35] Civil Code, MGL, 335.

agreed with the franchisor, as well as pay proper fees[36] or a certain part of the revenues.

A franchisor shall have the obligation to protect a cooperation program from the involvement of third parties, regularly update the program, supply the necessary information to the franchisee, provide technical assistance to the franchisee, and offer training for employees. A franchisee shall have the obligations to use the rights and property received under the contract productively and in accordance with the purpose, pay fees and certain parts of the revenue on time, and ensure transferred rights and property to the franchisor if provided so by the contract.

Parties shall determine the duration of the franchising contract depending on the demand for a particular product or service and market share.[37] Upon the expiration of the franchising contract, the franchisor shall have the right to prohibit the franchisee's successor to compete in a specific territory for up to one year.

Also, parties shall exchange all necessary information only if a contract is concluded. In addition, the Civil Code does not provide for an obligation to exchange information in the pre-franchise agreement, nor does it set a time limit.

3. Vertical restraints and Patent protection

The core issue facing franchisors today is constituted by the legal aspect of the country to which the franchisee belongs. Local laws can affect the viability of a franchise system and the franchisor's ability to control the franchisee in a variety of ways. So due diligence[38] on legal issues should be carried out before a draft franchise agreement is provided to potential franchisees. At least, investors should check whether the trademarks have been registered and are valid, as well as figure out market restrictions applicable to the franchisor and leases or assets. These processes will reduce potential disputes further.

In EU countries, the cartel prohibition is laid down in Article 101 (1) of TEFU. Member states and courts shall apply both Union and national competition law.[39] Also, since Regulation No 19/65, the Commission has

[36] The licensee may be required to make lump-sum payments, and in some situations the parties may agree upon a profit sharing scheme. "See also", Richard Whish, *Competition Law* (Oxford: Oxford University Press, 2012), 772.

[37] Valentine Korah, *In Introductory Guide to EC Competition Law and Practice*, (Oxford: Hart Publishing, 2007), 376.

[38] Ned Levitt, Kendal Tyre, and Penny Ward, *Controlling Your International Franchising System* (San Diego: American Bar Association, 2010), 3. https://www.dickinson-wright.com/-/media/documents/documents-linked-to-attorney-bios/levitt-ned/20the-impossible-dream.pdf?la=en&hash=A14886008FC10EF3BFDB3AA13E380D8E52383E2C.

[39] Derek French, Stephen Mayson, and Christopher Ryan, *Company Law* (Oxford: Oxford University Press, 2012), 21. Directives will have effect between a citizen and

adopted Regulation No 772/2004 conferring block exemption on technology transfer agreements pursuant to Article 101 (3) of the Treaty.[40]

"Franchise agreements are subject to a full review under EU competition law. A franchisor is not allowed to implement practices that are not permitted under competition law, such as vertical or horizontal price-fixing, sharing markets, prohibiting passive sales and imposing a direct or indirect ban on internet sales."[41] Furthermore, Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market removes a number of barriers to cross-border trade in the EU.[42] "Competition law mainly restricts the action which can be taken against parallel trade."[43]

Specific contractual restrictions on the franchisee which are necessary to protect know-how and goodwill, and to maintain the common identity of the franchise network fall outside the European cartel prohibition.[44] A key element of a franchise agreement is the licensing of certain intellectual property rights. Hence, as mentioned in the abstract, the franchisor is not prohibited from having a priority right in the countries.[45] "Within the EU, the basic policy of free movement of goods dictates that intellectual property may not be used in this way to prevent a parallel importer from moving 'legitimate' goods between one member state and another."[46] So the European single market is a strong factor in the process of globalization.[47]

However, the franchisee must trade and provide services only in the designated geographical location, population, and market. This is the main way to impose restrictions on the market without affecting the franchise party's legal rights. Because market share and fair competitions are the fundamental rules of game theory. On the other hand, due to technological advances, strict market rules have begun to change. For instance, E-commerce is an unlimited virtual

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the state or its organs. "See also", Andrew Burrows, *English Private Law* (Oxford: Oxford University Press, 2007), 6.

[40] Richard Whish, *Competition Law*, 781.

[41] Guy Tritton and Richard Davis, *Intellectual Property in Europe* (London: Sweet & Maxwell, 2008), 975.

[42] Stephen Weatherill and Ulf Bernitz, *The Regulation of Unfair Commercial Practices under EC Directive* (London: Hart Publishing, 2007), 31.

[43] Christopher Stothers, *Parallel Trade in Europe: Intellectual Property, Competition and Regulatory Law* (Oxford: Hart, 2007), 9.

[44] Lucy Jones, *Introduction to Business Law* (Oxford: Oxford University Press, 2017), 641. "See also", Kennedy Van der Laan, "EU & Competition Law," 2021, https://www.lexology.com/library/detail.aspx?g=500ddb51-85e6-42c5-bdeb-0d0e221e24cd.

[45] Annette Kur and Thomas Dreier, *European Intellectual Property Law* (Cheltenham: Edward Elgar Publishing, 2013), Chapter 3.

[46] Burrows, *English Private Law*, 503.

[47] Arthur Hartkamp and Martijn Hesselink, *Towards a European Civil Code* (Alphen aan den Rijn: Wolters Kluwer Law & Business, 2011), 110.

environment.[48] Therefore, recently the most pressing issue is the legal and market regulation related to the scope of conducting this type of business in digital form.[49]

Franchising is the vertical production process of supplying goods or services to customers. This type of business usually contains a combination of different vertical restraints with regard to the products being distributed, such as exclusivity, quality requirement, assortment, customer group, and certain internet sales restrictions. Hence, under EU competition law it is not allowed for a franchisor to impose on its franchisees an absolute ban on online sales and services.[50] It can be considered the second flexible regulation enshrined in the rules of the European Union.

EC Regulation No 330/2010 on vertical restrictions on competition and its subsequent guidelines makes a fundamental distinction, as far as online sales are concerned, between active and passive ones. Online sales are considered passive when the franchisee offers goods and/or services on the web, without "actively" soliciting consumers to come to his website.

However, franchisors can regulate, in the franchise agreement, the terms and conditions of use of the websites by the franchisees participating in the network, to protect their image and their distinctive signs. "These and other provisions, to be specifically included in the franchise agreement, are aimed at protecting the franchisor and his network, in order to ensure uniformity of image and the same quality standards of products and services, whether they are sold online or through traditional channels."[51]

"In cases where another applicable law has been chosen by the parties and where the mandatory consumer protection provisions of the member state of the consumer provide a higher level of protection, these mandatory rules of the consumer's law need to be respected. Traders, therefore, need to find out in advance whether the law of the member state of the consumer's habitual residence provides a higher level of protection and ensure that their contract is in compliance with its requirements." [52]

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[48] Efraim Turban, Judy Whiteside, David King, and Jon Outland, *Introduction to Electronic Commerce and Social Commerce* (USA: Springer International Publishing, 2017), 29. "See also", Rozenn Perrigot and Thierry Pénard, "Determinants of E-commerce Strategy in Franchising," *International Journal of Electronic Commerce* 17 (2013): 112.

[49] Robert W. Emerson, and Michala Meiselles, "U.S. Franchise Regulation as a Paradigm for the European Union," *20 Washington University Global Studies Law Review* 20 (2021): 751.

[50] Rules Applicable to Antitrust Enforcement. EU Competition Law, Volume 1.

[51] Valerio Pandolfini**,** "Franchising and e-commerce: can franchisors (legally) limit online sales and social media by franchisees?," 18 February, 2021, https://franchisinginitaly.com/franchising-and-e-commerce-can-franchisors-legally-limit-online-sales-and-social-media-by-franchisees/.

[52] Martijn W. Hesselink, *The New European Legal Culture* (Deventer: Kluwer Law International, 2002.), 43. "See also", Hesselink, *EU Contract law* (European University Institute, 2009.), 14.

In France, "the French courts have stressed the importance of know-how and continuing technical assistance as criteria distinguishing franchising from other distribution systems.[53] The French courts also attach great importance to a balanced contractual vertical relationship between franchisor and franchisee that shelters the franchisee from arbitrary impositions by the franchisor."[54] Trademarks are regulated by the Intellectual Property Code, enacted by law no. 92-597 of 1992. A duly registered trademark confers exclusive rights on its holder for a period of 10 years, which is renewable indefinitely. Competition issues are governed by French and EC competition rules.[55]

In Germany, franchise agreements are subject to general German competition law.[56] "The objectives of the two German competition laws are the suppression of unfair business practices under the Act against Unfair Competition (Gesetz gegen unlauteren Wettbewerb), whose basic aim is the prevention of unethical, excessive, or otherwise abusive practices in competition, and the suppression of restrictive business practices under the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen ARC), whose basic aim is to maintain competitive market structures. Franchise agreements are not specifically defined under the ARC. Generally speaking, however, franchise agreements are considered to be those by which a producer or trader (franchisor) grants to one or several independent enterprises (franchisees) the right to use his firm name and/or his trademark to distribute goods and services within the framework of a marketing concept developed by the franchisor."[57]

The key intellectual property rights involved are trademarks, designs, domain names, and copyright, database, and know-how rights. Although copyright is not registrable in Germany, trademarks are, and franchisors can choose whether to register them as domestic German or European Union trademarks or international registrations.[58]

In Belgium, "Most franchise agreements expressly give the franchisee the right to use the franchisor's trademarks or distinctive signs, or both, for the performance of the franchise agreement. Franchise agreements are subject to competition law, both at the EU and national levels. Economic law implements

[53] Good faith in the performance of contracts is required by the French Civil Code. Zimmermann, and Whittaker, *Good Faith in European Contract Law*, 695.

[54] In France jurisprudence has distinguished franchising from other distribution systems for some purposes. OECD, "Competition Policy and Vertical Restraints," 54.

[55] Emmanuel Schulte, "France," in *Franchise 2011*, ed. Philip F. Zeidman (London: Law Business Research Ltd., 2011), 52.

[56] Antitrust law, based upon Article 101 of the Treaty on the Functioning of the European Union.

[57] OECD, "Competition Policy and Vertical Restraints," 72.

[58] Stefan Münch, Alexander Duisberg, et al., "The Franchise Law Review: Germany," in *The Franchise Law Review*, https://thelawreviews.co.uk/title/the-franchise-law-review/germany.

on the Belgian market a prohibition against anti-competitive agreements between undertakings and a prohibition against abuse of a dominant position."[59]

In Hungary, "Franchise agreements must be in compliance with the Competition Act. In the absence of a special block exemption regulation on franchises, the general block exemption regulation sets out the criteria as to how franchise agreements may be exempted from the prohibitions relating to the restriction of competition. In relation to intellectual property rights and know-how, the provisions of the Trademark Act, Copyright Act, Patent Act, and Trade Secret Act may apply to franchise agreements."[60] "Copyright rules, as well as industrial property standards, are of territorial effect and they can only be enforced in the territory of the country."[61]

In Poland, "Franchisees must comply with Polish consumer laws if they offer products or services to consumers. A franchise agreement is a type of distribution relationship between independent entities. Under certain circumstances, such a relationship may affect trade by restricting or distorting competition in the relevant market, as it usually contains a combination of different vertical restraints. The confidentiality of trade secrets is protected under the Act on Combating Unfair Competition, even before entering into non-disclosure obligations.[62]

In Italy, the domestic antitrust law, Act 287/1990, applies to the sole extent that the concerned vertical agreements, abuse of dominant position or concentrations do not fall within the scope of the EU rules.[63]

Under Spanish law, the franchisor must be in possession of the trademark that he is licensing to the franchisees. Furthermore, the license must not have been revoked.[64] Competition law is governed by EU Regulation No 330/2010, as well as Royal Decree 261 of, 2008 on antitrust regulation and Act 15/2007 on the competition.

U.S competition rules belong to a wide web of laws that are particularly worth noting, namely: the Sherman Act 1890, the Clayton Act 1914, and the Federal Trade Commission Act 1914.[65] The U.S and European experiences show that pre-emption norms can be used to limit the expansion of protection in intellectual property and unfair competition cases, but that the reverse effect of

[59] *The Franchise Law Review: Belgium*, ed. Mark Abell (London: Law Business Research Ltd., 2016), 220–226.

[60] Rippel-Szabó, Kövecses, and Sziládi, "The Franchise Law Review: Hungary". In https://thelawreviews.co.uk/title/the-franchise-law-review/hungary.

[61] Anikó Grad-Gyenge, "The Law of Intellectual Property," in *Business Law in Hungary*, ed. Istvan Sandor (Budapest: Patrocinium, 2016), 441.

[62] Kuba Ruiz, "The Franchise Law Review: Poland," in *The Franchise Law Review*, https://thelawreviews.co.uk/title/the-franchise-law-review/poland.

[63] Claudia Ricciardi, "The Franchise Law Review: Italy," in *The Franchise Law Review*, https://thelawreviews.co.uk/title/the-franchise-law-review/italy.

[64] "See details", https://www.fieldfisher.com/en/locations/spain.

[65] Maher Dabbah, *International and Comparative Competition Law*, (Cambridge: Cambridge University Press, 2010), 237.

pre-emption can be that harmonization efforts have to take into account the existing practice.[66]

At the federal level of U.S law, both intellectual property protection and antitrust policy share a common goal of encouraging innovation. This provides a second level of intellectual property protection besides each state protecting intellectual property through its own trade secret and trademark laws. "The Lanham act of 1946 supplements state trademark laws and the Economic espionage act of 1996 renders trade secret misappropriation a federal crime. The licensing guidelines address unilateral acquisitions of intellectual property when they take the form of exclusive licensing arrangements."[67]

Under the U.S Federal Trade Commission Rule, a business or licensing arrangement will be regulated as a franchise if it has two elements: 1) the franchisor grants the franchisee a right to use the franchisor's trademark; 2) the franchisor exerts or has the authority to exert a significant degree of control or assistance over the franchisee's method of operation. Even if the parties to a contract call it a licensing agreement, a distribution agreement, or explicitly state that it is not a franchise arrangement, if the three elements are present, then US franchise law will apply.

Trademark rights in the United States are based on use under common law rather than arising from trademark registration. This means that from the moment that an owner begins to use a trademark on or in connection with some goods or service, the owner owns rights to the mark and it generates associated goodwill.

The Canadian Trade-Marks Act defines a trademark as a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired, or performed by him from those manufactured, sold, leased, hired or performed by others, a certification mark, a distinguishing guise or a proposed trade-mark. As such, distinctiveness is central to the definition and a trademark need not be registered to be valid, or even licensed, in Canada. The Competition Act sets forth penal and civil recourses with respect to various practices, including those identified as conspiracies and collusion, abuse of dominance, price maintenance, promotional allowances, and price discrimination, misleading advertising, deceptive marketing, pyramid selling, refusal to deal, exclusive dealing, tied selling, as well as certain other vertical market restrictions.[68]

The English competition legislation applicable to franchise agreements is comprised of four statutes: the Fair Trading Act 1973; the Restrictive Trade Practices Act 1976; the Resale Prices Act 1976 and the Competition Act 1980. The Fair Trading Act, which deals with monopoly situations, may apply to

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[66] Anselm Sanders, *Unfair Competition Law: The Protection of Intellectual and Industrial Creativity* (Oxford: Clarendon Press, 1997), 22.

[67] Anderman, *Intellectual Property Rights and Competition Policy,* 217.

[68] Bruno Floriani and Marvin Liebman, "Canada,", in *Franchise 2011*, ed. Philip F. Zeidman (London: Law Business Research Ltd., 2011), 26.

franchises if the franchised group falls within the definition of "complex monopoly".

In Australia, the franchisor is required to provide disclosures about any patents or copyrights that are material to the franchise system. Such information must include a description of the intellectual property, and details of the franchisee's rights and obligations in connection with the use of the intellectual property.[69] The Patents Act, the Copyright Act, and the Designs Act all make provisions for compulsory licensing. The patentee will be able to block parallel imports if they are put on the market in the foreign country by a licensee which does not have authority to sell in Australia.[70]

The Anti-Monopoly Law aims to safeguard China against anti-competitive activity. As such, it applies to conduct both within China, and conduct outside China which has the effect of eliminating or restricting competition in the Chinese market. It is permissible for a franchisor to exercise control over the franchisee's business.[71] The Anti-Monopoly Law also allows private actions to be brought by parties who have suffered loss as a result of the contravention. The Law defines a dominant market position as the ability of one or several business operators to control the price, volume, or other trading terms in the relevant market, or to otherwise affect the conditions of a transaction.[72]

In Japan, intellectual property has always been interpreted in the wider context of competition policy and domestic development. This has often been regarded as discrimination against foreign rights owners. Compared with patents, know-how is characterized by an uncertain technological scope, weak exclusivity protection, and uncertainty as to the duration of protection. Therefore, in determining competition in market know-how licensing agreements, it is necessary to take into account these specific characteristics of know-how.[73] Under Antimonopoly laws, either franchise agreements as a whole, or specific provisions of franchise agreements, can be found to constitute unfair business practices. Under the decree guidelines, the franchise agreement as a whole must be so balanced as to avoid unreasonable restrictions on the franchisee.[74]

Singapore's Patents Act 1994 sets out a legislative framework for grants. One of the central features of the internal interface between patent law and competition law is the way in which the patentee's exclusive rights over the invention are circumscribed by the language he has used in his patent claims and specifications. "The Trademarks Act 1998 promulgates the legal framework

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[69] *International Franchise Sales Law,* ed. Andrew Loewinger and Michael Lindsey, (American Bar Association: Forum on Franchising 2006),11.

[70] Anderman, *Intellectual Property Rights and Competition Policy,* 453.

[71] Werner, "The Franchise Law Review: China," in *The Franchise Law Review*, https://thelawreviews.co.uk/title/the-franchise-law-review/china

[72] David Fleming, et al., "Antitrust and Competition in China," 2008**,** https://www.globalcompliancenews.com/antitrust-and-competition/antitrust-and-competition-in-china/.

[73] Anderman, *Intellectual Property Rights and Competition Policy*, 276.

[74] OECD, "Competition Policy and Vertical Restraints," 73.

which supports the registered trademark system in Singapore, setting out the legal standards for acquiring intellectual property rights in signs which are used in indicators of origin for goods and services."[75]

There is no time limit for registering any trademark, therefore a trademark may be used by the owner without the need for registration. But, unless a trademark is registered, the trademark owner cannot bring an action for registered trademark infringement or seek relief under the Trade Marks Act.

The Competition Act came into force in 2005 and has a retrospective effect, applying equally to all agreements made before the effective date of the Act or the relevant provisions. In general, the Competition Act prohibits any agreement that has the object or effect of preventing, restricting, or distorting competition within Singapore. Therefore, a franchise agreement will be rendered void to the extent that the franchise agreement prevents, restricts, or distorts such competition. The Competition Act provides certain exemptions to and exclusions from the strict application of the provisions in the Competition Act. If a franchise agreement meets all the criteria required for any exemptions or falls within any exclusions, it can be exempted from compliance with the Competition Act requirements.

In Mongolia, entrepreneurs are prohibited from establishing contracts and agreements (cartels) aimed at restricting competition by negotiating and agreeing to fix the prices of goods and products[76]. Also, entities shall be prohibited from using trademarks, labels, names, and quality guarantees of others' products without proper authorization, or copying brand names or packages.

Intellectual property rights[77] may be put into economic circulation through licenses[78], franchises, merchandise, and other agreements, that allow full or partial use of the intellectual property[79] by others, transfer of ownership[80], and investments made in legal entities in the form of intellectual property. Concerned laws focus predominantly on the appropriate design and application of antitrust rules to the accumulation and exercise of intellectual property rights. Most antitrust claims relating to intellectual property involve challenges to agreements, licensing practices, or affirmative conduct involving the use or

[75] Anderman, *Intellectual Property Rights and Competition Policy*, 393.

[76] Garry Moore, Arthur Magaldi, and John Gary, "The legal environment of Business." 1987. Vertical price fixing involves fixing the price at different levels of the manufacturing and distribution process.

[77] Law on Intellectual Property, MGL, 7. "See also", Law on Competition, MGL, 1.5.

[78] Abdul Kadar, et al., *Business and Commercial law*, 1993. 91.

[79] Stothers, *Parallel Trade in Europe, 27.* Intellectual property rights give the owners the right to prohibit third parties from carrying out certain activities. "See also", Burrows, *English Private Law*, 499.

[80] Marcus Smith and Nico Leslie, *The Law of Assignment*, 2013. 451. However, the mode of transfer of the intellectual property rights themselves does require separate consideration.

disposition of the intellectual property rights or the products they cover.[81] When two or more entities are using identical trademarks for similar goods or services, it shall protect the rights to ownership of the entity that has first applied for registration.[82]

A trademark registration shall be valid for a period of 10 years following the filing date and may be renewed by 10-year periods at the request of the owner.

Restricting market monopolies or promoting the franchise business is not a bipolar concept. This is because there is an economic and legal practice of granting monopolies to innovation in the market. The legal framework in the countries is generally based on the protection of the franchise's market share in certain territories and customers, and, on the special regulation of some monopoly franchises by investment and tax policies.

4. Conditions for legal entities

The franchisor and the franchisee (master or sub) must be a legal entity and a contract shall be entered into between the company, the joint-stock partner, the corporation, and the business group. Most companies today are incorporated under the procedure laid down in the Company's act. Businesses use agents in various forms throughout their activities, particularly if they are companies, as all companies must have human agents or holding out a partner to act on their behalf.[83]

The scope of EU Company law covers the protection of the interests of shareholders and others. As companies are creatures of the law, and more specifically enterprises of persons and assets organized by rules, including the law, there is an unbreakable link between companies.[84] For instance, a Limited Liability Company (GmbH) is the most widespread form of corporation in Germany. The legal form of the stock corporation (*Aktiengesellschaft* or AG) was originally intended for large enterprises. Today, both large public companies and smaller companies are organized in the legal form of an AG and a group of AG. GmbH is a legal person and a corporation. The basic form of the corporation is the organization under civil law *(Verein).* Thus, the basic provisions of the organization under civil law apply analogously to the GmbH.[85]

The preferred choice of vehicle used for the expansion of a foreign franchise system into Canada is the incorporation of a Canadian subsidiary. By using a Canadian subsidiary, the franchisor has a direct physical presence and

[81] *Antitrust, Patents and Copyright*, François Lévêque, Howard Shelanski (Edward Elgar Publishing, 2005), 12.
[82] Law on Trademarks and Geographical Indications, MGL, 4.
[83] Mueller, *Business Law*, 75. "See also", Ivamy Hardy, *Company Law*, 1985. 91.
[84] Nicola De Luca, *European Company Law*, 2017. 4.
[85] Gerhard Wirth and Michael Arnold, *Corporate Law in Germany* (München: Beck, 2004), 63. "See also", Joachim Rosengarten, Frank Burmeister, and Martin Klein, *The German Limited Liability Company* (München: Beck, 2015), 6.

indicates to the general public that it has made a commitment to Canada.[86] Each franchisee must operate as a truly independent and distinct entity from its franchisor so as to be considered a separate employer for labor union certification and collective bargaining purposes.[87]

If a foreign franchisor pursues economic activity in Hungary, it is required to set up a local company; setting up such a company follows the general rules of company formation. There is no general restriction on a foreign entity granting a master franchise or development rights to a local entity, although the parties to franchise agreements must comply with the provisions of competition law and sectoral rules.[88]

In Poland, non-EU companies are obliged to establish a branch or subsidiary company to operate a business. Ownership of real estate is restricted for non-European economic area franchisors and requires government approval.

In France, if a foreigner who is not a citizen of a country of the European Economic Area or of Switzerland is appointed as legal representative of a French company, some formalities like declarations to the prefectural authorities or obtaining a residence permit, depending on whether the person resides in France, must be fulfilled prior to the registration of the company.[89]

China requires a franchisor to establish and operate at least two company-owned units for at least one year before it grants franchises. The franchisor must be an enterprise. The earlier regulation specified that the pilot organizations should be in China, but the current law has removed that requirement. Since this increases the amount of capital that must be committed, as a practical matter, it bars all but well-capitalized companies. Indeed, it can bar even some very large companies whose business model calls for an entirely franchised network.[90]

A franchisor may choose its business structure when operating in Japan, such as establishing a corporation (subsidiary) or a branch in Japan.[91]

In Mongolia, a company (sole proprietorship, partnership, corporation, limited liability partnership) may have branches or representative offices in domestic or foreign countries. The establishing company shall be responsible for the consequences ensuing from the activities of its branches and representative offices. A founder of a company may be a citizen or legal person of Mongolia and, if provided by law, a foreign citizen or legal person, or a stateless person. Depending on the type of franchise agreement, the legal status of the parties to the agreement may be any.

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[86] Investment Canada Act, C 28. R.S.C.

[87] Bruno Floriani and Marvin Liebman, *Franchise Jurisdictions in Worldwide: Canada*, 2011. 26.

[88] Tamás Gödölle, "Hungary Franchise Laws and Regulations," 2022, https://iclg.com/practice-areas/franchise-laws-and-regulations/hungary

[89] Schulte, "France," 52.

[90] Zeidman, "Observations on the International Regulation of Franchising," 277.

[91] Tanaka, "The Franchise Law Review: Japan," in *The Franchise Law Review*, https://thelawreviews.co.uk/title/the-franchise-law-review/japan.

5. Economic outcome and tax policy

According to 2022 statistics, franchising produces two trillion US dollars in revenue every year worldwide. The sector, representing 2.5 percent of world GDP, has 2.4 million companies involved. Only in the United States, there are 773,603 franchise establishments registered and an estimated number of 8.43 million people were employed by franchise businesses, which contribute 477 billion US dollars to the GDP.[92]

In Europe, the franchise network has multiplied since the 1980s. It grew 2.7 times in Germany, 1.8 times in France and 2.1 times in the UK. The rules and regulations issued by the EU are directed at boosting member countries' exports, developing domestic manufacturers creating value-added products, and absorbing profits into Europe. Furthermore, the franchise business in the area is profitable, but the tax is slightly high (about 30 percent more than the Asian average). The rules and legal standards of playing in the market have elevated criteria including antitrust and consumer protection. Currently, around 10000 franchise networks operate in the EU, with nearly 405,000 outlets scattered across the EU, generating a turnover of almost 215 billion euros.[93]

It is the largest market for franchising in the Eurozone but also with more competition and high taxes and rents, and high standards for products and services. For instance, in France, if the franchisor is a company, it will be taxed at a 33.33 percent flat rate. If the franchisor is an individual, he or she will be subject to a progressive tax up to a maximum amount of 40 percent of his or her income. Value-added tax at a flat rate of 19.6 percent applies to all sales of goods or services in France. The fees paid to the franchisor are subject to value-added tax.

Franchisors that are tax residents in Germany are liable for corporation tax of 15 percent plus a solidarity surcharge that is added to the corporate income tax and set at a rate of 5.5 percent of the corporate income tax rate and trade tax. Trade tax is a municipal tax. As such, tax rates are individually determined by each municipality. A withholding tax of 25 percent is payable on dividends.[94]

Royalty (License fee) for the granting of rights under the German Copyright Act bears a reduced value-added tax rate of 7 percent, while all other fees paid to the franchisor by the franchisee are subject to value-added tax at 19 percent. The initial franchise fee is usually amortized over the duration of the franchise

[92] Christina Niu, *"Franchising Economic Outlook: Franchise Business Intelligence"* (*International Franchise Association, 2022*), https://www.franchise.org/sites/default/files/2022-02/2022%20Franchising%20Economic%20Outlook.pdf.

[93] Emerson and Meiselles, "U.S. Franchise Regulation as a Paradigm for the European Union," 751.

[94] Münch, Duisberg, et al., "The Franchise Law Review: Germany." https://thelawreviews.co.uk/title/the-franchise-law-review/germany.

for income tax purposes. In addition to corporation tax and the solidarity surcharge, trade tax is also payable by franchisees.[95]

In Belgium, corporate tax exists at a rate of 33.99 percent on net profit. Belgium offers a broad range of double tax treaties and domestic exemptions allowing the setting of tax-efficient franchising structures. Reduced rates can apply to small and medium-sized enterprises.

Italian income tax rates for residents and non-residents range from 23 percent to 43 percent plus an additional regional tax of between 0.8 to 3.33 percent, furthermore, an additional municipal tax could be due; the tax rates range from 0 to 0.9 percent depending on the municipality.[96] In cases of cross-border franchising, according to domestic law, royalties due to a non-resident franchisor are relevant for tax purposes in Italy and a withholding tax of 30 percent is applied to the amount of royalties paid by the franchisee; however, a double-taxation treaty between Italy and a third country may entitle the franchisor to a lower withholding tax. When cross-border franchising, the reverse-charge mechanism for value-added tax should be applied by the franchisee both for entry fees and royalties.[97]

The rapid development of the franchise network in Eastern Europe is due to the flexibility of tax policy. For instance, in Hungary, the corporate rate tax is 9 percent of the positive tax base. Value-added tax rates are 27 percent. The specificity of Hungarian law is a flexible tax system with policies that support the franchise business environment, with franchise agreements detailed in civil and other legislation. Hence, its legal environment can be concluded as a decent environment for investment.

The standard Polish withholding tax rate due on franchise fees and dividends is 20 percent. If a double-taxation agreement applies, both franchise fees and dividends payable to foreign entities are subject to tax established thereunder. The Polish franchisee is a remitter of withholding tax in Poland and remains liable for payment of amounts due to the tax office.[98]

Franchisors will generally be responsible for US federal income tax on income earned in the United States and for withholding and payroll taxes for their US employees. Franchisors will also be responsible for state income taxes to the extent that they conduct business in the 40 or more US states that impose such taxes. The 2017 Tax Cuts and Jobs Act significantly reduced corporate tax rates, which went from graduated rates, ranging from 15 percent to 35 percent, to what is now a flat rate of 21 percent. State corporate income marginal taxes generally range from 3 to 12 percent. The franchisee pays the franchisor a fee of at least 615 dollars.[99]

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[95] Ibid.
[96] Italian Tax Code. Amendment.
[97] Ricciardi, "The Franchise Law Review: Italy".
[98] Ruiz, "The Franchise Law Review: Poland".
[99] Disclosure requirements and prohibitions concerning franchising. 15 U.S.C, 72FR 15444. Section 436.8.a.(1).

As far as the Canadian general corporate tax rate on business income is concerned, the net tax rate after the general tax reduction is 15 percent. For Canadian-controlled private corporations' eligible for small business deduction, the net tax rate is 9 percent. Franchising is responsible for 5 percent of Canada's GDP.

In the UK, the standard rate of value-added tax increased to 20 percent. As previously announced and enacted in the Finance Act 2021, the rate of the corporation tax will remain at 19 percent for 2022/23, but there will then be an increase to 25 percent from April 2023 applying to profits over £250,000.

Before starting or continuing to pay the business tax[100], an initial capital investment fee, payment for goods or services, a fee based on a percentage of gross or net income; or a training fee or training school fee should be agreed upon. All companies are subject to a federal tax rate of 30 percent on their taxable income, except for 'small or medium business' companies, which are subject to a reduced tax rate of 25 percent. The standard value-added tax rate in Australia is a goods and services tax of 10 percent. Franchise royalties are often calculated as a function of sales, they are typically 5-6 percent but can be as high as 15 percent. Some franchisors charge a fixed fee irrespective of sales levels.

In China, the corporate income tax standard tax rate is 25 percent. The rate of value-added tax is 13 percent. In Japan, corporate and medium-sized enterprises' income tax is 21 to 29 percent. Value-added tax is 10 percent. In Singapore, the prevailing withholding tax rate is 10 percent and can be varied depending on the mutual deferred tax asset.

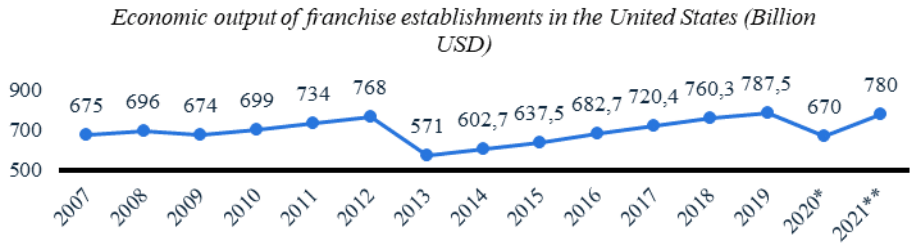
An investor shall have a right to seek tax and non-tax support in order to support investment. If investors fulfilled tax payment obligations, they shall have a right to transfer assets and revenues out of Mongolia, including license fees for use of their intellectual property rights and service charges.[101] The tax rate is 10-25 percent depending on the amount of income. In addition, there is a 5 percent tax for the sale of intellectual property rights. Value-added tax at the rate of 10 percent is imposed on the supply of goods, services, and works imported, exported, and sold in the country. The fees shall be imposed on income from royalties including the fee for the use and the right to the use of copyrighted works in accordance with the Law on copyright and related rights.

"Ensuring that franchise agreements can be legally enforced in the relevant jurisdictions is part of the solution, but establishing creative and practical methods of controlling international franchisees can be equally important. Franchising internationally can require more strategic and creative thinking and flexibility than franchising domestically. Franchisors cannot assume that they can simply transplant their domestic franchises overseas and manage them as they would at home. The tyranny of distance, time zones, cultural differences, market differences, unfamiliar business environments, and fewer opportunities to communicate combine to magnify the difficulty for the franchisor.

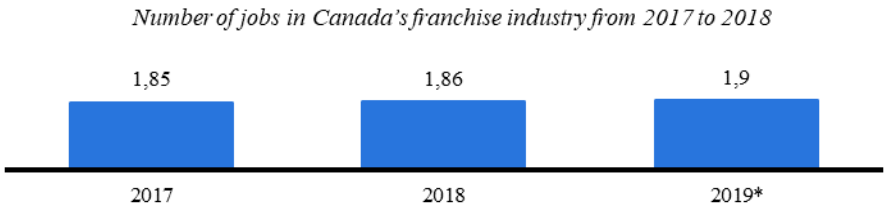
[100] Income Tax Assessment Act, N38. Franchise Fees Windfall Tax Act, N132.
[101] Law on Investment, MGL. 4.4.

Franchisors should invest significant time and resources in investigating new markets, even if they locate a local master franchisee, area developer, or joint venture partner who will be primarily responsible for local compliance issues."[102]

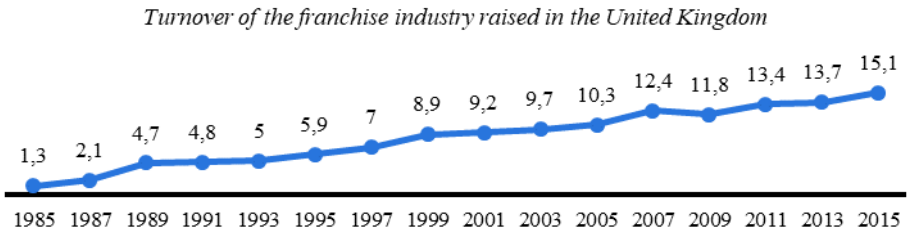
Investment, taxation, innovation, and long-term legal policies have a direct impact on franchise development. The positive impact or steady growth (sometimes U-turn) of franchise on the economic expansion of some countries can be seen in the following few charts.



(Source: https://www.statista.com/statistics/190318/economic-output-of-the-us-franchise-sector)

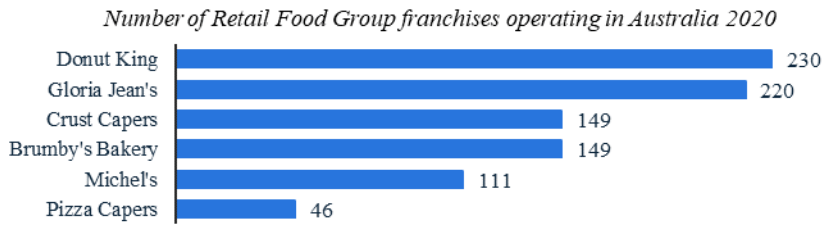


(Source: https://www.statista.com/statistics/953160/franchise-related-employment-canada)

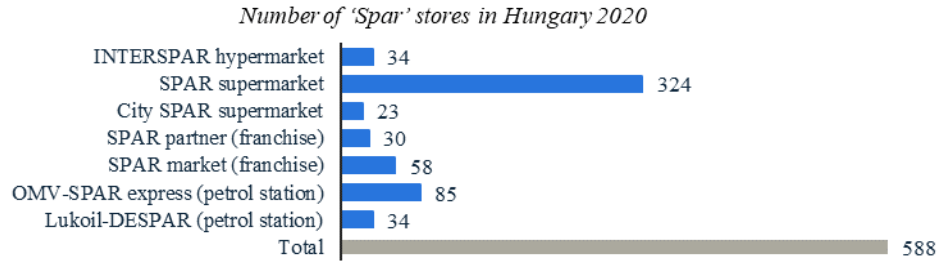


(Source: https://www.statista.com/statistics/665673/franchise-industry-turnover-united-kingdom-uk)

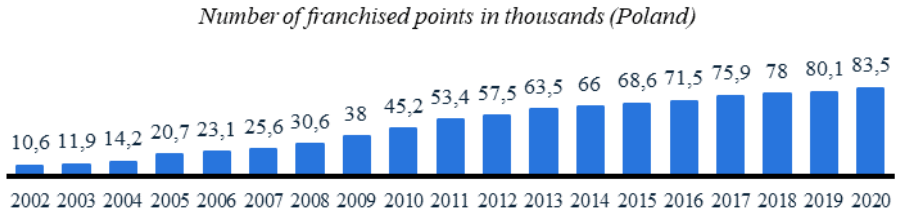
[102] Ned Levitt, Kendal Tyre, and Penny Ward, *Controlling Your International Franchising System* (San Diego: American Bar Association, 2010), 1, https://www.dickinson-wright.com/-/media/documents/documents-linked-to-attorney-bios/levitt-ned/20the-impossible-dream.pdf?la=en&hash=A14886008FC10EF3BFDB3AA13E380D8E52383E2C.



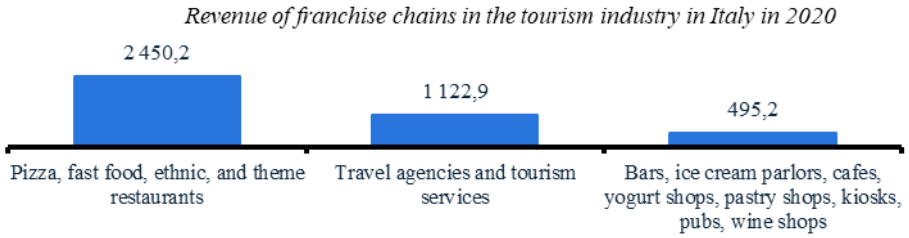
(Source: https://www.statista.com/study/101203/restaurant-and-food-service-in-australia)



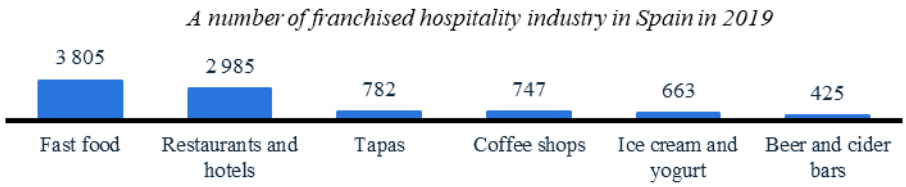
(Source: https://www.statista.com/statistics/1224865/hungary-number-of-spar-stores-by-type*)*



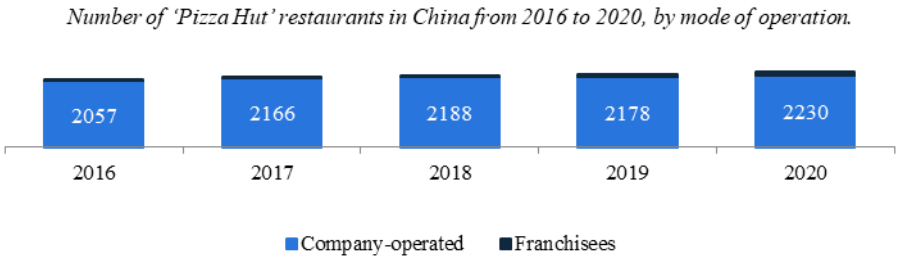
(Source: https://www.statista.com/statistics/1202390/poland-number-of-franchise-points-on-the-market)



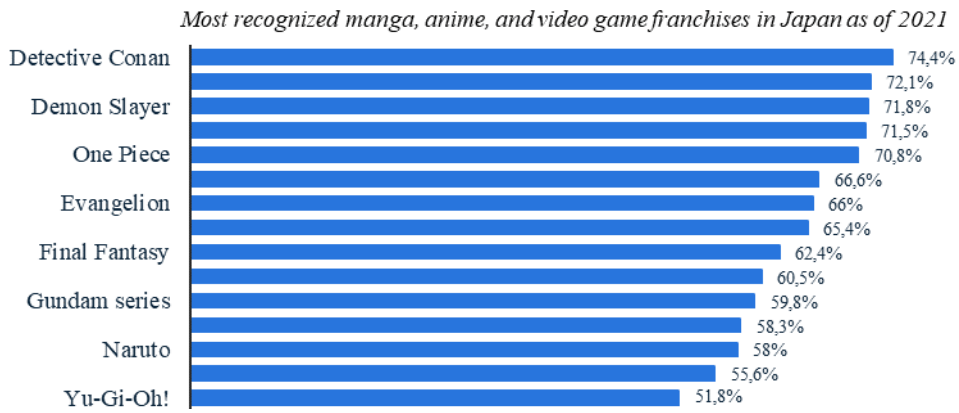
(Source: https://www.statista.com/statistics/615224/franchised-stores-of-italian-fashioncompany-tods-by-brand)



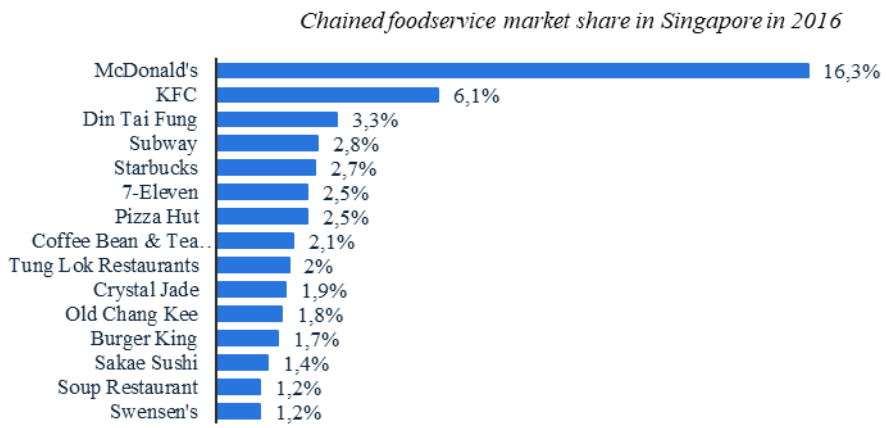
(Source: https://www.statista.com/study/87689/food-service-spain)



(Source:https://www.statista.com/statistics/1005007/china-pizza-hut-restaurant-number-by-operation-mode)



(Source: https://www.statista.com/statistics/1276143/japan-most-recognized-manga-anime-video-game-franchises)



(Source:https://www.statista.com/statistics/724478/chained-foodservice-market-share-in-singapore-by-brand)

6. Conclusion

Franchising is a business model and a legal object of contract that is important for re-selling intellectual property, industrial technology, and well-known products, and services, thus balancing supply and demand in the economy.

Contract law, intellectual property, tax, investment, competition, and consumer protection rules of countries are integrated through the exchange of experiences.

As intangible assets are an inexhaustible resource compared to tangible assets, this type of business environment will continue to expand at the national, regional, and international levels and will be a pillar of sustainable development. Statistical figures confirm this in the economic barometer. On the other hand, the legal challenges of running a franchise have not diminished. For instance, the number of cross-border litigations and franchise cases have doubled within the last 5 years in the world.

Legislative reforms in franchise are expected to continue in the broader areas of technology franchising, the regulation of large franchise networks in the region, unified intellectual property registration, inquiries, and monopoly regulation in economic blocs.

Citizen Rights in a Critical Juncture: Comparing the EU and ASEAN Legal Response in the time of the COVID-19 Pandemic

NUR, ASRUL IBRAHIM

ABSTRACT *The article's primary objective is to explore and compare the legal instrument adopted by regional organisations, specifically the EU and ASEAN, to impose restrictions on free movement rights during the COVID-19 Pandemic. This article uses hard and soft law classifications to denote the great number of types and forms of legal instruments. Furthermore, this article aims to explain the pattern of regional organisations adopting legal tools to govern restrictions on free movement rights. Legal research methodologies analyse legal instruments from the EU and ASEAN's official legal databases with doctrinal and comparative perspectives. The study's findings revealed two distinct trends of adopting various types of legal instruments by the EU and ASEAN. Additionally, the choice of this type of legal instrument has ramifications for guaranteeing the practical application of citizen rights, particularly the right to freedom of movement.*

KEYWORDS *ASEAN, comparative, EU, free movement right, legal instrument*

1. Introduction

What effect would the COVID-19 Pandemic (hence referred to as the Pandemic) have on human movement? This paper examines the impact on citizens of pandemic-induced movement restrictions on two distinct regional organisations: the European Union (EU) and the Association of Southeast Asian Nations (ASEAN). Free movement is one of the rights granted to EU citizens by Article 3(2) of the Treaty on European Union; Article 20 Paragraph 2(a) and Article 21 of the Treaty on the Functioning of the European Union (TFEU); Titles IV and V of the TFEU; and Article 45 of the European Union's Charter of Fundamental Rights.[1] While ASEAN member states citizens do not enjoy the same freedom of movement as EU citizens, restrictions remain during specific periods of the Pandemic, affecting human migration across the region.

[1] This study will limit the notion of free movement rights under Article 20 Paragraph 2 (a) of the TFEU, namely "the right to move and reside freely within the territory of the Member States".

The study of connections or comparisons between the EU and ASEAN has been extensively researched by scholars, including Jetschke & Murray,[2] Wong,[3] Murray,[4] Yukawa,[5] and Stojković.[6] This article aims to develop comparative legal studies by establishing the EU as a regional organisational model with maturity levels that can serve as a model for other regional organisations. Among others, Wunderlich,[7] Wong,[8] Murray and Moxon-Browne,[9] dan Allison-Reumann[10] did this classical viewpoint research. Although this is a classical stance, it is still relevant today because the EU continues to promote its model of regionalism to ASEAN. Additionally, the adoption of the ASEAN Charter, which came into force in 2008, was partly influenced by EU-style regionalism.[11]

This article was written based on three fundamental concepts: regional citizen, regional integration, and the role of hard and soft law in international government. Shaw,[12] Mantu & Minderhoud,[13] Neuvonen,[14] Cabrera & Byrne,[15]

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[2] Anja Jetschke and Philomena Murray, "Diffusing Regional Integration: The EU and Southeast Asia," *West European Politics* 35, no. 1 (2012): 174–91.

[3] Reuben Wong, "Model Power or Reference Point? The EU and the ASEAN Charter," *Cambridge Review of International Affairs* 25, no. 4 (2012): 669–82.

[4] Philomena Murray, "Europe and the World: The Problem of the Fourth Wall in EU-ASEAN Norms Promotion," *Journal of Contemporary European Studies* 23, no. 2 (2015): 238–52.

[5] Taku Yukawa, "European Integration through the Eyes of ASEAN: Rethinking Eurocentrism in Comparative Regionalism," *International Area Studies Review* 21, no. 4 (2018): 323–39.

[6] Fran Marko Stojković, "Rethinking The Binary Federal Theory: A Search For The EU's and ASEAN's Place In The Confederal-Federal Dichotomy," *Croatian Yearbook of European Law and Policy* 16 (2020): 61–93.

[7] Jens Uwe Wunderlich, "The EU an Actor Sui Generis? A Comparison of EU and ASEAN Actorness," *Journal of Common Market Studies* 50, no. 4 (2012): 653–69.

[8] Reuben Wong, "An EU Model for ASEAN?," *E-International Relations*, no. 2013 (2013), https://www.e-ir.info/2013/01/16/an-eu-model-for-asean/.

[9] Philomena Murray and Edward Moxon-Browne, "The European Union as a Template for Regional Integration? The Case of ASEAN and Its Committee of Permanent Representatives," *Journal of Common Market Studies* 51, no. 3 (2013): 522–37.

[10] Laura Allison-Reumann, "EU Narratives of Regionalism Promotion to ASEAN A Modest Turn," *Journal of Comm* 58, no. 4 (2020): 872–89.

[11] Jetschke and Murray, "Diffusing Regional Integration: The EU and Southeast Asia," 186–87.

[12] Jo Shaw, "The Interpretation of European Union Citizenship," *The Modern Law Review* 61, no. 3 (1998): 293–317.

[13] Sandra Mantu and Paul Minderhoud, "EU Citizenship and Social Solidarity," *Maastricht Journal of European and Comparative Law* 24, no. 5 (2017): 703–20.

[14] Päivi Johanna Neuvonen, "Transforming Membership? Citizenship, Identity and the Problem of Belonging in Regional Integration Organizations," *European Journal of International Law* 30, no. 1 (2019): 229–55.

[15] Luis Cabrera and Caitlin Byrne, "Comparing Organisational and Alternative Regional Citizenships: The Case of 'Entrepreneurial Regional Citizenship' in ASEAN," *Australian Journal of International Affairs* 75, no. 5 (2021): 507–26.

dan Weinrich[16] developed the study of regional citizens, which generally contradicts the concept of a well-known national citizen. Additionally, regional integration has been studied by Spandler,[17] Hooghe & Marks,[18] Schimmelfennig & Winzen,[19] Börzel & Risse,[20] and Jones et al.,[21] who all discuss the EU and ASEAN separately or in comparison. This concept is critical to examine since regional citizens exist due to extensive regional integration. Furthermore, the last concept is hard and soft law in international governance. Analysis of legal instruments adopted by regional organisations is also critical to examine, as these instruments may contain clauses regulating free movement. Additionally, it can refer to the cohesion of regional integration inside organisations such as the EU and ASEAN. Finally, comparisons will be conducted using comparison approaches to analyses of legal instruments and legal documents adopted by the EU and ASEAN in pandemic restrictions in 2020 and 2021.

This article argues that strong regional integration cohesiveness enables rapid response to crises within the institutional framework while respecting citizens' rights. Additionally, this paper contends that regional citizenship guarantees citizens of regional organisations that their rights will be protected during times of crisis. Moreover, the sort of legislative instrument adopted to address the crisis by restricting regional organisations' citizens' rights is highly dependent on the degree of regional cohesion and integration. Thus, the article's research issue is how the EU and ASEAN's legal frameworks respond to restricting free movement as citizen rights during a pandemic? Following that, the EU and ASEAN must determine the types of legal instruments to choose and the ramifications for regional citizens' fundamental rights.

This paper employed legal research methods with doctrinal and comparative approaches to examine the research problems. The study was conducted by inventorying, categorising and analysing legal instruments adopted by the EU and ASEAN with specific categories. These categories are the legal instruments of regional organisations adopted through processes agreed upon by member states, adopted in the framework of pandemic countermeasures and regulating

[16] Amalie Ravn Weinrich, "Varieties of Citizenship in Regional Organisations: A Cross-Regional Comparison of Rights, Access, and Belonging," *International Area Studies Review* 24, no. 4 (2021): 255–73.

[17] Kilian Spandler, "Regional Standards of Membership and Enlargement in the EU and ASEAN," *Asia Europe Journal* 16, no. 2 (2018): 183–98.

[18] Liesbet Hooghe and Gary Marks, "Grand Theories of European Integration in the Twenty-First Century," *Journal of European Public Policy* 26, no. 8 (2019): 1113–33, doi:10.1080/13501763.2019.1569711.

[19] Frank Schimmelfennig and Thomas Winzen, "Grand Theories, Differentiated Integration," *Journal of European Public Policy* 26, no. 8 (2019): 1172–92.

[20] Tanja A. Börzel and Thomas Risse, "Grand Theories of Integration and the Challenges of Comparative Regionalism," *Journal of European Public Policy* 26, no. 8 (2019): 1231–52.

[21] Erik Jones, R. Daniel Kelemen, and Sophie Meunier, "Failing Forward? Crises and Patterns of European Integration," *Journal of European Public Policy* 28, no. 10 (2021): 1519–36.

free movement rights for citizens of regional organisation members; the period is limited to 2020 and 2021 and applied to all member states (not intended for specific member states). First, legal instruments are traced from official legal databases owned by regional organisations.[22] The next stage is to group the instruments in hard law or soft law. Finally, based on these groupings, the author creates patterns, analyses, discusses, and concludes the research results.

2. Two models of regional integration: EU and ASEAN in comparison

Scholars have been concerned with regional integration since the end of World War II, namely since 1948.[23] The EU is widely considered a leading regional integration experiment that serves as a model for other regional organisations.[24] Economic, social, and territorial cohesion are all mentioned in Article 174 of the TFEU, providing a solid legal foundation for regional integration within the EU. Regional integration is successful in the EU version because of member states' economic interdependence and national leadership that fully encourages it.[25] Numerous theories, including intergovermentalism, neo-functionalism, and postfunctionalism, attempt to explain EU regional integration.[26] Nonetheless, the relevance and interdependence of member states are critical variables in determining the viability of regional integration.

The EU and ASEAN both serve as models of interdependence among member states. Economic factors, the repression of conflict, and the support of national political elites all contribute to the interdependence that underpins strong cohesion between EU member states.[27] The EU reaches regional maturity through a process of political policy adaptation to the crises it encounters

[22] For the EU legal database is https://eur-lex.europa.eu/homepage.html and for ASEAN legal database are https://asean.org/legal-instruments-database/ and https://asean.org/category/statements-meetings/.

[23] Amitav Acharya, "Comparative Regionalism: A Field Whose Time Has Come?," *International Spectator* 47, no. 1 (2012): 3–4.

[24] Börzel and Risse, "Grand Theories of Integration and the Challenges of Comparative Regionalism"; Jetschke and Murray, "Diffusing Regional Integration: The EU and Southeast Asia"; Daniella Da Silva Nogueira de Melo and Maria Mary Papageorgiou, "Regionalism on the Run: ASEAN, EU, AU and MERCOSUR Responses Mid the Covid-19 Crisis," *Partecipazione e Conflitto* 14, no. 1 (2021): 57–78.; Ana Paula Tostes, "Constructing Integration: Resilience and Political Innovation in the EU," in *Regionalism under Stress: Europe and Latin America in Comparative Perspective*, eds. Detlef Nolte and Brigitte Weiffen (London – New York: Routledge, 2021), 67–80.

[25] Börzel and Risse, "Grand Theories of Integration and the Challenges of Comparative Regionalism," 2.

[26] De Melo and Papageorgiou, "Regionalism on the Run: ASEAN, EU, AU and MERCOSUR Responses Mid the Covid-19 Crisis," Hooghe and Marks, "Grand Theories of European Integration in the Twenty-First Century".

[27] Börzel and Risse, "Grand Theories of Integration and the Challenges of Comparative Regionalism," 4.

throughout time.[28] Thus, regional integration is tested when the EU is confronted with a crisis.[29] The EU's history demonstrates that crises can be a critical phase of regional integration. Inability to manage crises effectively will push regional organisation leaders to adapt and evolve to deal with the problem.[30] Recent crises, such as pandemics, have emphasised the importance of the EU responding swiftly and efficiently. Although initially criticised for its tardiness in responding, the EU was able to coordinate regional actions in response to the pandemic crisis.[31]

If the European Union is considered a successful regional integration project, how about ASEAN? The adoption of the ASEAN Charter in 2008 provides a legal impetus for the region's regional integration procedures to be distinct. Desierto asserts that there are five significant distinctions between the period prior to and following the adoption of the ASEAN Charter.[32] First, ASEAN member states decided to establish regional institutions based on charters. Legally, the existence of a charter enhances the legal personality of the ASEAN organisation's entities.[33] Second, the post-Charter establishes a system for developing regional legal instruments and a legal framework for resolving disputes. However, it turns out that the conflict resolution process faces significant challenges during implementation due to structural and substantive concerns.[34]

Additionally, the third structural distinction is the formalisation of ASEAN Chairmanship and the assignment of responsibilities to member nations that

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[28] Ana Paula Tostes, "Constructing Integration: Resilience and Political Innovation in the EU," Federico Maria Ferrara and Hanspeter Kriesi, "Crisis Pressures and European Integration," *Journal of European Public Policy* 29, no. 9 (2022): 1351–1373.

[29] Ferrara and Kriesi, "Crisis Pressures and European Integration," Philipp Genschel and Markus Jachtenfuchs, "From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory," *Journal of Common Market Studies* 56, no. 1 (2018): 178–96.; Simon Otjes and Alexia Katsanidou, "Beyond Kriesiland: EU Integration as a Super Issue after the Eurocrisis," *European Journal of Political Research* 56, no. 2 (2017): 301–19.

[30] Jones, Kelemen and Meunier, "Failing Forward? Crises and Patterns of European Integration," 1525.

[31] Martin Rhodes, "'Failing Forward': A Critique in Light of Covid-19," *Journal of European Public Policy* 28, no. 10 (2021): 13.

[32] "Pre-Charter and Post-Charter ASEAN: Cross-Pillar Decision-Making in the Master Plan for ASEAN Connectivity 2025," in *ASEAN Law and Regional Integration: Governance and The Rule of Law in Southeast Asia's Single Market*, eds. Diane A. Desierto and David Cohen (New York: Routledge, 2021).

[33] Shaun Narine, "ASEAN in the Twenty-First Century: A Sceptical Review," *Cambridge Review of International Affairs* 22, no. 3 (2009): 369.

[34] Nattapat Limsiritong, "The Deadlock of ASEAN Dispute Settlement Mechanisms and Why ASEAN Cannot Unlock It?," *RSU International Journal of College of Government* 3, no. 1 (2016): 18–25.; Nattapat Limsiritong, "The Problems of Law Interpretation under ASEAN Instruments and ASEAN Legal Instruments," *MFU Connexion* 5, no. 2 (2016): 136–55.

hold the position.[35] Nonetheless, member nations serving as ASEAN Chair retain the authority to select the agenda for a particular year.[36] Fourth, the ASEAN Charter requires member states to enact national legislation to implement the agreed 'ASEAN Law.' However, Limsiritong asserts that there is confusion about the definition of ASEAN Legal Instruments and ASEAN Instruments, so the form of 'ASEAN Law' is not yet evident.[37] The final distinction in the post-ASEAN Charter is the term 'ASEAN Centrality' in member states' relations with other countries. According to Acharya,[38] the 'ASEAN Centrality idea has strategic and normative implications. ASEAN is strategically significant since it serves as the focal point for global interactions between key countries such as China and Japan and the Asia Pacific area. Additionally, the principle's normative interpretation is inextricably linked to the peaceful diplomacy known as 'the ASEAN ways.'[39]

Regional integration in ASEAN is often stagnant, but significant progress is made occasionally.[40] This fact cannot be disconnected from the adoption of the ASEAN Charter, a significant step toward regional integration. However, as with the EU, the situation is inextricably linked to the dynamics of ASEAN as a regional organisation founded more than five decades ago. The most severe crisis to strike ASEAN occurred during the 1997 'Asia Financial Crisis.'[41] Additionally, the most recent catastrophe is the Pandemic, to which ASEAN responded with 'business as usual' and without integration. [42]

3. Regional citizenship from the EU and ASEAN perspective

Regional citizenship exists due to solid regional integration, implying that the two ideas are interdependent and related. [43] As a result, the primary source of information for evaluating this notion is the legislative instrument established

[35] Article 32 ASEAN, "The ASEAN Charter," The ASEAN Charter § (2008).
[36] Sanae Suzuki, "Can ASEAN Offer a Useful Model? Chairmanship in Decision-Making by Consensus," *Pacific Review* 34, no. 5 (2021): 7.
[37] Limsiritong, "The Problems of Law Interpretation under ASEAN Instruments and ASEAN Legal Instruments," 141–42.
[38] Amitav Acharya, "The Myth of ASEAN Centrality?," *Contemporary Southeast Asia* 39, no. 2 (2017): 275.
[39] Amitav Acharya, *The Making of Southeast Asia*, *The Making of Southeast Asia* (Singapore: Institute of Southeast Asian Studies (ISEAS) Publishing, 2012), 206, https://doi.org/10.7591/9780801466359.
[40] Koichi Ishikawa, "The ASEAN Economic Community and ASEAN Economic Integration," *Journal of Contemporary East Asia Studies* 10, no. 1 (2021): 25.
[41] Iwan J. Azis, "ASEAN Economic Integration: Quo Vadis?," *Journal of Southeast Asian Economies* 35, no. 1 (2018): 2–12.
[42] Jürgen Rüland, "Covid-19 and ASEAN: Strengthening State-Centrism, Eroding Inclusiveness, Testing Cohesion," *International Spectator* 56, no. 2 (2021): 15.
[43] Neuvonen, "Transforming Membership? Citizenship, Identity and the Problem of Belonging in Regional Integration Organizations," 232.

by each regional body. A significant indicator of how far regional citizenship has progressed within a regional organisation is the perspective of rights, access, and belonging.[44] Another criterion utilised is the significant level of regional citizenship, as evidenced by membership, rights, identity, and involvement.[45] Nonetheless, this study will adopt the first frame because it is more pertinent to the circumstances and developments of regional citizens in various regional organisations.

The concept of EU citizenship originated in the post-World War II era and the consolidation of European economic progress through establishing a single market.[46] Furthermore, EU citizenship is a necessary component of its development and cannot be separated from the European integration agenda.[47] Regional citizenship is defined in the EU by Article 20 (1) TFEU. Each citizen of the EU member state automatically becomes an EU citizen. Therefore, citizen rights in the EU perspective are interpreted as rights granted by the EU to everyone who is a citizen of an EU member state.[48] EU citizenship became legally established with the signing of the Maastricht Treaty, and during its evolution, this notion grew stronger and became incorporated into EU legislation.[49] Although explicitly incorporated in the Maastricht Treaty, EU citizenship is a complex and multifaceted term.

Nonetheless, some researchers regard the regional vision of the EU citizen model as the most mature of the alternative models.[50] One of the reasons the EU regional citizenship model is more mature is the Union citizen's rights under Article 20 (2) of the TFEU. Nonetheless, the argument concerning the rights of EU citizens continues to be relevant. The presence of rights results from Union citizens being viewed as subjects of regional law.[51] Meanwhile, Ferrera asserts

[44] Weinrich, "Varieties of Citizenship in Regional Organisations: A Cross-Regional Comparison of Rights, Access, and Belonging," 259–60.
[45] Espen D.H. Olsen, "The Origins of European Citizenship in the First Two Decades of European Integration," *Journal of European Public Policy* 15, no. 1 (2008): 40–57.
[46] Willem Maas, "The Origins, Evolution, and Political Objectives of EU Citizenship," *German Law Journal* 15, no. 5 (2014): 797–819.; Olsen, "The Origins of European Citizenship in the First Two Decades of European Integration".
[47] Dimitry Kochenov, "The Right to Have What Rights? EU Citizenship in Need of Clarification," *European Law Journal* 19, no. 4 (2013): 502–16.
[48] Article 20 (2) European Union, "Consolidated Version of The Treaty on The Functioning of The European Union," The Treaty on The Functioning of The European Union § (1957), http://data.europa.eu/eli/treaty/tfeu_2012/oj.
[49] Martijn Van Den Brink, "EU Citizenship and (Fundamental) Rights: Empirical, Normative, and Conceptual Problems," *European Law Journal* 25, no. 1 (2019): 21–36.
[50] Cabrera and Byrne, "Comparing Organisational and Alternative Regional Citizenships: The Case of "Entrepreneurial Regional Citizenship" in ASEAN," Weinrich, "Varieties of Citizenship in Regional Organisations: A Cross-Regional Comparison of Rights, Access, and Belonging".
[51] Shaw, "The Interpretation of European Union Citizenship," 294.

that, in addition to rights, establishing EU citizenship entails a set of responsibilities.[52]

As indicated earlier, the TFEU guarantees the rights of EU citizens. This article will discuss the right to free movement as defined in Article 20(2a) of the TFEU. At the outset of the EU integration process, it was critical to agree on free movement rights. However, this condition is inextricably linked to the European Coal and Steel Community (ECSC) requirement to employ people from across Europe. Therefore, the free movement rights are being developed to include employees and all EU citizens and their families and the free movement of products and services guaranteed by Article 45 TFEU. The term "free movement" refers not only to physical travel but also to the right of all EU citizens to access sources of welfare or social benefits in all EU member states.[53]

This article argues that access and belonging are included in the right to free movement from a rights viewpoint. Because this privilege entitles EU citizens to live and work in all member states, reducing the national citizenship barrier, as a result, EU residents will have a sense of belonging to their country.[54] However, all EU citizens (not only employees) rights to free movement are further restricted by various legal instruments such as laws and directives. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of Union citizens and their family members to freely travel and reside within the territory of the Member States is the complete EU directive on free movement rights.

If the EU is recognised with the concept of Union citizens, then what about ASEAN? As an organisation undergoing a gradual and informal regional integration process, the term 'ASEAN citizen' is not defined officially under the ASEAN Charter.[55] Nonetheless, some scholars use a set of indices to establish the existence of the 'ASEAN citizen.' Weinrich, for example, finds that ASEAN citizenship is informal, changing, and unconventional via the lens of rights, access, and belonging.[56] In their study, Cabrera & Byrne added another characteristic when they proposed six elements (agents, something binding, rights, duties, substance, and institutional status), concluding that ASEAN citizenship arises due to social responsibility and entrepreneurial ties between

[52] Maurizio Ferrera, "EU Citizenship Needs a Stronger Social Dimension and Soft Duties," in *Debating European Citizenship,* ed. Rainer Bauböck (Springer Open, 2019), 182.

[53] Michael Blauberger and Susanne K. Schmidt, "Welfare Migration? Free Movement of EU Citizens and Access to Social Benefits," *Research and Politics* 1, no. 3 (2014).

[54] Weinrich, "Varieties of Citizenship in Regional Organisations: A Cross-Regional Comparison of Rights, Access, and Belonging," 261.

[55] Neuvonen, "Transforming Membership? Citizenship, Identity and the Problem of Belonging in Regional Integration Organizations," 235.

[56] Amalie Ravn Weinrich, "The Emerging Regional Citizenship Regime of the Association of Southeast Asian Nations," *Journal of Current Southeast Asian Affairs* 40, no. 2 (2021): 201–23.

its member states.[57] Finally, Neuvonen sought to define citizenship by examining the ASEAN Charter terms' people-oriented ASEAN' and 'ASEAN identity.[58]

Scholars are examining this research to identify patterns or develop criteria for ASEAN citizenship. Although there is no formal definition of an ASEAN citizen like a Union citizen in the EU, from a human rights viewpoint, ASEAN is a regional organisation, and each member state acknowledges the idea of an ASEAN citizen. Additionally, the author will discuss free movement rights in light of the ASEAN Human Rights Declaration and the ASEAN Agreement on Natural Persons Movement. The ASEAN Human Rights Declaration emphasises in Article 15 that freedom of movement is a component of civil and political rights.[59] However, the Declaration's human rights provisions have been frequently criticised for being overly generic and failing to reflect ASEAN individuals' identities.[60] Additionally, the ASEAN Agreement on the Movement of Natural Persons regulates free movement rights, particularly for workers and the business world.[61] However, this Agreement is more concerned with business issues than granting ASEAN citizens access or rights. Therefore, the concept of citizen rights in the ASEAN perspective is defined in a limited way as the rights of citizens of ASEAN member states. In addition, there are additional other rights adopted by ASEAN member states based on the organisation's legal instruments. The article contends that ASEAN's responses to the issue are influenced by a lack of wholly defined regional citizenship. The COVID-19 epidemic exemplifies the argument. ASEAN's approach to the pandemic problem is to convene meetings to facilitate coordination between member nations and other countries in the region or adjacent to it.[62] In addition to establishing rules for travel bans inside the region, ASEAN also establishes guidelines for travel bans between member nations and other regions, such as the EU.[63] Before proceeding, the author should first clarify the hard and soft law

[57] Cabrera and Byrne, "Comparing Organisational and Alternative Regional Citizenships: The Case of 'Entrepreneurial Regional Citizenship' in ASEAN".

[58] Neuvonen, "Transforming Membership? Citizenship, Identity and the Problem of Belonging in Regional Integration Organizations".

[59] ASEAN, "ASEAN Human Rights Declaration," 2012.

[60] Mathew Davies, "An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia," *Journal of Current Southeast Asian Affairs* 33, no. 3 (2014): 107–29.; Laura Allison-Reumann, "ASEAN and Human Rights: Challenges to the EU's Diffusion of Human Rights Norms," *Asia Europe Journal* 15, no. 1 (2017): 39–54.

[61] ASEAN, "ASEAN Agreement on the Movement of Natural Persons," *Invest in ASEAN*, 2020.

[62] Riyanti Djalante and al., "COVID-19 and ASEAN Responses: Comparative Policy Analysis," *Progress in Disaster Science* 8 (2020); Rüland, "Covid-19 and ASEAN: Strengthening State-Centrism, Eroding Inclusiveness, Testing Cohesion".

[63] De Melo and Papageorgiou, "Regionalism on the Run: ASEAN, EU, AU and MERCOSUR Responses Mid the Covid-19 Crisis," 64.

concepts in the next section. Conception plays a significant role in this paper's arguments and hypotheses.

4. Soft and hard law in regional organisation governance

Scholars have frequently employed the distinction of hard and soft law.[64] Additionally, the perspective and categorisation employed are highly varied. The most frequently used indicators of hard law include a legally binding perspective, a precise production process, and the presence of a delegation of authority to interpret and implement the law.[65] In contrast, soft law is defined as a feeble arrangement of obligations, details, delegation, and the presence of ambiguous ambiguity or substance associated with it.[66] Hard and soft laws appear to be poles apart, easily distinguishable. However, some researchers attempt to define soft law to avoid being naive about the distinction between the two sorts of laws.

Blutman classified soft law into three categories. The first category includes non-binding judgments made by international organisations and institutions; this instrument may take the form of guidelines, declarations, resolutions, or recommendations.[67] The second type of soft law document is bilateral or multilateral cooperation that imposes no responsibilities on the participating countries, with joining statements, letters of intent, or memorandums of understanding typically serving as the preferred form of this type of soft law instrument.[68] Finally, the recommendations made by Non-Governmental

[64] Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization* 54, no. 3 (2000): 421–56.; Sylvia Karlsson-Vinkhuyzen and Antto Vihma, "Comparing the Legitimacy and Effectiveness of Global Hard and Soft," *Regulation & Governance* 3 (2009): 400–420.; Fabien Terpan, "Soft Law in the European Union-The Changing Nature of EU Law," *European Law Journal* 21, no. 1 (2015): 68–96.; Barnali Choudhury, "Balancing Soft and Hard Law for Business and Human Rights," *International and Comparative Law Quarterly* 67, no. 4 (2018): 961–86.; Elizabeth Ferris and Jonas Bergmann, "Soft Law, Migration and Climate Change Governance," *Journal of Human Rights and the Environment* 8, no. 1 (2017): 6–29.; Anna Di Robilant, "Genealogies of Soft Law," *American Journal of Comparative Law* 54, no. 3 (2006): 499–554; László Blutman, "In the Trap of a Legal Metaphor: International Soft Law," *International and Comparative Law Quarterly* 59, no. 3 (2010): 605–24.

[65] Abbott and Snidal, "Hard and Soft Law in International Governance"; Choudhury, "Balancing Soft and Hard Law for Business and Human Rights"; Fabien Terpan and Sabine Saurugger, "Soft and Hard Law in Times of Crisis: Budget Monitoring, Migration and Cybersecurity," *West European Politics* 44, no. 1 (2021): 21–48.

[66] Abbott and Snidal, "Hard and Soft Law in International Governance"; Harsh Mahaseth and Karthik Subramaniam, "Binding or Non-Binding: Analysing the Nature of the ASEAN Agreements," *International and Comparative Law Review* 21, no. 1 (2021): 100–123.; Karlsson-Vinkhuyzen and Vihma, "Comparing the Legitimacy and Effectiveness of Global Hard and Soft".

[67] Blutman, "In the Trap of a Legal Metaphor: International Soft Law," 607.

[68] Blutman, 607.

Organisations (NGOs) have a tangible effect on world politics.[69] Bluntman's method is predicated on the label of the legal instrument in question. However, the type of instrument does not necessarily indicate the nature of law, whether hard or soft.[70] Terpan argues a variety of perspectives when he categorises soft law into three categories: norms that are not legally binding but have legal relevance, norms that are legally binding but have soft characteristics, and finally, a combination of the two.[71] Additionally, it is stressed that there is a distinction between soft law and non-legal norms, which their legal relevance or absence can determine.[72] An instrument must first be declared a legal action by an authorised organisation before it can be classed as hard or soft.

This article distinguishes hard and soft law based on legally binding, which is the essential factor that distinguishes it from hard law,[73] its determination mechanism, and the sanctioning aspects available in legal instruments because it will be more relevant to the studies conducted.[74] The focus of this study is one of them, it is the choice of legal instrument forms adopted by regional organisations in the crisis period caused by the Pandemic. Therefore, the aspect of the substance is more appropriate to determine whether the law used is hard or soft. Nonetheless, the authors recognise that the EU and ASEAN have inconsistent nomenclature naming adopted legal instruments.[75]

5. EU free movement restrictions in times of COVID-19 Pandemic: from soft law to hard law

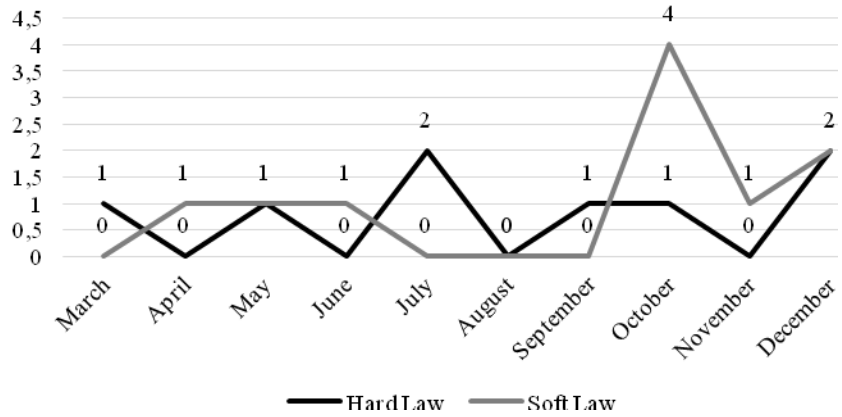
Article 288 TFEU specifies the form and content of appropriate legal instruments within the EU. On the one hand, regulations, directives, and decisions have binding legal effects, whereas recommendations and opinions do not.[76] On the other hand, the three legal instruments stated at the outset are hard law, whereas the latter two are soft law. The EU's legislative approach to the

[69] Blutman, 608.
[70] Choudhury, "Balancing Soft and Hard Law for Business and Human Rights," 964.
[71] Terpan, "Soft Law in the European Union– The Changing Nature of EU Law," 70–72.
[72] Terpan, 72.
[73] Ramses A. Wessel, "Normative Transformations in EU External Relations: The Phenomenon of 'Soft' International Agreements," *West European Politics* 44, no. 1 (2021): 74.
[74] Terpan and Saurugger, "Soft and Hard Law in Times of Crisis: Budget Monitoring, Migration and Cybersecurity"; Mahaseth and Subramaniam, "Binding or Non-Binding: Analysing the Nature of the ASEAN Agreements"; Ferris and Bergmann, "Soft Law, Migration and Climate Change Governance".
[75] Limsiritong, "The Problems of Law Interpretation under ASEAN Instruments and ASEAN Legal Instruments".
[76] Bruno de Witte, "Legal Instruments and Law-Making in the Lisbon Treaty," in *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?*, ed. Stefan Griller and Jacques Ziller (Vienna: SpringerWienNewYork, 2008).

COVID-19 pandemic crisis is thus inextricably linked to legal tools, both hard and soft. Unfortunately, the EU reacted slowly and incoherently at the outset of this crisis.[77] This condition exists because Article 168 TFEU establishes the EU's competence in public health to complement member states' national policies. As a result, when the COVID-19 Pandemic began affecting member states, the EU lacked the capacity and authority to respond promptly.[78]

The first legal instrument adopted by the EU to address the COVID-19 Pandemic, particularly in terms of restrictions on free movement rights, is Council Decision (EU) 2020/430 of 23 March 2020, authorising a Temporary Derogation from the Council's Rules of Procedure in light of the travel difficulties caused by the COVID-19 Pandemic in the Union. Additionally, between March and December 2020, the EU enacted 18 legal instruments regulating or restricting free movement rights. The legal instrument comprises eight instruments containing hard laws and ten instruments containing soft laws (recommendations). Council Decision, Council Implementing Decision, Commission Delegated Regulation, Commission Implementing Regulation, and Commission Implementing Decision are the hard law instruments used in 2020. In contrast, Council Recommendation and Commission Recommendation are utilised as soft law mechanisms. The following figure illustrates the EU's adoption of legal instruments in 2020:

Figure 1. Legal instruments adopted by EU on free movement rights in times of pandemic (2020)



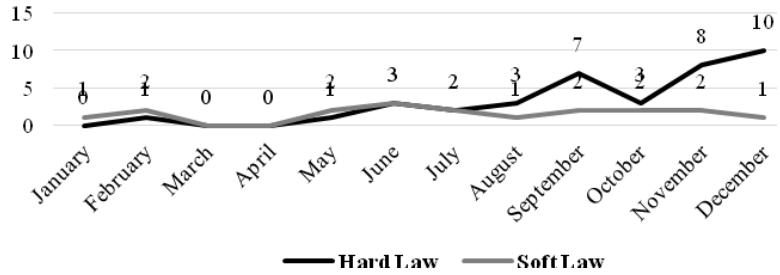
Sources: Data compiled by the author based on EUR-Lex (2022)

[77] Sarah Wolff and Stella Ladi, "European Union Responses to the Covid-19 Pandemic: Adaptability in Times of Permanent Emergency," *Journal of European Integration* 42, no. 8 (2020): 1025–40.; de Melo and Papageorgiou, "Regionalism on the Run: ASEAN, EU, AU and MERCOSUR Responses Mid the Covid-19 Crisis".

[78] Eleanor Brooks and Robert Geyer, "The Development of EU Health Policy and the Covid-19 Pandemic: Trends and Implications," *Journal of European Integration* 42, no. 8 (2020): 1058.

In 2021, it demonstrated a trend toward adopting legal mechanisms to manage free movement rights rather than hard law. This statistic reveals that the Inner EU had made significant strides in overcoming the Pandemic. The following figure illustrates the distribution of the EU's adoption of hard law and soft law instruments regulating restrictions on free movement rights in 2021:

Figure 2. Legal instruments adopted by EU on free movement rights in times of pandemic (2021)



Sources: Data compiled by the author based on EUR-Lex (2022)

According to Figure 2, there are 56 legal instruments in use, including 38 hard and 18 soft laws. In addition, three Regulations, 32 Commission Implementing Decisions, one Commission Implementing Regulation, and two Commission Delegated Regulations, were utilised as hard law instruments. At the same time, the soft law instrument is a Council Recommendation. The adoption of hard law tools increased significantly in the second part of 2021, peaking at the year's close. What is notable is that the majority of legal instruments enacted in 2021 concern the relaxation of travel restrictions enacted in 2020.

Additionally, there exist some legal instruments that recognise foreign-issued COVID-19 test documents. The EU's adoption of both hard and soft legislative instruments demonstrates hope for resolving the epidemic at the regional level. The following table summarises the many legal mechanisms that the EU had established to control the restriction of free movement rights in preparation for the Pandemic in 2020-2021:

Table 1. Various legal instruments adopted by the EU 2020-2021

Type of Law	Legal Instruments	2020	2021
Hard Law	Regulation	0	1
	Council Decision	1	0
	Council Implementing Decision	1	0
	Commission Delegated Regulation	3	2
	Commission Implementing Regulation	2	1
	Commission Implementing Decision	1	32
Soft Law	Council Recommendation	5	18
	Commission Recommendation	5	0

Sources: Data compiled by the author based on EUR-Lex (2022)

The EU adopted the hard law instrument as its initial approach to curtailing free movement rights in response to the Pandemic. However, until the end of 2020, soft legislation was designated as the vehicle for regulating people's travel limitations between EU member states. At the start of the Pandemic, the employment of hard law instruments was partly in conformity with Article 168 (5) of the TFEU, which requires the use of non-soft laws to preserve public health in the region.[79] Additionally, until December 2020, soft law is more extensively employed as a legal mechanism for regulating travel limitations that affect free movement rights. The choice of soft legislation is extremely sensible given its adaptable character and capacity to be easily replaced in pandemic situations.[80] The establishment of hard law as a first response to restrict people's travel, followed by soft law, attempts to provide direction and instructions to member states on how to control the coronavirus within their internal borders. This is particularly pertinent given the nature of soft law, which is intended to convey basic guidelines rather than organise them in detail.[81]

The adoption of soft laws restricting people's travel at the beginning of the crisis indicates the EU's inability to anticipate and react to unforeseen events. Nonetheless, the EU's adoption of soft rules is primarily focused on assuring rapid reaction in the public interest and economic recovery.[82] Additionally, it

[79] Mariolina Eliantonio and Oana Ştefan, "The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU," *European Journal of Risk Regulation* 12, no. 1 (2021): 159–75.
[80] Stefan Oana, "COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda | European Papers," *European Papers* 5, no. 1 (2020): 663.
[81] A. E. Boyle, "Some Reflections on the Relationship of Treaties and Soft Law," *International and Comparative Law Quarterly* 48, no. 4 (1999): 901.
[82] David Townend et al., "What Is the Role of the European Union in the COVID-19 Pandemic?," *Medicine and Law* 39, no. 2 (2020): 249–68.

demonstrates the EU's pattern of crisis management, notable continuity and quick change in response to and recovery from calamities. On the one hand, soft law allows for greater flexibility and response time; on the other hand, its use can be viewed as a shortcut that disrupts the rhythm of developing national and regional legislation and regulations.[83] However, the EU's implementation of soft regulations limiting free movement rights during the early stages of the pandemic crisis is a sort of constraint on regional organisations and an attempt to coordinate member states' national policies.[84]

Moreover, adopting soft law mechanisms to govern restrictions on free movement rights is a type of EU caution. The EU Fundamental Rights Charter guarantees the right to free movement as a fundamental right. According to Mantu's research in Romania, EU nationals retain their rights to free movement in a pandemic despite the limits.[85] When the Pandemic began, the EU responded by establishing soft legislation limiting the viral spread and curtailing free movement rights. Additionally, this alternative cannot ignore the historical facts of the EU's experience with the spread of contagious diseases through soft law instruments.[86]

On the other hand, the adoption of soft laws to restrict freedom of movement during the start of the COVID-19 epidemic is also an attempt to provide guidance or instructions to member nations. The EU's lack of binding legal power also allows member states to experiment with restrictions on free movement rights in their separate domains. A crisis in its manifestations can be a litmus test for regional integration, particularly for the EU, renowned for its deep and robust integration. This prudence in limiting free movement rights demonstrates that the stronger regional integration is, the more certain it is that human rights such as free movement will not be eroded even in pandemic conditions. As a result, containing the virus's spread and limiting people's movement inside a territory that has been solidly integrated is not a viable option.

Soft law is increasingly being used at the regional level and within member states. Germany, for example, employs Pandemic Plans, Recommendations, Informal Agreements, and Administrative Directions as soft law instruments to

[83] Stella Ladi and Dimitris Tsarouhas, "EU Economic Governance and Covid-19: Policy Learning and Windows of Opportunity," *Journal of European Integration* 42, no. 8 (2020): 1041–56.

[84] Alberto Alemanno, "The European Response to COVID-19: From Regulatory Emulation to Regulatory Coordination?," *European Journal of Risk Regulation* 11, no. 2 (2020): 307–16.

[85] Sandra Mantu, "EU Citizenship, Free Movement, and Covid-19 in Romania," *Frontiers in Human Dynamics* 2, no. December (2020): 1–7.

[86] Barbara Boschetti and Maria Daniela Poli, "A Comparative Study on Soft Law: Lessons from the COVID-19 Pandemic," in *Cambridge Yearbook of European Legal Studies*, vol. 23, eds. Emilija Leinarte and Oke Odudu (Cambridge: Cambridge University Press, 2021), 24.

rein in coronavirus spread throughout the country.[87] Meanwhile, Italy is implementing soft law tools as part of the second phase of a pandemic reaction to restore normalcy to its citizens' lives.[88] Guidelines, protocols, circulars, recommendations, and frequently asked questions (FAQs) are all legal instruments available on government websites.[89] The Spanish government followed suit, utilising soft law instruments such as nomenclature standards, protocols, recommendations, and guidance on best practices to aid in the control of coronavirus spread across the country.[90]

The shift from soft to hard law happened in 2021; as illustrated in Figure 2, hard law adoption peaked in the second half of 2021. This fact, the authors assert, implies that the leaders of EU bodies appear to have unified their pandemic preparedness plans with member states. As a result, the instrument type shifted from soft to hard legislation. There are three distinct processes by which hard law becomes soft law or vice versa, namely due to crises, the effectiveness of legal standards, and the decision of actors.[91] The three kinds are decisive regarding limits on freedom of movement during the COVID-19 epidemic. Because crisis conditions affecting all member states might result in instability and uncertainty, there are openings for modifying legal instruments' forms.[92] Restricting free movement rights during the COVID-19 pandemic crisis can be an illustrative case. In terms of effectiveness, the shift in the type of legal instrument from hard law to soft law in 2021 can be understood as an increase in public participation in decision-making. The European Parliament's (EP) viewpoint is critical since it bears on the legitimacy of political parties and the public.[93] The approval of Regulations (EU) 2021/953 and (EU) 2021/954 represents a significant step forward in terms of public interaction. Additionally, the role of players in the transformation of legal instruments is critical to review. Throughout 2020, the European Commission and the Council of the European Union established themselves as institutions and critical actors in the adoption of legal instruments imposing restrictions on free movement rights at the regional level; however, since 2021, other actors have been involved, most

[87] Matthias Knauff, "Coronavirus and Soft Law in Germany: Business as Usual?," *European Journal of Risk Regulation* 12, no. 1 (2021): 45–58.
[88] Flaminia Aperio Bella, Cristiana Lauri, and Giorgio Capra, "The Role of COVID-19 Soft Law Measures in Italy: Much Ado about Nothing?," *European Journal of Risk Regulation* 12, no. 1 (2021): 100.
[89] Aperio Bella, Lauri, and Capra, "The Role of COVID-19 Soft Law Measures in Italy: Much Ado about Nothing?"
[90] Dolores Utrilla Fernandez-Bermejo, "Soft Law Governance in Times of Coronavirus in Spain," *European Journal of Risk Regulation* 12, no. 1 (2021): 114.
[91] Sabine Saurugger and Fabien Terpan, "Normative Transformations in the European Union: On Hardening and Softening Law", *West European Politics* 44, no. 1 (2021): 7.
[92] Terpan and Saurugger, "Soft and Hard Law in Times of Crisis: Budget Monitoring, Migration and Cybersecurity," 4.
[93] Christopher Lord, "How Can Parliaments Contribute to the Legitimacy of the European Semester?," *Parliamentary Affairs* 70, no. 4 (2017): 675.

notably the EP as a representative of the European people and a mechanism for ensuring transparency in public policymaking.[94]

The degree of coherence among regional organisations heavily influences the legislative forms used to restrict fundamental rights such as freedom of movement. From March 2020 to December 2021, the EU's experience revealed the change of soft law acceptance into hard legislation. According to the author, this occurs as a result of three causes. First, freedom of movement is a fundamental right guaranteed by Article 45 of the European Union's Charter of Fundamental Rights.[95] As a result, if the restriction is implemented hastily and abruptly without first determining its efficiency in suppressing virus spread, it will almost surely result in resistance. Imitating China's 'lockdown' strategy on the city of Wuhan after COVID-19 spread for the first time undoubtedly requires strategic initiatives supported by all member states. Second, crises are a natural part of the EU integration process, and each crisis requires a unique response. Third, the COVID-19 epidemic has had an equal impact on all spheres of life and all member states. Thus, the adoption of soft legislation during the early Pandemic is appropriate if the goal is to assess the epidemic's impact and the ability of member states to overcome it autonomously. Additionally, the limitations of the EU's authority in public health under Article 168 TFEU must be examined. Finally, the progressive implementation of hard law demonstrates the EU institutions' confidence in their ability to begin addressing the Pandemic's regional consequences in a coordinated manner.

6. Southeast Asian Free movement rights in times of COVID-19 Pandemic: follow 'the ASEAN ways'

ASEAN maintained free movement rights differently from the EU during the COVID-19 epidemic. As previously noted, the EU employs a combination of hard and soft law, whereas ASEAN relies entirely on soft law in the form of declarations and statements. Throughout 2020, ASEAN published 56 declarations and statements connected to COVID-19; however, only two joint statements were indirectly tied to travel restrictions, and one declaration was directly related to travel restrictions that impacted the free movement of ASEAN member states' citizens. Additionally, ASEAN published 48 declarations and statements in 2021 regarding COVID-19, but just one statement regarding travel restrictions. Thus, between March 2020 and December 2021, ASEAN filed just one declaration and three declarations on restrictions on free movement between member nations.[96]

The first joint statement in 2020 was The ASEAN Tourism Ministers' *Joint Statement on Strengthening Cooperation to Revitalise ASEAN Tourism* on 29

[94] Nicole Bolleyer and Valeria Smirnova, "Parliamentary Ethics Regulation and Trust in European Democracies," *West European Politics* 40, no. 6 (2017): 1218–40.
[95] European Union, "Charter of Fundamental Rights of The European Union" (2000).
[96] Generated and analysed from https://asean.org/category/statements-meetings/ last accessed on 31 March 2022.

April 2020, and the second was *The ASEAN Tourism Ministers' Joint Statement on Responding to the Impact of COVID-19 on Labor and Employmen*t on 29 May 2020.[97] Additionally, on 12 November 2020, the specific declaration was adopted under the formal title ASEAN Declaration on an ASEAN TRAVEL Corridor Arrangement Framework.[98] Then, in 2021, the joint statement was presented on the eve of the ASEAN Tourism Ministers' 24th Meeting on 4 February 2021.[99] Hence, this paper found some facts that ASEAN did not adopt hard laws in regulated travel limits at the regional level. Instead, the soft law was chosen by ASEAN during Southeast Asia's COVID-19 epidemic in 2020 and 2021. This condition may refer to various issues concerning regional citizens' rights and the most recent advancements in ASEAN integration efforts.

ASEAN has a considerable amount of experience related to public health crises. For example, previous MERS and SARS outbreaks had hit the region in 2003 and 2009.[100] As an area geographically close to China, ASEAN member states can mitigate the potential spread of this virus earlier than other countries.[101] However, in reality, ASEAN can be slow in responding to the emergence of COVID-19. In the early phases of the COVID-19 Pandemic spread in the Southeast Asian region, each member country carried out travel restrictions without ASEAN's coordination.[102] However, soft law related to free movement rights was adopted in November 2020 to guide essential business travel.[103] This fact in a state of crisis reinforces the doctrine of 'the ASEAN ways', which prioritises the sovereignty of each country in regional cooperation.[104]

In addition, in responding to the COVID-19 Pandemic, ASEAN conducts multilateral cooperation well with certain countries or with regional

[97] ASEAN, "Joint Statement of The ASEAN Tourism Ministers on Strengthening Cooperation to Revitalise ASEAN Tourism" 2019, no. February (2020): 2019–21, https://asean.org/joint-statement-asean-tourism-ministers-strengthening-cooperation-revitalise-asean-tourism/; ASEAN, "Joint Statement on Response to the Impact of COVID-19 on Labour and Employment," 2020.

[98] ASEAN, "ASEAN Declaration on an ASEAN Travel Corridor Arrangement," 2020.

[99] ASEAN, "Joint Media Statement The 24th Meeting of ASEAN Tourism Ministers," no. February (2021): 1–5.

[100] Mely Caballero-Anthony, "ASEAN's Multilateral Path Through the Pandemic," *Current History* 119, no. 818 (2020): 222.

[101] Rüland, "Covid-19 and ASEAN: Strengthening State-Centrism, Eroding Inclusiveness, Testing Cohesion"; Gianna Gayle Amul et al., "Responses to COVID-19 in Southeast Asia: Diverse Paths and Ongoing Challenges", *Asian Economic Policy Review* 17 (2022): 90–110.

[102] ASEAN, "Declaration of the Special ASEAN Summit on Coronavirus Disease 2019 (COVID-19)," 2020.

[103] ASEAN, "ASEAN Declaration on an ASEAN Travel Corridor Arrangement".

[104] Rüland, "Covid-19 and ASEAN: Strengthening State-Centrism, Eroding Inclusiveness, Testing Cohesion," 14.

organisations[105] However, travel restrictions remain the domain of each member country without any commitment at the beginning of the Pandemic. Therefore, the Declaration on travel corridor arrangements was established more than six months after the Pandemic. On the one hand, ASEAN member states are trying to limit the spread of the virus. However, on the other hand, travel restrictions will weaken the tourism industry. The tourism industry is one of the leading sectors of ASEAN, which was severely affected when travel restrictions were imposed to prevent the spread of the virus.[106]

Furthermore, the selection of instruments in the form of declarations or statements is a significant issue. Because the two instruments are not legal acts, they are not legally enforceable and have no legal implications. The two institutions are classified as 'ASEAN Instruments' rather than 'ASEAN Legal Instruments,' but the ASEAN Charter makes no distinction between the two titles.[107] Nonetheless, based on their nomenclature, the author refers to the two instruments as 'ASEAN Instruments.' ASEAN's legal acts, referred to as 'ASEAN Legal Instruments,' generally use treaty terminology, Agreement, arrangement, and protocol.[108] As a result, instruments in the form of declarations and statements are non-binding on ASEAN member nations.

On the one hand, this scenario demonstrates the fragility of regional institutions such as the ASEAN's legal system. On the other hand, this fact demonstrates the legal system's complexity, owing to the ambiguity of the nomenclature and the binding nature of each legal instrument. However, by utilising soft law as a legal instrument for regional organisations, conflicts with national law and pressure from the industrial world can be avoided.[109]

Regional integration factors greatly influence the choice of legal instruments adopted by ASEAN in tackling the Pandemic. ASEAN implements coordination and activates multilateral cooperation with China, Russia, the United States, Korea, Japan, and regional organisations such as the EU without producing a legally binding agreement. Therefore, ASEAN consistently implements 'the ASEAN ways' that prioritise informality, non-legal consensus building, and weak regionalism.[110] From this perspective, it can be said that the crisis caused by the Pandemic has not had a significant impact on the ASEAN

[105] Djalante et al., "COVID-19 and ASEAN Responses: Comparative Policy Analysis"; Amul et al., "Responses to COVID-19 in Southeast Asia: Diverse Paths and Ongoing Challenges".

[106] Loo See Beh and Woon Leong Lin, "Impact of COVID-19 on ASEAN Tourism Industry," *Journal of Asian Public Policy* 00, no. 00 (2021): 1–21.

[107] Limsiritong, "The Problems of Law Interpretation under ASEAN Instruments and ASEAN Legal Instruments," 139.

[108] Yoshifumi Fukunaga, "Use of Legal Instruments in the ASEAN Economic Community Building," *Journal of Contemporary East Asia Studies* 10, no. 1 (2021): 66.

[109] Di Robilant, "Genealogies of Soft Law," 502.

[110] Amitav Acharya, "Arguing about ASEAN: What Do We Disagree About?," *Cambridge Review of International Affairs* 22, no. 3 (2009): 493–99.; Usanee Aimsiranun, "Comparative Study on the Legal Framework on General Differentiated Integration Mechanisms in the European Union, APEC, and ASEAN," 2020, 1–17.

integration process. Furthermore, this condition also affects 'ASEAN citizens' human rights, pseudo or non-existent. The choices taken by ASEAN leaders in dealing with the Pandemic are also included as a development strategy.[111] Restrictions on free movement rights carried out by each member country are expected to build resilience in response to the ongoing Pandemic or even further Pandemic.

ASEAN's response to free movement rights since the Pandemic broke out also shows that ASEAN integration processes in the legal sector are slow. The implications also affect the implementation of the Rule of Law at the regional level. Strengthening the Rule of Law is very important for the rule-based organisation as aspired by ASEAN.[112] Furthermore, ASEAN's lack of response regarding restrictions on free movement rights continued in 2021. During the Pandemic, most ASEAN Citizens experienced a lack of legal protection, especially in terms of free movement rights, relying solely on the legal protection of national countries without contributions from regional organisations. This condition occurs not almost evenly distributed throughout ASEAN countries; the Pandemic is a momentum to further limit human rights for citizens.[113] In addition, democratic backsliding also occurs with a coup by the military or a change of government without elections.[114] Weak legal integration makes ASEAN's powerlessness even more complete. The principle of non-interference adopted by ASEAN also makes interference of member states to other countries impossible.[115] This condition increasingly limits the guarantee of citizens' rights of ASEAN member states listed in the ASEAN Declaration of Human Rights.

[111] Ishikawa, "The ASEAN Economic Community and ASEAN Economic Integration".
[112] Kevin Y. L. Tan, "ASEAN Law: Content, Applicability, and Challenges," in *ASEAN Law and Regional Integration: Governance and The Rule of Law in Southeast Asia's Single Market*, eds. Diane A Desierto and David Cohen (New York: Routledge, 2021), 39–56.; ASEAN Secretariat, *Roadmap for an ASEAN Community 2009-2015, Jakarta: ASEAN Secretariat*, 2009, http://www.asean.org/images/2012/publications/RoadmapASEANCommunity.pdf; ASEAN, "Asean Community Vision 2025," 2015, 8, http://www.asean.org/wp-content/uploads/images/2015/November/aec-page/ASEAN-Community-Vision-2025.pdf.
[113] Champa Patel, "How COVID-19 Infected Human Rights Protection," *East Asia Forum Quarterly*, 2020.
[114] Rüland, "Covid-19 and ASEAN: Strengthening State-Centrism, Eroding Inclusiveness, Testing Cohesion"; Saleena Saleem, "Malaysia 2020: Democratic Backsliding Amid the COVID-19 Pandemic," *Asia Maior* XXXI, no. 1 (2020): 241–58.
[115] Sanae Suzuki, "Why Is ASEAN Not Intrusive? Non-Interference Meets State Strength," *Journal of Contemporary East Asia Studies* 8, no. 2 (2019): 158.

7. Conclusion

The EU and ASEAN chose different paths in providing guarantees for implementing free movement rights during the Pandemic.[116] Strong regional integration in the EU has implications for guaranteeing human rights and implementation. Furthermore, this condition is strongly related to adopting legal instruments to ensure the implementation of human rights during times of crisis, especially pandemics. The EU adopts hard and soft laws to handle the Pandemic quite tactically and strategically. However, it is not easy to distinguish strictly between hard law and soft law adopted by the EU.[117] In instruments in the form of soft law, there is a dimension of substance that is hard and vice versa.[118] Nonetheless, in the context of restrictions on free movement rights, the EU adopts both of these instruments regardless of the dimensions of the substance it regulates. On the other hand, ASEAN consistently adopt soft law with dimensions of substance that do not have legally binding power.

The two forms of regional integration of the EU and ASEAN consistently carry out their respective organisational visions. The EU, with the pattern of using soft law at the beginning of the Pandemic, which then turned into hard law in the following year, showed the strong integration and influence of the Union on handling the Pandemic. ASEAN, which is consistent with the principle of non-interference, prefers the form of soft law instruments with soft substances. As a result, the role of each ASEAN member state in dealing with the Pandemic is more prominent without showing any significant contributions from regional organisations. In this context, it can be said that the public health crisis cannot strengthen ASEAN regional integration once again. State-centrism remains a common choice with symptoms of democratic backsliding that ignore citizen rights.

The study conducted by this author has limitations in reaching and identifying instruments other than soft law and hard law. In addition, the documents on which the research is based are legal acts officially declared by regional organisations. However, the author has realised that there are documents that do not include legal acts but have an influence on handling the Pandemic, especially related to restrictions on free movement rights. Therefore, future research can cover these documents to photograph more comprehensive results. Furthermore, the dichotomy of the form of hard and soft law instruments can be less precise to measure the cohesion of integration and implementation of human rights. However, the classification of these two forms of legal instruments remains relevant for reviewing and discussing integration at the legal and regulatory levels. For example, regional organisations with solid

[116] Maas, "The Origins, Evolution, and Political Objectives of EU Citizenship"; Van Den Brink, "EU Citizenship and (Fundamental) Rights: Empirical, Normative, and Conceptual Problems".
[117] Terpan, "Soft Law in the European Union– The Changing Nature of EU Law," 84.
[118] Choudhury, "Balancing Soft and Hard Law for Business and Human Rights".

integration cohesion, such as the EU, the soft and hard law is formal and has become a part of supranational legal order. Otherwise, ASEAN with weak integration cohesion tends to adopt soft law in informality lawmaking process.

Further research should examine strategically legal responses either through legal or non-legal instruments that have implications for the public. The EU and ASEAN can overview two different polar models of regional organisations with different goals and outcomes. The escalation of the Pandemic, which is changing, also makes the study of the legal responsibility of regional organisations relevant, especially regarding the restriction of free movement rights, which is a source of regional economic stagnation.

Requests for internal review and the revised Aarhus Regulation

PÁNOVICS, ATTILA

ABSTRACT *This article examines the development of EU law in the context of access to justice guaranteed under the Aarhus Convention. It considers how the Court of Justice of the European Union and the Compliance Committee of the Convention (ACCC) interpret obligations arising under Article 9(3) of the Convention.*

When the EU ratified the Convention in 2005 it committed to guaranteeing broad access to justice in environmental matters at both national and Union levels. Until now, the 2006 Aarhus Regulation is the sole piece of EU legislation outside the provisions of the Treaties that was adopted for the purpose of providing the basis for access to justice in environmental matters at Union level. Unfortunately, the internal review procedure set out by the 2006 Aarhus Regulation has been interpreted so restrictively by the Court of Justice of the EU that its added value in striving for better access to courts remained ephemeral.

The article discusses the findings of the ACCC on the EU's non-compliance with Article 9(3) of the Convention, and highlights the recent legislative activities at EU level relating to access to justice in environmental matters. The application of the revised Aarhus Regulation will demonstrate whether the European Union has duly implemented its international obligations regarding access to justice in environmental matters.

KEYWORDS *Aarhus Convention, access to justice in environmental matters, Aarhus Regulation, internal review of administrative acts*

1. Introduction

The UNECE[1] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters[2] is the most

[1] The United Nations Economic Commission for Europe, abbreviated as UNECE, is one of the five regional commissions of the United Nations. The UNECE region encompasses the whole of Europe and five Central Asian countries, as well as Canada, the United States and Israel. Over 70 international professional organisations and other non-governmental organisations take part in UNECE activities. As a multilateral platform, UNECE facilitates pan-European economic integration and cooperation among its 56 member countries, and promotes sustainable development and prosperity.

[2] UN Treaty Series 2161, 447.

far-reaching international agreement on environmental rights. It was adopted in Aarhus, Denmark, in June 1998, and signed by 39 European countries and the European Community. It entered into force in October 2001 and its Parties now include 46 countries and the European Union.[3]

The main aim of the Convention is to allow the public to become more involved in environmental matters and to actively contribute to improved preservation and protection of the environment. Public participation gives the public the opportunity to express its concerns, contributes to greater transparency, improves openness and accountability, and a more effective pursuit of the environmental objectives. It also enables public authorities to take due account different views, which is vital to enhance the quality and the implementation of their decisions.

Since its adoption, the Convention has been a model for application of the concept of 'environmental democracy' as enshrined in Principle 10[4] of the Rio Declaration on Environment and Development. The main objective of the Convention is to contribute to the protection of the right of every person of present and future generations in an environment adequate to his or her health and well-being.[5] The Convention was the first legally-binding international agreement putting the principles of environmental democracy into action, and confirming the global importance of environmental rights which are at the heart of sustainable development.

After 20 years of being in force, the Aarhus Convention remains the most inspiring international instrument in the field of environmental democracy.[6] In October 2021, the Parties to the Convention also agreed to establish a mechanism in the form of a Special Rapporteur on environmental defenders to provide a rapid response to alleged violations.[7] The Rapporteur's role is to take measures to protect any person experiencing, or at imminent threat of penalization, persecution, or harassment for seeking to exercise their rights under the Aarhus Convention.[8] This decision marks an important step for the advancement of environmental democracy, helping to uphold the universal right to a clean, healthy and sustainable environment – as recognized by the UN Human Rights Council earlier the same month.[9] On 24 June 2022, the Meeting

[3] https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27.

[4] https://www.unep.org/civil-society-engagement/partnerships/principle-10

[5] See Article 1 of the Convention.

[6] "Aarhus Convention celebrates its twentieth anniversary", 9 July, 2018, https://unece.org/media/press/1381.

[7] See Decision VII/9 on a rapid response mechanism to deal with cases related to article 3(8) of the Aarhus Convention, ECE/MP.PP/2021/CRP.8.

[8] "Rapid response mechanism to protect environmental defenders established under the Aarhus Convention", 22 October, 2021, https://unece.org/media/environment/Aarhus-Convention/press/361413.

[9] "Access to a healthy environment, declared a human right by UN rights council", 8 October, 2021, https://news.un.org/en/story/2021/10/1102582.

of the Parties to the Aarhus Convention has elected, by consensus, *Mr. Michel Forst*[10] as the world's first Special Rapporteur on environmental defenders.[11]

2. Access to justice in environmental matters

The Aarhus Convention consists of three important aspects of environmental governance, namely access to information, public participation in decision-making and access to justice in environmental matters. Access to justice provides the foundation of the 'access rights', as it facilitates the public's ability to enforce their right to be informed, to participate, and to hold regulators and polluters for environmental harm. The Convention does not define the notion of act or body acting in a legislative capacity. In the second subparagraph of Article 2(2), it merely distinguishes between judicial and administrative procedures, and excludes public authorities when they act in a judicial capacity, but not when they act by way of administrative review. Administrative acts should be subject to review where they have legally binding and external effect as long as those acts are not adopted by bodies or institutions acting in a legislative or judicial capacity.[12]

The Convention not only guarantees access to justice but goes further and sets down minimum standards for administrative and judicial mechanisms.[13] Article 9(3) of the Convention provides for access to judicial or other review procedures for challenging acts and omissions by private persons and public authorities which contravene environmental law.[14] Nevertheless, Article 9(3) does not require an *actio popularis* allowing any natural or legal person to have access to review procedures. However, between an *actio popularis*, and an approach limiting administrative review to environmental NGOs only, it is possible to establish a legal framework which allows Parties a degree of discretion to provide criteria that must be met by members of the public[15] before they have access to justice. Where they have a sufficient interest or maintain the

[10] He was formerly UN Special Rapporteur on the situation of human rights defenders (2014-2020) and UN Special Rapporteur on Haiti (2008-2013), under the Human Rights Council.

[11] "World's first Special Rapporteur on environmental defenders elected under the Aarhus Convention", 24 June, 2022, https://unece.org/media/Environment/press/368806

[12] In the same way, omissions should be covered where there is an obligation to act under environmental law.

[13] Áine Ryall, "Access to Justice in Environmental Matters in the Member States of the EU: The Impact of the Aarhus Convention," *Jean Monnet Working Paper* 16, no. 5 (2016), 3.

[14] Article 9(3) states that each Party to the Convention must ensure that *"where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."*

[15] The term 'members of the public' in the Convention includes, but is not limited to environmental NGOs; see Article 2(5) of the Convention.

impairment of a right, members of the public should have access to environmental proceedings in order to challenge in courts or before other review bodies, the procedural or substantive legality of administrative acts or omissions which contravene environmental law. This means that the Parties have a broad margin of discretion when defining the rules for the implementation of the administrative or judicial procedures referred to in Article 9(3).

Judicial review constitutes an important aspect of any legal system operating under the rule of law. Access to justice also represents a significant issue given the essential enforcement deficit of environmental laws. Today, there is still a number of practical and/or formal obstacles to have access justice, including unreasonable fees and restrictive procedural requirements curbing the possibilities of the public to represent environmental interests.

3. The Aarhus Convention and the EU

The Aarhus Convention was signed by the European Commission in 1998, and approved by the Council in 2005.[16] However, the fact that the European Community had ratified the Convention did not mean that all EU Member States automatically became Parties. Each of them had to ratify separately, and to date all 27 Member countries are Parties to the Convention.

The EU is a special Party, but it is still bound by the Aarhus Convention and its obligations in full.[17] Pursuant to Article 216(2) TFEU, international agreements concluded by the EU bind its institutions and prevail over the acts laid down by those institutions. However, Union primary law, such as the EU Treaties, takes precedence over the Convention.[18] The EU is required by Article 3(1) of the Convention to take the necessary legislative, regulatory and other measures to establish and maintain a clear, transparent and consistent framework to implement the Convention. The provisions of EU law must be consistent with the requirement of the Convention and, as a Party to the Convention, the EU is subject to the mechanism for review of compliance with the obligations established therein.

Upon signature and upon approval of the Convention the EU made a Declaration in which it drew attention to the 'institutional and legal context of the Community' and the repartition of tasks with its Member States in the areas covered by the Convention.[19] Previous Community rules on access to

[16] Council Decision 2005/370 (OJ 2005 L 124, 17.5.2005, 1.)

[17] Rui Lanceiro, "The Review of Compliance with the Aarhus Convention of the European Union," in *Global Administrative Law and EU Administrative Law (Relationships, Legal Issues and Comparison)*, eds. Edoardo Chiti and Bernardo Giorgio Mattearella (Berlin Heidelberg: Springer-Verlag, 2011), 381.

[18] See order of 28 September 2016, *PAN Europe and Others v Commission* (T-600/15, ECLI:EU:T:2016:601).

[19] The Declaration is published on the UN Treaty Collection website under the heading „Declarations and Reservations",

documents helped shape the Convention; the obligations deriving from the Aarhus Convention are implemented by secondary EU legislation. In 2003, two directives have been adopted to develop the first and second pillars of the Convention.[20] Unfortunately, the proposed directive on access to justice in environmental matters[21] did not make through the legislative process, as the Commission withdrew the proposal following a 10-year long period of inaction by the Council.[22] Consequently, Community environmental law already provided for review mechanisms to provide requested environmental information of public consultation in relation to environmental impact assessments and integrated pollution prevention and control permit decisions.

Increased public access to justice in environmental matters contributes to achieving the objectives of Union policy on the protection of the environment by overcoming current shortcomings in the enforcement of environmental law and, eventually, to a better environment. The proper function of judicial review in the EU is to a large extent dependent on how one views the nature of the EU. A discussion about access to justice is therefore a discussion about the nature of the acts which are adopted by the EU institutions.[23]

3.1 The *Plaumann* doctrine

As regards access to justice, it is clear from the settled case-law of the CJEU that Article9(3) of the Aarhus Convention is not directly applicable within the EU legal order, nor can it be relied upon as a criterion for assessing the legality of EU acts.[24] In the EU legal order, the main avenue to challenge acts and omissions of EU institutions are actions for annulment. Actions for annulment are complemented by the possibility for national courts to refer questions as to the validity of EU acts, in cases where the validity of an EU act feature in an existing national dispute.[25]

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https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en.

[20] See Directive 2003/4/EC of the European Parliament and the Council of 28 January 2003 on public access to environmental information (OJ L 41, 14.2.2003, 26.) and Directive 2003/35/EC of the European Parliament and the Council of 26 May 2003 providing for public participation in respect of drawing up certain plans and programmes relating to the environment and amending, with regard to public participation and access to justice, Council Directive 85/337/EEC and 96/61/EC (OJ L 156, 25.6.2003, 17.)

[21] COM(2003) 624 final, 24.10.2003.

[22] OJ C 153, 21.05.2014, 3.

[23] Alexander H. Türk, *Judicial Review in EU Law* (Cheltenham: Edward Elgar Publishing, 2009), 2.

[24] Judgment of 27 September 2018, *Mellifera eV v Commission* (T-12/17, EU:T:2018:616, paragraph 85.).

[25] Juliette Delarue and Sebastian D. Bechtel, "Access to Justice in State aid: how recent legal developments are opening ways to challenge Commission State aid decisions that may breach EU environmental law", *ERA Forum* 22, no. 2 (May 2021): 6.

Article 263(4) TFEU sets out the conditions under which an action for annulment may be brought by non-privileged applicants before the CJEU. The conditions laid down in Article 263(4) TFEU and its predecessors have been interpreted by the CJEU in its jurisprudence, the landmark case concerning the interpretation of the 'individual concern' test being *Plaumann*,[26] in which the CJEU ruled that *"persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed"*. The *Plaumann* formula still poses considerable problems for private persons to gain direct access to the CJEU for administrative acts of general application.

The Convention and the EU have mutually reinforced and developed each other over the years. On the one hand, EU law, as interpreted by the CJEU,[27] has served as a catalyst of access to justice for environmental NGOs at national level.[28] As the Commission's Notice on access to justice in environmental matters shows,[29] CJEU case-law has been steadily strengthening the basis for giving standing before national courts.

On the other hand, the EU's own rules on *locus standi* have been the subject of criticism for being overly restrictive. The CJEU developed its *Plaumann* case-law over the years and adapted it to particular legal or factual circumstances, irrespective of the nature of the applicant. For example, in case *Stichting Greenpeace* the Court held that the *Plaumann* test *"remains applicable, whatever the nature, economic or otherwise, of those of the applicants' interests which are affected"*.[30]

In this regard, the Treaty of Lisbon has not radically changed the situation, neither the Charter was intended to change the system of judicial review laid down by the EU Treaties. The Treaty of Lisbon contains a small amendment of the standing requirements for non-privileged applicants. A new limb of Article 263(4) TFEU is introduced which allows those having 'direct concern' to challenge regulatory acts not entailing implementing measures.[31] Where these new prerequisites laid down in Article 263(4) TFEU apply, there is no need for the applicant to show that he or she is individually concerned by the contested

[26] Judgment of 15 July 1963, *Plaumann & Co v Commission* (25/62, ECLI:EU:C:1963:17).

[27] The CJEU consists of the General Court and the Court of Justice.

[28] See judgment of 12 May 2011, *Bund für Umwelt* (C-115/09 Trianel, EU:C:2011:289), and judgment of 8 March 2011, *Lesoochranárske zoskupenie* (C-240/09 Slovak Bears I, ECLI:EU:C:2011:125).

[29] Commission Notice on access to justice in environmental matters, C(2017) 2616 final, 28 April 2017, 12.

[30] Judgment of 2 April 1998, *Stichting Greenpeace Council (Greenpeace International) and Others v Commission* (C-321/95 P, EU:C1998:153).

[31] In environmental policy, most EU acts do require national implementing measures at some stage.

act. Besides widening the direct access to the CJEU, the Treaty of Lisbon gives particular relevance to the role of national courts in Article 19(1) TFEU, second sentence, according to which *"Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law"*. By the way, where an applicant can clearly challenge a measure under Art. 263(4) TFEU, they cannot at the same time ask a national judge to refer the issue of validity to the CJEU.[32] The right to trigger the preliminary ruling procedure is enjoyed exclusively by the national court,[33] which is permitted to declare an EU act valid, but not invalid.[34]

3.2 The Aarhus Regulation[35]

In order to implement obligations on the Community level, a new regulation was adopted in 2006, supplementing Community legislation on access to documents held by the Commission, the European Parliament and the Council,[36] but the Convention was the direct reason for the adoption of the Aarhus Regulation.[37] The Regulation includes obligations of the EU institutions and bodies related to all three pillars of the Convention. As regards the interplay between the EU and the national level, the initiative had to take into account in particular that the EU is an integrated legal and judicial order.

As the CJEU has held on a number of occasions,[38] Article 9(3) of the Convention is not directly applicable in the Union legal order and cannot be invoked as a criterion to judge the legality of EU acts. The Parties have wide discretion to implement it as Article 9(3) only applies where *'the criteria, if any, laid down by … national law'*[39] are met. Article 9(3) is thus subject, in its implementation and effects, to the adoption of subsequent measures.

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[32] Judgment of 25 July 2018, *Georgsmarienhütte (*C-135/16, ECLI:EU:C:2018:582, paragraphs 17 and 18).

[33] See in this regard the judgment of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 39 and the case-law cited).

[34] Judgment of 22 October 1987, *Foto-Frost* (314/85, EU:C:1987:452, paragraphs 14 and 15).

[35] Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention to Community institutions and bodies (OJ 2006 L 264, 25.9.2006, 13-19.).

[36] Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.05.2001, 43-48.)

[37] See recital 4 of the Regulation.

[38] See for example judgment of 13 January 2015, *Stichting Natuur en Milieu and Pesticides Action Network* (Joined Cases C-404/12 P and C-405/12 P, ECLI:EU:C:2015:5, paragraphs 47 and 51). See equally judgment of 13 January 2015, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* (Joined Cases C-401/12 P to C-403/12 P, ECLI:EU:C:2015:4, paragraph 55).

[39] It should be noted that EU law is considered as 'national law' for the purposes of Article 9(3) of the Convention.

Article 9(3) of the Convention requires 'members of the public' that meet the criteria, if any, laid down in in the law, to be given access to administrative or judicial proceedings. The Aarhus Regulation implements inter alia Article 9(3) of the Convention for EU institutions and bodies. To that end, the Regulation has created a new form of administrative review, by creating a new category of acts, namely, requests for an internal review of 'administrative acts'.[40]

As described in Article 10 of the Regulation, the procedure for internal review is quite simple.[41] Any non-governmental organisation that meets the criteria set out in Article 11 is entitled to make a request for internal review[42] to the Union institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act. 'Environmental law' was defined in Article 2(2)(f) of the Regulation as EU legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of EU environmental policy as set out in Article 191 TFEU.

'Administrative act' is defined by Article 2(1)(g) of the Regulation as *"any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects."* The conditions required for an act to be regarded as an 'administrative act' within the meaning of Article 2(1)(g) are cumulative. Furthermore, Article 2(2) excludes from the notion of administrative acts measures taken by an EU institution in its capacity as an administrative review body, notably under competition rules, and infringement, Ombudsman and OLAF proceedings.

Article 2(1)(h) of the Aarhus Regulation defines 'administrative omission' as *"any failure of a Community institution or body to adopt an administrative act"* as defined in Article 2(1)(g). In turn, Recital 11 further provides that *'omissions should be covered where there is an obligation to adapt an administrative act under environmental law.'*

The Aarhus Regulation can be used by environmental NGOs both to seek administrative review under the Regulation and judicial review under the first limb of Article 263(4) TFEU. Where previous requests for internal review have been unsuccessful, the NGO concerned may institute proceedings before the

[40] Matthijs van Wolferen and Mariolina Eliantonio, "Access to Justice in Environmental Matters in the EU: The EU's Difficult Road towards Non-compliance with the Aarhus Convention," in *Research Handbook on EU Environmental Law*, eds. Marjan Peeters and Mariolina Eliantonio (London: Edward Elgar Publishing, 2020), 158.

[41] The request needs to be in writing, be lodged within 6 weeks, and state the ground for review. The EU institution or body has to consider the request, unless it is clearly unsubstantiated. It is required to state its reasons in a written reply within 12 weeks, in exceptional cases 18 weeks.

[42] For detailed rules governing the request for internal review see Commission Decision 2008/50/EC of 13 December 2007 (OJ 2008 L 13, 24.). Under that decision the party requesting review must provide 'the relevant information and documentation supporting those grounds' (see Article 1, point 3, of that decision).

General Court[43] in accordance with the relevant provisions of the EU Treaties.[44] They can bring the matter before the European Ombudsman or before the General Court in accordance with the provisions laid down in Articles 228 or 263, respectively, of the TFEU. Unfortunately, the Regulation did not change the Plaumann doctrine in this regard, as one of the conditions for environmental NGOs to institute proceedings is to do so *"in accordance with the relevant provisions of the Treaty"*, and thus the EU's general *locus standi* rules.[45]

3.3 Internal reviews under the Aarhus Regulation

The purpose of the Aarhus Regulation was precisely to implement the Aarhus Convention. In theory, the internal review procedure should therefore apply to all measures within the meaning of the Convention. Article 10(1) of the Regulation failed correctly to implement Article 9(3) of the Convention because the former provision covered only acts of individual scope.[46] On a number of occasions administrative review of an EU act has been refused because of this requirement (so far, it has only been available for certain c1hemicals and GMO decisions). The effect of a restricted definition of 'environmental law' in Article 2(2)(f) was that certain provisions and measures, to a great extent fell outside its scope.[47] Other reasons for inadmissibility were that the EU act fell into categories of act specifically excluded by the Aarhus Regulation.

Since the Aarhus Regulation has entered into force, environmental NGOs have submitted a number of internal review requests.[48] For example, four organisations[49] sent urgent requests to the Commission to review its decision of 12 September 2007 adopting the list of candidates to be proposed by the Commission to the Management Board of the European Chemicals Agency by the latter of the Executive Director of the Agency. The Commission considered that such staff related decisions are by their very nature to be regarded as internal to the institution or body concerned and thus incapable of having 'external effects' within the meaning of the Regulation. Therefore, the

[43] The first case whereby environmental NGOs have instituted proceedings for the annulment of the reply sent to them by the Commission under Title IV of the Regulation was Case T-338/08 *Stichting Natuur en Milieu and Pesticide Action Network Europe v Commission* (EU:T:2012:300).

[44] See Recital 21 and Article 12(1) of the Aarhus Regulation.

[45] Sacha Garben, "Articles 191-193," in *Commentary on the EU Treaties and the Charter of Fundamental Rights*, eds. Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (Oxford: Oxford University Press, 2019), 1525.

[46] An EU act is regarded as being of general application if it applies to objectively determined situations and entails legal effects for categories of persons regarded generally and in the abstract.

[47] See judgment of 14 March 2018, *TestBioTech v Commission*, (T-33/16, EU:C:2018:135, paragraph 45).

[48] https://ec.europa.eu/environment/aarhus/requests.htm.

[49] European Environmental Bureau (EEB), Friends of the Earth Europe (FOEE), Health & Environment Alliance (HEAL) and Women in Europe for a Common Future (WECF)

Commission considered the requests as inadmissible as they concerned a measure which is not an administrative act as defined in Article 2(1)(g) of the Regulation.[50]

In another procedure, a not-for-profit association registered in Germany, which works for the conservation and promotion of bees, submitted a request to the Commission for internal review of Implementing Regulation (EU) 2016/1056 of 29 June 2016.[51] As regards the extension of the approval period of the active substance 'glyphosate', the Commission extended for a second time the approval period, setting its new expiry date. Again, the request for internal review was rejected by the Commission as inadmissible on the grounds that the act referred to in that request did not constitute an EU measure of individual scope. In that regard, the Commission explained inter alia that the Implementing Regulation did not state to whom it was addressed but merely provided that it was binding in its entirety and directly applicable in all Member States.[52] The provisions of the Implementing Regulation were applicable to all operators manufacturing or placing on the market plant protection products containing glyphosate.

In another case, the environmental NGO meeting the criteria for standing under the Aarhus Regulation, submitted a request for internal review the decision of the EIB's Board of Directors.[53] The EIB rejected the request, stating that it was inadmissible because the internal review procedure did not apply to its financing decisions. ClientEarth brought an action for annulment of this decision,[54] and the General Court rejected the argument of the EIB and the Commission that the decision was not subject to review because it was not taken 'under environmental law'. The Court underlined that *"all acts of public authorities which run counter to the provisions of environmental law should be open to challenge"*,[55] and the financing decision was taken under environmental law, because it was adopted on the ground that it satisfied lending criteria for projects relating to the environment.[56] In paragraph 170 of its judgment, the General Court also rejected the argument by the EIB that the financing decision lacked 'legally binding and external effects', even though the terms and conditions of the financing had to be negotiated after the Board of Directors had made its decision.[57]

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[50] https://ec.europa.eu/environment/aarhus/pdf/title_iv/Reply%20to%20EEB.pdf.

[51] OJ L 2016 L 173, p. 52.

[52] See Article 2 of the Implementing Regulation.

[53] The decision related to the provide financing to the construction of a biomass power generation plant in Spain.

[54] See judgment of 27 January 2021, *ClientEarth v European Investment Bank* (T-9/19, EU:T:2021:42).

[55] Paragraph 125 of the judgment.

[56] Paragraphs 138-142.

[57] James Flynn, Sarah Abram, and Hugo Leith, "EU General Court annuls decision of the European Investment Bank and underlines importance of environmental law in EU legal order", *Brick Court Chambers*, 28 January, 2021, https://www.brickcourt.co.uk/news/detail/eu-general-court-annuls-decision-of-the-

3.4 Case ACCC/C/2008/32

In March 2017, after extensive and detailed consideration of a communication that was submitted by an environmental NGO (ClientEarth) in 2008, the Aarhus Convention Compliance Committee[58] (hereinafter ACCC) found that the EU was in non-compliance with the Convention due to the very limited possibilities for citizens and NGOs to have access to justice at the EU level and to bring cases before the CJEU.[59] The EU failed to comply with Article 9(3)-(4) of the Convention with regard to access to justice by members of the public because neither the Aarhus Regulation nor the jurisprudence of the CJEU implemented or complied with the obligations arising under those paragraphs.[60]

The ACCC added that the Regulation cannot compensate for these shortcomings as it equally breaches the Convention on the following points:

- the review mechanism should be opened up beyond NGOs to members of the public,
- review should encompass general acts and not only acts of individual scope,
- every administrative act that is simply "relating" to the environment should be challengeable, not only acts "under" environmental law,
- acts that do not have legally binding and external effects should also be open to review.[61]

Moreover, the findings of the ACCC in case ACCC/C/2008/32 touch on a basic principle of the Union legal order, that is the principle of judicial protection by means of remedies provided for in the EU Treaties in order to protect rights derived from EU law. The ACCC also considered that there has

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european-investment-bank-and-underlines-importance-of-environmental-law-in-eu-legal-order.

[58] Pursuant to Article 15 of the Convention, the ACCC was established and is competent to review the Parties' compliance with the provisions of the Convention. The ACCC is an independent committee consisting of nine persons who are directly elected by the Meeting of the Parties (MoP) by consensus. The compliance mechanism under the Convention provides the possibility for any member of the public or environmental NGOs to submit communications to it about alleged non-compliance with the Convention.

[59] This was the second part of findings in case ACCC/C/2008/32, which have appeared in two parts; Part II is available at: https://unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/Findings/C32_EU_Findings_as_adopted_advance_unedited_version.pdf.

[60] For an in-depth analysis of the ACCC's findings, see Benedikt Pirker, "Implementation of the Aarhus Convention by the EU – An Inconvenient Truth from the Compliance Committee," *European Law Blog*, 24 April, 2017, https://europeanlawblog.eu/2017/04/24/implementation-of-the-aarhus-convention-by-the-eu-an-inconvenient-truth-from-the-compliance-committee/.

[61] See paragraphs 85-121 of the ACCC's findings.

been no new direction in the jurisprudence of the CJEU that will ensure compliance with the Convention.[62] It was recommended that the CJEU modifies its case-law or that the EU legislator amends the Aarhus Regulation (or adopts new legislation).

The European Commission immediately declared that the findings of the ACCC were problematic for the EU because they did not recognise the EU's special legal order. In the Commission's view, the findings neither acknowledged the central role of national courts as ordinary courts of Union law, nor recognised the system of preliminary rulings under Article 267 TFEU as a valid means of redress.[63] In this regard, it cannot be considered that, by adopting the Aarhus Regulation, which concerns only EU institutions and moreover concerns only one of the remedies available to private persons for ensuring compliance with EU environmental law, the Union was intended to implement the obligations which derive from Article 9(3) of the Aarhus Convention with respect to national administrative or judicial procedures, which, as EU law now stands, fall primarily within the scope of national laws.

The ACCC considered that it was possible paragraphs 122 and 123 of its findings on communication ACCC/C/2008/32 (Part II) to be addressed through appropriate amendments to the Aarhus Regulation, and did not expect the EU legislator to set up a separate regime for access to justice in environmental matters. The findings of the ACCC concerned access for the members of the public to challenge acts and omissions by EU institutions and bodies that contravened EU law relating to the environment. They did not concern acts or omissions at the Member State level at all.

3.5 The amendment of the Aarhus Regulation

The Aarhus Regulation has long been criticised by academic commentators and environmental NGOs as falling short of Aarhus requirements, particularly in the context of access to justice.[64] Until the adoption of the ACCC's findings, EU institutions have shown much reluctance to revise the Aarhus Regulation. On June 2018, the Council adopted Decision (EU) 2018/8818,[65] based on Article 241 TFEU, and requested the Commission to submit a study on the EU's options for addressing the findings of the ACCC, and to submit a proposal

[62] See paragraphs 122-123 and 81-83 of the findings.
[63] Article 263(4) TFEU and the Aarhus Regulation do not exhaust the system of redress, which also includes Articles 267 and 277 TFEU.
[64] Marc Pallemaerts, "Access to Environmental Justice at the EU Level: Has the 'Aarhus Regulation' improved the situation?," in *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, ed. Marc Pallemaerts (Groningen: Europa Law Publishing, 2011), 271-312.; Ludwig Krämer, "The Aarhus Convention and the European Union," in *The Aarhus Convention, A Guide for UK Lawyers*, ed. Charles Banner (Oxford: Hart Publishing/Bloomsbury, 2015), 92-93.
[65] OJ L 155, 19.6.2018, 6.

for amending the Aarhus Regulation (or otherwise inform the Council on other measures).

In October 2019, the Commission published the study that it had commissioned on options for resolving the problem of the EU's non-compliance with the Convention. The study and the accompanying staff working document[66] confirmed that the most effective way to address the problem was through revising the Aarhus Regulation. In December 2019, the Communication on the European Green Deal contained the commitment to *"consider revising the Aarhus Regulation to improve access to administrative and judicial review at EU level for citizen and NGOs who have concerns about the legality of decisions with effects on the environment"*.[67]

On 14 October 2020, the Commission has adopted a legislative proposal with the objective of bringing the EU into compliance with the Aarhus Convention and to ensure delivery of the European Green Deal.[68] The proposal of the Commission contains an explicit reference to Article 9(3) of the Convention and the concerns expressed by the ACCC in its findings.

The Commission has engaged constructively with the European Parliament and the Council to facilitate the adoption of the amendments before the next Meeting of the Parties.[69] The amendment of the Aarhus Regulation[70] was adopted in October 2021. In the same month, MoP7 endorsed the findings of the ACCC in case ACCC/C/2008/32, and at the same time concluded by adopting the revised Aarhus Regulation the EU had made all necessary steps to ensure compliance with the Convention.

The initiative of the Commission aimed to remedy the shortcomings regarding access to justice in environmental matters in the EU by measures aimed both at the EU and the national levels. The most significant constraint in practice was the limitation to acts of individual scope. Article 9(3) of the Convention does not specify that the opportunity it provides for bringing administrative procedures relates only to cases where the acts at issue are of individual scope. The limitation of the internal review to administrative acts of individual scope has been the main ground for the non-admissibility of requests made by environmental NGOs for internal review. This means that environmental NGOs could not obtain administrative review of acts of general

[66] SWD(219) 378 final, 10.10.2019.
[67] COM(2019) 640 final, 11.12.2019, 23.
[68] COM(2020) 642 final, 14.10.2020.
[69] The seventh session of the Meeting of the Parties to the Aarhus Convention (MoP7) took place in Palais des Nations, Geneva from 18 to 22 October 2021. Following another decision at the meeting, Bissau-Guinea will become the first country outside the UNECE region to accede to the Convention that is open to all United Nations members, available at: https://unece.org/media/environment/Aarhus-Convention/press/361456.
[70] Regulation (EU) 2021/1767 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies (OJ L 356, 8.10.2021, 1-7.).

application.[71] Many applications for administrative review have been rejected for this reason. It was therefore necessary to broaden the scope of the internal review procedure to include non-legislative acts of general scope.[72]

The internal review procedure also has to cover EU acts that had been adopted in the implementation of policies other than EU environmental policy. The Aarhus Regulation simply provided for internal review where a Community (EU) institution or body has *"adopted an act under environmental law"*. But Article 9(3) of the Convention is broader than that. It is clear from the wording and the scheme of Articles 9(3) and (4) of the Convention that all public authorities which run counter to the provisions of environmental law should be open to challenge. Thus, in view of the fact that environmental law is in a constant state of development, access to justice in environmental matters should not be limited solely to acts of public authorities that have as their formal legal basis a provision of environmental law. It is already clarified that an internal review should be carried out in order to verify whether an administrative act *'contravenes'* environmental law.

Deadlines are also being extended to improve the quality of the scrutiny: 2 extra weeks to consider whether to launch a request for review are to be added, while the institution concerned gets 4 extra weeks to reply. As regards access to justice, members of the public acting together in the public interest will be able to ask for scrutiny of such request when it is supported by at least 4000 citizens from at least 5 Member States, with at least 250 members of the public coming from each of those Member States.

4. Conclusions

Effective judicial systems play a crucial role in safeguarding the rule of law enshrined in Article 2 TEU, and in ensuring effective application of EU law and improving public trust in public administrations. The Charter of Fundamental Rights of the EU,[73] in its Article 47, in the fields covered by EU law, provides the right to an effective remedy and a fair trial.[74] The Charter of Fundamental Rights of the EU confirms in its Article 47 the right to an effective remedy to everyone whose rights and freedoms guaranteed by the law of the Union are

[71] Including acts of general application covered by the third limb of Article 263(4) TFEU.

[72] Article 2(1)(g) of the Regulation also required a measure to have 'legally binding and external effects' before the measure falls within the definition of 'administrative act' and thus within the scope of Article 10(1).

[73] OJ C 326, 26.10.2012, 391-407.

[74] Zoltán Szente, "Conceptualising the principle of effective legal protection in administrative law," in *The Principle of Effective Legal Protection in Administrative Law – A European comparison*, eds. Zoltán Szente and Konrad Lachmayer (London: Routledge, 2017), 5.

violated.[75] Moreover, private persons (citizens and NGOs) must be provided with effective remedies in environmental matters, since the involvement and commitment of the public and all stakeholders is crucial to the success of the European Green Deal.

The amendment of the Aarhus Regulation was important to correct failures in the implementation caused by the use of words and terms that do not fully correspond to the terms of the Convention. The commitment to environmental democracy made by the EU institutions now rests largely on the successful implementation of the new provisions of the revised Aarhus Regulation.

The amendment of the Aarhus Regulation will certainly improve the possibilities for private persons to request that EU institutions review their acts with the aim to ensure better environmental protection. Hopefully, it will further improve the openness, transparency and accountability of EU actions and will support the Commission's objective to achieve transformative change under the European Green Deal.[76]

The question that is now open is therefore whether the CJEU remains hardly accessible to private persons seeking to challenge EU acts harmful to human health and/or the environment. Hopefully, the narrow interpretation of the 'direct and individual concern' test by the *Plaumann* case-law and the compliance of the EU with the requirements of the Aarhus Convention will be solved. We will see how the revised Aarhus Regulation will improve the possibilities to request that the EU institutions review their acts to better ensure environmental protection,[77] and how the gates of the CJEU will be opened as proposed by environmental NGOs and the ACCC.

[75] It can also be recalled that Art. 37 of the Charter provides for the integration of a high level of environmental protection and the improvement of the quality of the environment into the policies of the Union.

[76] Press release, "Political agreement on the Aarhus Regulation: Commission welcomes increased public scrutiny of EU acts related to the environment", Brussels, 13 July, 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3610.

[77] https://www.reuters.com/business/environment/greenpeace-takes-legal-action-over-eus-green-label-gas-nuclear-2022-09-19/.

Illegal removal of minors abroad in connection with child trafficking

RIPSZÁM, DÓRA

ABSTRACT *Human trafficking can be seen as a modern version of slavery; it is estimated to be the second most lucrative branch of international organized crime. According to the International Labour Organization (ILO), the profit from forced labour reaches $ 32 billion a year.[1] One of the most vulnerable groups targeted by human traffickers are children.[2] In view of the fact that Hungary can also be regarded as a country of origin, destination and transit for trafficking in human beings, it is necessarily intertwined with the phenomenon of the illegal removal of minors abroad. Acts involving the illegal removal of minors abroad do not constitute an independent legal category, this is a special umbrella term for when a minor is attempted to cross the border of the state of origin or current residence by other means of other means in breach of its legislation.[3]*

KEYWORDS *child trafficking, illegal removal of minors abroad, human trafficking, minor*

1. Introduction

In view of the fact that Hungary can also be regarded as a country of origin, destination and transit for trafficking in human beings, it is necessarily intertwined with the phenomenon of the illegal removal of minors abroad.

The modern slave trade is one of the most serious violations of human rights. Trafficking in human beings, like migration, appears as a global problem that affects not only individual countries, but also the whole world through its organic connection to organised crime. At the same time, there is a clear link

[1] Krisztina Száraz, "Kényszermunka a modern gazdaságban", http://retp.eu/index.php/retp/article/view/520.

[2] Report from the Commission to the European Parliament and the Council on the 20th day of Directive 2011/36/EU on the prevention and combat of trafficking in human beings and the protection of victims. The report on the progress made in the fight against trafficking in human beings as provided for in Article 11(2) of regulation (EC) No 1200/2016 10.09.2018. quoted in Erzsébet Hatvani, Viktória Sebhely, and Gergely Vaskuti, *Gyermekprostitúció visszaszorítása, gyermekkereskedelem* (Budapest: Szociális és Gyermekvédelmi Főigazgatóság, 2018).

[3] Zoltán Székely, "Kiskorúak jogellenes külföldre vitelének jogi aspektusai," *Határrendészeti Tanulmányok*, no. 3 (2017): 46–97.

with migration, as people appearing in migration processes often become victims of human trafficking due to their vulnerable situation.[4]

Acts involving the illegal removal of minors abroad do not constitute an independent legal category, nor does the law of Hungary or other states contain such a definition. This is a special umbrella term for when a minor is attempted to cross the border of the state of origin or current residence by other means of other means in breach of its legislation.[5]

The illegal removal of minors abroad is a global problem that, based on the examples of our daily lives, can rightly be regarded as an important, current problem of Hungarian society and the European Union. There are significant differences in the rules and practical implementation of past and today's procedures, depending on whether the illegal activity is related to cross-border family law cases, trafficking in human beings, illegal migration, the protection of refugees or other categories.[6]

The illegal removal of minors abroad is a special umbrella term that defined from the perspective of integrated border management, national and EU border security systems and the responsibilities of the authorities involved in the fight against cross-border trafficking in human beings, which involves the unlawful acts for or as a result of which a minor crosses the state border of a country, such as Hungary.[7]

2. Definition of trafficking in children

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography defines the concept of child trafficking. „Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”[8] A child, regardless of how it is recruited, removed, handed over, concealed or taken over, is considered a victim of trafficking if the purpose is exploitation.[9] According to the directive 2011/36/EU of the European Parliament and of the Council ”Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to

[4] János Varga and László Kui, “A határrendészeti szervek tevékenysége a kiskorúak jogellenes külföldre vitelének megakadályozása érdekében” *Határrendészeti Tanulmányok* no. 3 (2017): 135-155.

[5] Székely, “Kiskorúak jogellenes külföldre vitelének jogi aspektusai”.

[6] Varga and Kui, “A határrendészeti szervek tevékenysége a kiskorúak jogellenes külföldre vitelének megakadályozása érdekében”.

[7] Székely, “Kiskorúak jogellenes külföldre vitelének jogi aspektusai”.

[8] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography Article 2. https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-sale-children-child

[9] “Az Európa Tanács Emberkereskedelem Elleni Fellépéséről szóló Egyezménye,” https://rm.coe.int/16805d41ee 09.01.2021.

slavery, servitude, or the exploitation of criminal activities, or the removal of organs."[10]

On 20 November 1989, the United Nations General Assembly adopted the Convention on the Rights of the Child, which defines the concept of a child as follows: a child is a person who has not reached the age of eighteen unless he has reached the age of majority under the legislation applicable to him or her.[11] Despite the fact that the UN Convention on the Rights of the Child defines the child, we cannot speak of a unified thinking about the duration of childhood today.[12] The exploitation of children may also be made more difficult by different, varying interpretations of the protection or protected age from country to country, but in most cases the aforementioned 18th year of age is indicated as the limit of the protected age.[13]

According to the Hungarian Civil Code, a minor is a person under the age of eighteen, and a minor under the age of fourteen is considered incapacitated. [14] It also uses the concept of a minor child, an adult child, an adult child of further education, a minor child with judgment, and a child over the age of fourteen. According to the concept system of the Civil Code, as a general rule, a minor is a person who has not reached the age of eighteen, but the minor comes of age by marriage.[15]

The Hungarian Criminal Code uses the separated concept of childhood and juvenile, according to which every person under the age of twelve of children is not 12 years of age, and as a general rule, persons under the age of fourteen cannot be punished. However, in the case of certain crimes, the age of criminality according to the Criminal Code is the twelfth year of age.[16] In view of the above, criminal law divides minors in the sense of civil law into children and young people, persons of childhood and juveniles.[17]

[10] Ibid.

[11] "A Gyermek jogairól szóló, New Yorkban, 1989. november 20-án kelt Egyezmény kihirdetéséről szóló 1991. évi LXIV. törvény".

[12] Eszter Végh, "Gyermekkatonák – a Sierra Leone-i polgárháború igazi áldozatai," https://btk.ppke.hu/uploads/articles/6414/file/vegheszter.pdf.

[13] Krisztina Kállai, "Az emberkereskedelem kiskorú áldozatait érintő kizsákmányolás sajátosságai," http://www.kodolanyi.hu/kv/cikk/az-emberkereskedelem-kiskoru-aldozatait-erinto-kizsakmanyolas-sajatossagai.

[14] See more: Act V of 2013 on the Civil Code.

[15] Hatvani, Sebhely, and Vaskuti, *Gyermekprostitúció visszaszorítása, gyermekkereskedelem*, 106.

[16] See more: Act C of 2012 on the Criminal Code.

[17] Hatvani, Sebhely, and Vaskuti, *Gyermekprostitúció visszaszorítása, gyermekkereskedelem*.

3. Child trafficking as a driving force for the illegal removal of minors abroad

Minors are among the most vulnerable victims of human trafficking, for whom accurate statistics are not available due to high latency, but it is estimated that around one million children worldwide are victims of sexual exploitation and 170 million are illegally engaged in physical work. All this leads to physical and psychological injuries to the victims. The victims are mainly from the underdeveloped regions of the world (Southeast Asia, Africa, Eastern Europe, Latin America), but more and more people are victims in Romania, Ukraine, Bulgaria, Albania and Russia. In many cases, the child's family - in the absence of the means of subsistence - makes the child available to traffickers.[18]

Children who are victims of trafficking typically come from difficult socio-economic backgrounds,[19] with trafficking networks targeting socially and economically disadvantaged families. [20] It happens that organised crime circles use money loans to push them into debt, extremely high interest rates prevent families from paying off their debts, and traffickers force them to hand over their children in return for their debts, so in some cases, as mentioned earlier, children are sold by their families to traffickers.[21]

The latency of this phenomenon is extremely high, since in most cases the victims do not have the opportunity to escape their forced fate, or despite their subjugation, they still consider that even their subsistence is in danger if they are released.[22]

János Varga and László Kui found in the framework of the research carried out in the framework of the project BBA-2.4.2-2015-0003 entitled "Preventing the illegal transfer of minors abroad", that since child trafficking has been flourishing in Romania, the victims of which are being sent to Western Europe for begging and sexual exploitation, border police pay special attention to the

[18] Varga and Kui, "A határrendészeti szervek tevékenysége a kiskorúak jogellenes külföldre vitelének megakadályozása érdekében".

[19] Fighting child trafficking: a main priority for EU law enforcement https://www.europol.europa.eu/newsroom/news/fighting-child-trafficking-main-priority-for-eu-law-enforcement 31.03.2021.

[20] Report from the Commission to the European Parliament and the Council Report on the progress made in the fight against trafficking in human beings (2016) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims{SWD (2016) 159 final}

[21] Fighting child trafficking: a main priority for EU law enforcement https://www.europol.europa.eu/newsroom/news/fighting-child-trafficking-main-priority-for-eu-law-enforcement 31.03.2021.

[22] Varga and Kui, "A határrendészeti szervek tevékenysége a kiskorúak jogellenes külföldre vitelének megakadályozása érdekében".

control of minors with inadequate parental consent, and this activity is carried out both by the Romanian border police and the Ukrainian one very strictly.[23]

4. Unaccompanied minor

From a legal point of view, it is of paramount importance whether this is illegal or legal migration. The persons concerned migrate from one state to another in the course of legal migration with the necessary documents, and in the case of illegal migration they do the same in the absence of them. In the latter case, we can talk about escape or human smuggling, or even trafficking in human beings entwined with it.[24]

An unaccompanied child shall mean a child who has entered the territory of a Member State without the escort of an adult person responsible for him by law or the practice of the Member State concerned, until such person/adult person is effectively supervised; including a child who has been left unattended after entering the territory of a Member State.[25]

A significant number of unaccompanied children who are forced to leave their countries become victims of child prostitution and child trafficking.[26]

Unaccompanied minors reach Europe mainly through smugglers. Their families are, as it were, "blindly" trusting - and not least paying a significant amount of money - who promises to take their child to a family member or acquaintance living in Western Europe. Given that in most cases families have no other option, they trust the fate of their child to an unknown person and hope that this person will safely transport their child to the desired country, keeping the promise of this person. Unfortunately, however, most of these children are victims of child trafficking, child labour and child prostitution, and the greatest threat to the youngest is illegal adoption.[27]

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[23] János Varga and László Kui, "A kiskorúak jogellenes külföldre vitele megakadályozásának helyzete Magyarország schengeni külső határain," *Határrendészeti Tanulmányok*, no. 3 (2017): 26–46.

[24] Katalin Siska Szűcs Lászlóné „*Nemzetközi menekültjog, migráció és menedékjog a magyar és az uniós jogban*" (Working Paper, 2008) quoted in Eszter Karoliny and Ágoston Mohay „*A nemzetközi migráció jogi keretei*" (Legal framework for international migration") http://www.solidalapok.hu/solid/sites/default/files/IDResearch_Itt%20vagyunk!_2.pdf.

[25] Committee on the Rights of the Child: General Commentary No 6 (2005): Treatment of unaccompanied and adult family members outside their country of origin, 1 September 2005, CRC/GC/2005/6, Section III, point 8. Cited by EASO: Practical guide to the best interests of the child in asylum procedures 2019. https://easo.europa.eu/sites/default/files/Practical_Guide_on_the_Best_Interests_of_the_Child_HU.pdf.

[26] Renáta Kálmán: „Ki vigyáz rájuk? Avagy a kísérő nélküli kiskorúak helyzete napjainkban," *Állam- és Jogtudomány* no. 4 (2019): 71–87.

[27] Kálmán, „Ki vigyáz rájuk? Avagy a kísérő nélküli kiskorúak helyzete napjainkban".

5. Signs of child trafficking

Hungarian government has collected the characteristics of child victims of human trafficking, which are as follows:

- the child cannot have contact with parents or guardian
- appear to be intimidated or otherwise engaged in inappropriate behaviour
- there are no peers, no friends outside the workplace
- the child cannot go to school
- cannot play
- lives in poor conditions, isolated from other children
- eats separately from those who it lives with
- the child can only eat leftovers
- does age-inappropriate work
- travels unaccompanied by an adult
- travels with people who are not related to it[28]

János Varga and László Kui listed the specific suspicions about the illegal transfer of minors abroad at border crossing points, which are as follows:

- the vehicle under control contains objects indicating the presence of a minor (clothing, toys, etc.), however, the minor is not detected in the passenger compartment, and the adult/adults travelling in the vehicle make a contradictory statement about the objects. In this case, it is recommended to thoroughly inspect the vehicle in order to find a possible hiding place.
- the minor travels unaccompanied.
- the minor travels with an escort, but there is no identity or nationality is different from the attendant.
- there are no or few packages in the vehicle carrying the minor that can be related to the minor.
- the minor's passport or visa contains signs of forgery of documents.
- the attendant does not have parental consent or there are indications of forgery in the consent presented.
- due to the accompanying language barrier, he/she is unable to communicate with the minor traveling with him/her.
- the minor is dazed.
- the minor is visibly afraid of the attendant travelling with him or appears unreasonably nervous.
- the minor has visible injuries or is malnourished and the attendant cannot give an acceptable explanation.

[28] Belügyminisztérium, “Emberkereskedelem elleni küzdelem. Gyermekekre vonatkozó jelek” https://emberkereskedelem.kormany.hu/?_preview=63cc4f4f-1be1-5f08-5220-00002a504cac.

- the minor is extremely exhausted; his/her clothing is poor.
- the minor's attendant is conspicuously cooperative during the inspection or unreasonably nervous.[29]

6. Conclusion

Human trafficking can be seen as a modern version of slavery; it is estimated to be the second most lucrative branch of international organized crime. According to the International Labour Organization (ILO), the profit from forced labour reaches $ 32 billion a year.[30]

One of the most vulnerable groups targeted by human traffickers are children.[31]

”Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”[32]

Minors are one of the most vulnerable victims of human trafficking, it is estimated that around one million children worldwide are victims of sexual exploitation and 170 million are illegally engaged in physical work. All this leads to physical and psychological injuries to the victims. The victims are mainly from the underdeveloped regions of the world, but more and more people are victims in Romania, Ukraine, Bulgaria, Albania and Russia.[33]

In view of the fact that Hungary can also be regarded as a country of origin, destination and transit for trafficking in human beings, it is necessarily intertwined with the phenomenon of the illegal removal of minors abroad.

Acts involving the illegal removal of minors abroad do not constitute an independent legal category, this is a special umbrella term for when a minor is attempted to cross the border of the state of origin or current residence by other means in breach of its legislation.[34]

János Varga and László Kui listed the specific suspicions about the illegal transfer of minors abroad at border crossing points.

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[29] Varga and Kui, “A határrendészeti szervek tevékenysége a kiskorúak jogellenes külföldre vitelének megakadályozása érdekében”.

[30] Száraz, “Kényszermunka a modern gazdaságban”.

[31] Report from the Commission to the European Parliament and the Council on the 20th day of Directive 2011/36/EU on the prevention and combat of trafficking in human beings and the protection of victims. The report on the progress made in the fight against trafficking in human beings as provided for in Article 11(2) of regulation (EC) No 1200/2016 10.09.2018. quoted in Hatvani, Sebhely, and Vaskuti, *Gyermekprostitúció visszaszorítása, gyermekkereskedelem*.

[32] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography Article 2.

[33] Varga and Kui, “A határrendészeti szervek tevékenysége a kiskorúak jogellenes külföldre vitelének megakadályozása érdekében”.

[34] Székely, “Kiskorúak jogellenes külföldre vitelének jogi aspektusai”.

A review of online business regulatory framework to reduce IFF in Bangladesh

SONY, M M ABDULLAH AL MAMUN

ABSTRACT *Illicit Financial Flow (IFF) is a key development challenge all over the world. In developing countries, though IFF may take place in different ways, but over the past couple of years IFF via the digital ecosystem has been demanding a rethink of the existing legal structure. For instance, in Bangladesh, the fastest developing country, by today about five leading e-commerce companies have been accused of fraud mostly in supply chain management and also accused of money laundering issues. Therefore, the Bangladesh government has adopted Digital Commerce Guidelines. Since these e-commerce scams take place frequently, this raises the question of the effectiveness of this existing legal structure in Bangladesh and how the same legal framework can meet the challenge of IFF via digital platform. With the help of the comparative method, the research has tried to address these gaps in academic literature from a qualitative approach. This study has indicated that a flaw in Bangladesh's present regulatory system is the lack of legislative directions on how to supervise excessive discounts or predatory pricing. Finally, no cross-border e-commerce rules or recommendations have been established under the present legal regulatory framework. As a result, it is suggested that these flaws in the current policy be reconsidered to reduce IFF. Overall, the findings of this study will assist policymakers in defining additional actions aimed at reforming a robust digital regulatory environment.*

KEYWORDS *Digital, Commerce, Supervision, Legal system, Illegal finance, Bangladesh*

1. Introduction

In the wake of the coronavirus pandemic, business and commerce on the digital platform have gained more popularity than ever before. Evidence of this can be found in the report of UNCTD (2021)[1] which has shown that global online retail sales increased from 14 to 19 percent between 2018 and 2020. Likewise, a dramatic increase in these platforms' growth has been addressed by

[1] UNCTD, "Covid-19 and E-Commerce: A Global Review," in *United Nations Conference on Trade and Development*, Geneva: UNCTAD Technical Notes on ICT for Development, 2021.

Alcedo et al. (2022)[2] after analyzing global e-trade and services data in the period between pre-pandemic and pandemic times. Observing such a scenario OECD (2022)[3] has drawn policymakers' attention to the need to rethink the changing nature of trade and commerce structure, since everything from luxury goods and services to daily necessary products is available online even in the third world country.

Linked to this statement, an estimation has also found that in South Asia alone the online retailer market value would be worth $90 billion and the growth will continue from 6.0% to 11.2% between 2020 and 2025.[4] In a similar vein, another popular organization Statista (2022)[5] has projected that the market share of online business by the end of 2022 only in Bangladesh, a fast-growing South Asian country, is going to be worth $8,030 million and the number of beneficiaries will have grown to 75.5 million by the end of 2025. The mean revenue per user is also expected at $136.72.[6]

However, over the past few years, several scholars' development organizations have also been stressing the question as to whether these digital platforms are facilitating the illicit financial flow (IFF) or not. For instance, focusing on the relationship between IFF and digital technologies (DT), Tropina (2016)[7] - in a World Bank fact sheet - highlighted some areas of the close association between these two umbrella terms. Illegal procurement of money is one of the most important areas of IFF and DT relationship identified by Tropina (2016)[8], which has been produced and reproduced by illegal online markets and the lack of proper policy measures. Moreover, these transforming platforms also make the room for a number of opportunities for fraud, corruption, tax evasion, and other criminal activities (Kabir,[9] Tropina[10]). For example, Evaly, one of the popular e-commerce platforms in Bangladesh, has

[2] Joel Alcedo, Alberto Cavallo, Bricklin Dwyer, Prachi Mishra, and Antonio Spilimbergo, "E-Commerce During Covid: Stylized Facts from 47 Economies," (Cambridge: National Bureau of Economic Research, 2022).

[3] OECD, "Coherent Policies for Combatting Illicit Financial Flows," Framework for Policy Coherence for Sustainable Development: Thematic Module on Illicit Financial Flows [SG/PCD(2016)3], 2016, http://www.un.org/esa/ffd/ffd-follow-up/inter-agency-task-force.html.

[4] Ethan Cramer-Flood and Benjamin Silverman, "Southeast Asia Ecommerce Forecast," 2022, https://www.emarketer.com/content/southeast-asia-ecommerce-forecast-2022.

[5] Statista, "Digital Markets eCommerce Bangladesh," 2022, https://www.statista.com/outlook/dmo/ecommerce/bangladesh.

[6] Ibid.

[7] Tatiana Tropina, "Do digital technologies facilitate illicit financial flows?," World Bank, 2016, https://openknowledge.worldbank.org/handle/10986/23803.

[8] Ibid.

[9] Md. Adnan Kabir, "A Legal Analysis on Resolving Recently Growing Online Business Frauds in Bangladesh," International Conference on Human Rights and Business Law, Chittagong, 2022.

[10] Tropina, "Do digital technologies facilitate illicit financial flows?"

been accused of committing fraud in its supply chain management.[11] In Bangladesh, another piece of evidence linking e-commerce business and avoidance of customs tax has been presented by Islam (2020).[12]

Further, these new digital platforms as well as a new form of doing business online without proper regulation do not only act as a facilitator of illegal profits and fake e-commerce companies but also help to aggregate illicit funds in offshore accounts and offshore online businesses.[13] Aside from this, Tropina has anticipated, if online money transfers like mobile banking, electronic payments, cryptocurrencies, e-commerce providers, and online gambling services work combinedly, then several potential doors would be open for outlawed sources of money and for transmitting money from lawful sources in an unauthorized manner.[14] In line with this view, Joveda et al. (2019)[15] have speculated whether Bangladeshi Banking Industries can tackle cyber laundering in the existing legal framework. So, such questions generally urge the policymakers of third world countries to rethink their existing policies in the wake of this new industrial development.

Since, over the past couple of years several fraud cases, like Orange, Dhamaka, Evaly, Qcoom, Adyan Mart, and Aleshamart, have been discovered in Bangladesh associated with an e-commerce business. Through an unofficial source, it has been speculated that these organizations might have siphoned off $152 million from Bangladesh.[16] Therefore, tackling the challenge of this new digital ecosystem in a new form of legal structure and regulatory framework has become a pressing need in Bangladesh.

The importance of regulatory frameworks for a state is not new. The effectiveness of the state-owned online regulatory structure has been highlighted by different scholars. For instance, Larionova and Shelepov (2021, 23) have stated that,

> *... A window of opportunity was opened in 2020, not only to implement the G20's 2008 pledge to reform the international financial and economic architecture, but also to build a new digital economy governance system, ensuring that emerging*

[11] Farrukh Uddin, "Supply chain performance scandals of e-commerce industry: qualitative evidence from Bangladesh," *North American Academic Research* 4, no. 3 (2021): 293–308.

[12] Tanbirul Islam, *Tax Evasion by E-Commerce Businesses in Bangladesh*. Ontario: Brock University, 2020, https://books.google.hu/books?id=1BZxzwEACAAJ.

[13] Tropina, "Do digital technologies facilitate illicit financial flows?"

[14] Ibid.

[15] Nahid Joveda, Md. Tarek Khan, and Abhijit Pathak, "Cyber Laundering: A Threat to Banking Industries in Bangladesh: In Quest of Effective Legal Framework and Cyber Security of Financial Information." *International Journal of Economics and Finance* 11, no. 10 (2019): 54–65.

[16] Zia Chowdhury and Sakhawat Prince, "E-commerce scams: Now finger pointed at Foster for laundering Tk1,300cr," *The Business Standard*, 2021, https://www.tbsnews.net/economy/e-commerce-scams-now-finger-pointed-fosterlaundering-tk1300cr-311992.

> *markets and developing countries have a voice in decision-making commensurate with their weight in the global economy.*[17]

Notwithstanding that, Larionova and Shelepov (2021) have highlighted the importance of a regulatory framework in Multilateral Global Governance, but it is also important at the national level, especially for protection from IFF.[18] The hints of it can be found in a policy brief of the CAREC (2020) institute, where they have demonstrated some key policy issues of the digital regulatory framework for member states to link with international channels safely.[19] To do so, this institute emphasizes some special issues as a key digital e-commerce regulatory framework, like authenticating text and transacting parties, promoting privacy, preventing cybercrime and protecting consumers, how to follow the leading international trends, and what should be done, while expressing concerns about the ability of commercial and public actors to make safe decisions, as well as the ability of some member states to administer an effective regulatory environment (CAREC, 2020).[20] Similar characteristics are also found in the European Union's (EU) digital economic affairs and, by providing such a strong regulatory structure, the EU is providing a safe e-commerce platform for its member states (Kwilinski et al. [21]; Lodder and Murray[22]; Lone et al. [23]).

Howsoever, coming back to Bangladesh's case again, over the past couple of years a significant problem of fraud and money laundering cases has emerged related to online business, which raises the question of the usefulness of existing online regulatory frameworks. Besides, beyond doubt, this existing stature is also vulnerable to accelerating IFF in Bangladesh. Against such a background this study has been designed to assess the effectiveness of Bangladesh's online regulatory framework for minimizing illicit financial flow in a critical manner by addressing two most important questions. Namely, what are the strengths and weaknesses of the existing e-commerce regularity framework in relation to minimizing the IFF of Bangladesh?

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[17] Marina Larionova and Andrey Shelepov, "Emerging Regulation for Digital Economy: Challenges and Opportunities for Multilateral Global Governance." *International Organisations Research Journal* 16, no. 1 (2021): 29–63.

[18] Ibid.

[19] CAREC, "Regulatory Framework for e-Commerce Development in CAREC," T. C. Institute, 2020, https://www.carecinstitute.org/wp-content/uploads/2020/04/2-CI-Policy-Brief-e-Commerce-Framework-in-CAREC-25-Apr-2020.pdf.

[20] Ibid.

[21] Aleksy Kwilinski, Ruslan Volynets, Inna Berdnik, Mykhailo Holovko, and Pavlo Berzin, "E-Commerce: Concept and Legal Regulation in Modern Economic Conditions," *Journal of Legal, Ethical Regulatory Issues* 22 (2019): 1–6.

[22] Arno R. Lodder and Andrew D. Murray (eds.), *EU Regulation of E-commerce: A Commentary*, (Cheltenham: Edward Elgar Publishing, 2017).

[23] Sara Lone, N. Harboul, and Jesse Weltevreden, "2021 European E-commerce Report," 2021, https://pure.hva.nl/ws/files/23594824/European_Ecommerce_Report_2021.pdf.

2. Illicit Financial Flow (IFF)

In academia, no specific definition has been found to characterize IFF. However, international development organizations like IMF, OECD, WB, and UN use this umbrella term widely to denote national as well as cross-border illegal monetary transactions. Nevertheless, to understand IFF, it is important to know what is meant by illicit finance. When discussing illicit finance Chowla and Falcao (2016, 2) wrote,

> *Illicit financial flows are the subset of illicit finance that crosses borders. The scope of all illicit finance will clearly be larger than the scope of illicit financial flow, as not all illicit finance will cross borders. Domestic tax evasion, criminal activity and corruption are significant and impact on the ability of countries to raise the finance needed to investment in sustainable development.*[24]

Following Chowla and Falcao's (2016) opinion, illicit finance can be perceived as finance that is procured illegally within a nation. In line with this opinion, the IMF defines the term IFF as, "…the movement of money across borders that is illegal in its source (e.g. corruption, smuggling), its transfer (e.g. tax evasion), or its use (e.g. terrorist financing)" (IMF, 2021).[25] Similarly, WB (2017) stated that,

> *… a powerful and constructive umbrella to bring together previously disconnected issues. The term emerged in the 1990s and was initially associated with capital flight. It now generally refers to cross-border movement of capital associated with illegal activity or more explicitly, money that is illegally earned, transferred or used that crosses borders.*[26]

Gaining knowledge from such definition, Reuter (2017) has highlighted five important sources of IFF in a nation which include, bribes, tax evasion, criminal enterprise earnings, corporate profit shifting, and currency regulation evasion.[27] Besides, bulk cash smuggling, shell corporations, informal value transfer systems, and trade-based money laundering were also identified as the wider channel for these financial movements.[28] In a similar vein, according to WB (2017) a cash flow can be IFF only if it is procured illegally (e.g., corruption,

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[24] Peter Chowla and Tatiana Falcao, "Illicit Financial Flows: Concepts and Scope," *Interagency Task Force* (2016): 1–20.

[25] IMF, "The IMF and the Fight Against Illicit and Tax Avoidance related Financial Flows,"International Monitary Fund, Retrieved June 2 from 2021, https://www.imf.org/en/About/Factsheets/Sheets/2018/10/07/imf-and-the-fight-against-illicit-financial-flows.

[26] WB, "Illicit Financial Flows (Iffs)." The World Bank, https://www.worldbank.org/en/topic/financialsector/brief/illicit-financial-flows-iffs.

[27] Peter Reuter, "Illicit Financial Flows and Governance: The Importance of Disaggregation," *Governance the Law, Background paper for World Development Report 2017* (2017): 1–33.

[28] Ibid.

tax evasion); or the monies are the product of criminal activity (e.g., smuggling and trafficking in minerals, wildlife, drugs, and people); or the money is being utilized for nefarious reasons (e.g., financing of organized crime).[29] For the purposes of this study, overall, IFF can be seen as those cross-border economic transactions which aim at illegal activities or assisting non-legitimate groups, which may threaten humankind via generating unlawful activities.

3. Relationship between IFF and Regulatory Framework

The introduction of the term "IFF" happened in the early 90s by international organizations to address a development challenge of developing countries (OECD, 2016).[30] The leading organizations have agreed that because IFF, from developing countries to developed countries, hinders the sustainable development goals. Certainly, the weakened legal structure of the national institutions remains the key provoking mechanism of IFF for the developing nations, since IFF covers a large part of policy areas with small loops.[31] Subsequently, combating IFF remains a concerning matter for policymakers of all time and the institutional framework.

The proper implementation of those strong policies by government stakeholders through establishing an anticorruption environment can enable fighting against IFF at all levels. In line with this view, Dohlman and Neylan (2020) have stated five major interlinked policy areas that can control IFF at any national level, which include criminal justice, regulation and supervision of financial institutions and professions, the tax system, government and public administration, and company and trust law.[32]

Following the objective of this study, the relationship between IFF and the regulation and supervision of financial institutions and professions has been considered in this part. At the same time, with regard to controlling illicit finance, scholarly emphasis has been on the sensible regulation of the financial institutions and their business models along with consumer behavior as well as data protection. For instance, Dohlman and Neylan (2020, 20-21) believed that,

> *As well as preventive measures to counter illicit finance, financial institutions are also subject to prudential supervision, and supervision of their conduct of business, consumer protection, and data protection. These different supervisory regimes have*

[29] WB, "Illicit Financial Flows (Iffs)," The World Bank, https://www.worldbank.org/en/topic/financialsector/brief/illicit-financial-flows-iffs.

[30] OECD, "Coherent policies for combatting Illicit Financial Flows," *Framework for Policy Coherence for* Sustainable *Development: Thematic Module on Illicit Financial Flows [SG/PCD(2016)3]*, 2016, http://www.un.org/esa/ffd/ffd-follow-up/inter-agency-task-force.html.

[31] Ebba Dohlman and Tom Neylan, "Policy Coherence in Combating Illicit Financial Flows: PCSD Thematic Module (2020)," https://www.oecd.org/gov/pcsd/IFFs%20thematic%20module%20v12cl_for%20web.pdf.

[32] Ibid.

> *distinct purposes, different approaches to supervision, and in many cases different agencies are responsible for supervising compliance with regulations relevant to IFFs and for other forms of financial supervision. A consistent approach to these various regulatory regimes and their supervision is desirable to enable a coherent compliance culture in financial institutions (for example with a consistent approach to risk, so that managers do not face a zero-failure regime on one issue, and a risk-based approach on another), and to avoid overburdening the financial sector and their supervisors. It can also enable synergies between different 21 forms of supervision, e.g., where there are red-flag indicators of IFF activity which are visible to a prudential supervisor, but not normally reviewed by AML/CFT or conduct or business supervisors.*[33]

According to Dohlman and Neylan (2020), these regulations should have a wider scope with different approaches in different areas, sometimes the form of supervision and the implementation agencies can be different, thus can create a filtering net against illicit finance and procuring financial agencies.[34] In continuation, Dohlman and Neylan (2020) have further highlighted who would be the responsible authority to supervise financial organizations. Beyond the border, cooperation of monitory regulatory authorities via promoting financial sector standards and links between the standard-setters like the Financial Stability Board (FSB), the Basel Committee on Banking Supervision (BCBS); the International Organization of Securities Commissions being an association of organizations (IOSCO); and the International Association of Insurance Supervisors (IAIS) can regulate IFF.[35] At the border, the responsible authority for supervision may have a single body divided into several organs or have a network of separate supervisors for each sector, including banking, insurance, securities sectors, and regulated businesses and professions.[36] However, the standards may vary from country to country.

4. Logical Structure of the Regulatory Framework

From the local to global, the regulation remains an important part of optimal policy making both in the public and private spheres. With the beginning of the fourth generation of industrialization (Industry 4.0), the actions of regulatory frameworks become more complex since the actors both in public and private sectors have to deal with individual behavior at global, national, and local levels on the same platform. Whereas traditionally ‘how to regulate in better ways’ remains an important part of governmental agencies, nowadays understanding a better approach to regulation has become a multidisciplinary concern. In any

[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid.

case, 'building better' has always been a major concern of policymakers, and remains a formal step for different actors. From this point of view, Bluff (2018) has identified five different regulation theories (Table 1) which are generally practiced all over the world. In this section of this study, it is important to understand which theory will best fit for explaining Bangladesh's existing online regulatory frameworks and which theory can help to move this structure one step ahead.[37]

Table 1: Five different regulation theories[38]

	Theories	Description	Example
1.	The Risk-based regulation	Based on an assessment of threats to the regulator's objectives, the regulator employs systematized decision making to prioritize regulatory actions and deploy resources.	food safety policy in different countries
2.	The Regulatory craft	Regulators examine specific problems, threats, or risk concentrations in a systematic manner and respond with specific interventions or solutions.	The Australian Skills Quality Authority (ASQA)
3.	The Responsive regulation	Aims to balance cooperative and deterrent regulatory tactics by using a pyramid of supports to gradually increase regulator capacity and reinforce strengths, and if that fails, a pyramid of progressively more punitive punishments is implemented until reform is achieved.	Work place Safety and Insurance Board (WSIB) in Ontario Canada
4.	The Smart regulation	Builds on responsive regulation by implementing a three-sided pyramid in which government, business, and third-party regulators all work together to implement complementing mechanisms in a coordinated manner.	The Dutch Inspectorate of Environment in the Netherlands
5.	The Strategic enforcement	Supply chains, branding, franchising, third-party management, and other business systems are used by regulators to design and target interventions.	The Working Hour Division (WHD) of the Department of Labor in the United States

[37] Elizabeth Bluff, "Regulatory Theories and Frameworks," in *Hybrid Public Policy Innovations*, eds. Mark Fabian and Robert Breunig (New York: Routledge, 2018), 46–62.
[38] Ibid.

In implementation the above-mentioned five theories have their effectiveness on their subject matter. To discuss this, Bluff (2018, 58) has further mentioned,

> *In risk-based regulation the regulatory response is proportionate to risk, while in responsive and smart regulation the regulator is responsive to reform (or not) by regulates. The regulatory craft and strategic enforcement are more concerned with regulator tactics; that is, planning strategies or actions to achieve a specific end. In risk-based regulation the priorities for attention are the risks or regulates that pose the likeliest threat to the regulator's objectives. By contrast, the regulatory craft calls for assessment of identified harms to determine priorities. The approach of strategic enforcement is different again as it prioritizes influential actors in supply chains and business systems that give rise to systemic non-compliance. Responsive and smart regulation shed little light on priority setting.*[39]

Apart from Bluff's (2018) perceptions, UNODC and OECD (2016, 5) have recommended four coherent frameworks to combat IFF, which include "identifying and raising awareness of the types, magnitudes, and risks of IFFs (particularly at the political and policy-making level); considering the contextual factors that allow IFFs to thrive; supporting coherence within and between national and international normative frameworks (vertical coherence); Identifying critical, prioritized interactions across economic, social and environmental areas to address IFFs (horizontal coherence)".[40] In this study, the presented theories will be used to explain the nature of Bangladesh's e-commerce regulatory framework and which one could be better to minimize the IFF through e-commerce.

5. Study Design

A comparative research method applying a qualitative approach has been adopted to assess the effectiveness of the existing Bangladeshi digital commerce regulatory framework to reduce IFF. The whole research has been structured in three parts. The study questions and objectives have been presented in the introduction, as well as the parameters of comparative analysis and the relevant assessment criteria. The second section has examined developing mechanisms and instruments and considers their impact on the national financial flow equilibrium. Lastly, the conclusion has been drawn along with recommendations for strengthening the subject's regulatory

[39] Ibid.

[40] OECD, "Coherent Policies for Combatting Illicit Financial Flows," *Framework for Policy Coherence for Sustainable Development: Thematic Module on Illicit Financial Flows [SG/PCD(2016)3]*, 2016, http://www.un.org/esa/ffd/ffd-follow-up/inter-agency-task-force.html.

mechanisms to combat the pressure of emerging platforms and to secure the national economy.

Several secondary sources like different countries as well as organizations' policies were the primary source of data. Through contentment analysis, the comparative discussion has presented under some themes like contractual information, payment gateway, withdrawal period, use of cookies, data protection, notification of purchase, VAT rules, cross-border delivery rules, customs and taxation rules, online banking rules, and so on. Later based on these findings the researcher has to seek the answer to the second research question as to how illicit financial flow via digital platforms can be minimized through an effective policy measure in Bangladesh with reference to different successful policy initiatives in other countries or regions.

6. Brief Economic Background of Bangladesh and Its E-commerce Legal Framework

Bangladesh is the fastest developing country in South Asia. By the Fiscal Year (FY) 2020-2021, the GDP growth rate was 5.47 percent, and it was 8.15 percent in FY 2018-19. In comparison to the previous fiscal year, per capita, the national income was USD 2,227, up from USD 2,024 before. In FY 2020-21, the budget deficit is expected to be approximately 6.1 percent of GDP. Therefore, to improve tax administration transparency, steps have been taken to further automate and digitize the income tax (IT), value-added tax (VAT), and customs agencies. A value-added tax system based online has already been implemented. The execution of current reform programs is projected to aid in keeping the budget deficit under the 5% limit in the following years. Importantly, the remittances inflows for FY 2020-21 totaled USS 24.78 billion, increasing by 36.10 percent from the previous fiscal year.[41]

However, Bangladesh has a lag of a unified legal framework to regulate the rights of consumers and sellers in relation to online trade and commerce. The existing commercial legal structure consisted of the Contract Act of 1872, the Sale of Goods Act of 1930, the Consumer's Right Protection Act 2009, and the Competition Act of 2012, which need to be reshaped according to various aspects of e-commerce. The current Bangladeshi digital sector is generally governed by the ICT division of the Government of the People's Republic of Bangladesh. Under this ministerial division, Bangladesh has taken different digital policies to regulate online business and other activities. For instance, the Digital Commerce Operation Guidelines 2021, National ICT Policy 2018, National Digital Commerce Policy 2018, Government e-Mail Policy, Digital Bangladesh Award Policy 2021, National ICT Policy 2009, National ICT Policy

[41] BER, "Bangladesh economic review 2021," in Dhaka: Ministry of Finance, Government of the People's Republic of Bangladesh, 2021, https://mof.portal.gov.bd/site/page/28ba57f5-59ff-4426-970abf014242179e/Bangladesh-Economic-Review-2021.

2015, Policy for fellowship, scholarship, and grants for research and innovation in the ICT sector – 2016, Digital Security Rules-2020, National Strategy for Robotics, National Blockchain Strategy: Bangladesh, User's Policy for National Data Center, Bangladesh Computer Council, User's Policy for National Data Center, Bangladesh Computer Council. Nevertheless, by 2021 several e-commerce fraud and scam cases had come to light and revealed the weakness of the existing policy, which is suspectable to provoke IFF. However, to overcome the challenge, recently the Ministry of Commerce (MOC) of the Peoples Republic of Bangladesh has issued some standards and rules applicable to e-commerce operators known as the Digital Commerce Operational Guidelines 2021 ("the Guidelines"), but still, it remains a question of legal bindings.

Howsoever, the Ministry of Commerce is the sole authority to regulate Bangladesh's national as well as foreign trade and commerce under the Competition Act, 2012. The objectives of this government stakeholder are to ensure a sound competitive market environment through creating a business-friendly environment, price stability for essential commodities through adequate supply, enhanced market access for Bangladeshi exports, and protection of rights and interests of consumers. On the one hand, the Committees on Consumers' Right Protection have monitored consumer rights in 64 districts. On the other hand, the Business Promotion Council is responsible for introducing and implementing an appropriate program for export diversification. To keep pace with the changing nature of global trade and commerce the ministry, following a risk-based regulatory framework, has adopted a new policy, namely, the Digital Commerce Operation Guidelines 2021 (original in Bengali) of Bangladesh, which is governed by the Digital Security Act, 2018 (Act No. XLVI of 2018) of Bangladesh. In the following discussion, the author will present a brief overview of this latest policy and act, which are the soul of Bangladeshi e-commerce.

6.1 Digital Commerce Operation Guidelines 2021

The latest Digital Commerce Operation Guidelines 2021 of Bangladesh (original in Bengali) is the modified version of the Digital Commerce Operation Guidelines 2020 (the amended version of the National Digital Commerce Policy, 2018) aiming to provide transparency and accountability in the digital commerce industry, creation of employment opportunity, protecting consumer rights, and growing dependence on digital commerce by establishing a regulatory framework, and fostering a competitive market with possibilities for entrepreneurs.[42] Unlike the previous one, the guideline has defined the Marketplace and its rules to regulate. According to the policy, a marketplace is

[42] Law Desk, "An overview of the Digital Commerce Operation Guidelines 2021," *The Daily Star*, 2021, https://www.thedailystar.net/law-our-rights/news/overview-the-digital-commerce-operation-guidelines-2021-2128871. The People's Republic of Bangladesh, "Digital Commerce Operation Guidelines 2021," Dhaka: The People's Republic of Bangladesh, Ministry of Commerce (2021).

a digital commerce site that provides information on goods and services offered by one or more third parties, as well as facilitates transactions. And as a basic rule, the Guideline says unless otherwise agreed between them, the marketplace is obligated to pay the third-party vendor within 10 days after deducting relevant charges/commissions.[43]

Moreover, this Guideline applies to all organizations that are conducting business within the country. Thereafter, certain regulations have been postulated in this guide which should be followed by all business organizations. For instance, the necessity to specify the specific terms of purchase and return, to indicate the number of products, their ingredients, price, shipping or other costs, and to give an image, video, or other representation of the items to be sold for the buyer to make an educated decision. Side by side, certain restrictions on digital commerce platforms are also addressed in this policy which include that no addictive or illegal material may be sold; no arrangement for online betting or online gambling may be formed; and no lottery or raffle draw may be held in violation of the Penal Code, 1860, and without the approval of Bangladesh Bank. Besides, without a license from the Directorate General of Drug Administration, no digital commerce site can offer pharmaceuticals or health care products.[44]

For data protection, this policy has highlighted, that to get any personal data, digital commerce platforms must first obtain the buyer's consent by explaining why the data is being collected, where it will be stored, how it will be processed, and for what reasons it will be used. A “check-box” on the website can be good for this. Apart from these, all business-related information must be kept for at least six years and made available to any government entity upon request. Without the consent of Bangladesh Bank (where applicable) or in violation of Bangladesh Bank's instructions, no digital wallet, gift card, cash voucher, or other alternative payment methods may be implemented. The delivery timeline has also been clarified: products sent within the same city should be delivered within 5 days provided payment is received, while products shipped to a different location should be delivered within 10 days, according to the Guideline. For commodities that are used frequently or are perishable, delivery must be expedited, and the customer must be informed of this.[45]

For the complaint and redress mechanisms, some guidelines have been set for the Marketplaces, such as, consumers must have access to a phone number, email address, or other means of contact to make a complaint. Such concerns must be documented, and the consumer must be given a remedy within 72 hours. Digital commerce platforms must also guarantee that an appropriate rating and review system is in place so that purchasers can see them and make an educated decision, and that such reviews cannot be removed by the platform. The authority may take required actions or file a complaint with the appropriate

[43] The People's Republic of Bangladesh, “Digital Commerce Operation Guidelines 2021”.
[44] Ibid.
[45] Ibid.

government agencies against any platform that does not follow the Guidelines - these actions include the termination of a trading license, business registration, VAT registration, and so on. Buyers can also file a complaint with the Directorate of Consumer Rights Protection for compensation for any losses incurred as a consequence of noncompliance. Furthermore, it is also required to have a Unique Business Identification Number (UBID) for each organization in the marketplace. All international digital commerce platforms that conduct business in Bangladesh must register in Bangladesh and receive the appropriate approvals from the relevant authorities, according to the rules.[46]

Though this latest digital commerce guideline 2021 has created a space for the direct inspection of the government, in some area criticisms have been raised. For instance, Chomok and Roni (2021) have stated "although the guidelines provide instructions for complaints, it fails to mention detailed instructions and procedures following a complaint by a customer". Besides the complaint issue, to resolve some issues these Guidelines depend on the Consumer Rights Protection Act, 2009 (CRPA) but CRPA does not cover all those issues which have not been highlighted in this latest one. For example, CRPA does not apply to online transactions, which is a major loophole of this guideline, provoking IFF.[47]

Criticizing the policy, Chomok and Roni (2021) further highlighted that very few specific instructions have been given to minimize the excessive discount or predatory pricing, which have been weaponized by the Evaly and Alesha Mart to do their fraud activities against consumers.[48] Here, e-commerce organizations like Evaly and Alesha Mart have offered predatory prices with luring cashback offers, which motivated customers to wait for 3-4 months to get their goods or services, and in the meantime, these organizations have withdrawn their business.[49] Apart from these, no guidelines can be found on the cross-border e-commerce legislative issue. Having these weaknesses, the possibility to have IFF from Bangladesh has increased.

6.2 Digital Security Act, 2018

The Digital Security Act 2018 is the primary legislative instrument in Bangladesh that would apply to the violation of the Bangladesh Digital Commerce Guidelines 2021. This legal instrument defines "Appellate Tribunal" as the Cyber Appellate Tribunal constituted under section 82 of the Information and Communication Technology Act, 2006 (Act No. XXXIX of 2006); "Tribunal" means the Cyber Tribunal constituted under section 68 of the

[46] Ibid.
[47] Gargi Das Chomok and Saurov Dash Roni, "Why the new 'Digital Commerce Operation Guidelines' needs major revisions?," *The Daily Star*, 2021, https://www.thedailystar.net/law-our-rights/law-analysis/news/why-the-new-digitalcommerce-operation-guidelines-needs-major-revisions-2143741.
[48] Ibid.
[49] Ibid.

Information and Communication Technology Act, 2006 (Act No. XXXIX of 2006); "Criminal Procedure" means the Code of Criminal Procedure, 1898 (Act V of 1898); "defamation" means defamation as defined under section 499 of the Penal Code (Act XLV of 1860)". As for data storage under this act, all forms of information, knowledge, event, a basic concept, or guideline presented as text, image, audio, or video format, which (i) is being or has been processed by any computer or computer system or computer network formally; and (ii) has been processed for use in any computer or computer system or computer network, have to be taken into account.

Further, a critical information infrastructure in the name of public safety or financial security or public health, national security or national integrity or sovereignty has been included. Here, this section is the key instrument of the law enforcement agency to regulate e-commerce in Bangladesh. This act also clarifies who would be the supervisory stakeholder to apply this Act. According to this legal architecture, such are the Digital Security Agency (under section 5 of this Act); the National Computer Emergency Response Team or Computer Emergency Response Team (under section 9 of this Act); the digital forensic lab (under section 10 of this Act); a police officer who is not below the rank of sub-inspector.

In chapter VI, different levels of punishment related to digital security have been specified. For instance, punishment for illegal access to any critical information infrastructure etc. (section 17); illegal access to computer, digital device, computer system, etc. (section 18); damage to a computer, computer system, etc. (section 19); offence and punishment related to modification of computer source code (section 20); punishment for making any kind of propaganda or campaign against the liberation war, the spirit of the liberation war, the father of the nation, the national anthem or national flag (section 21); digital or electronic forgery (section 22); digital or electronic fraud (section 23); identity fraud or personation (section 24); transmission, publication, etc. of offensive, false or threatening data information (section 25); punishment for unauthorized collection, use etc. of identity information (section 26); offence and punishment for committing cyber terrorism (section 27); publication, broadcast, etc. of information on a website or in any electronic format that offends the religious values or sentiment (section 28); publication, transmission, etc. of defamatory information (section 29); offence and punishment for e-transaction without legal authority (section 30); offence and punishment for deteriorating law and order, etc. (section 31); offence and punishment for breaching secrecy of the Government (section 32); punishment for holding, transferring data-information illegally, etc. (section 33); offence related to hacking and punishment thereof (section 34); abetment of committing an offense and punishment thereof (section 35); offense committed by a company (section 36); power to issue an order for compensation (section 37); non-responsibility of the service provider (section 38).[50]

[50] Digital Security Act, 2018 (Act No. Xlvi of 2018).

However, in terms of effectiveness to control actual crime, this Act has been criticized severely. For instance, Rahman and Rashid,[51] Ataulla and Yildirim,[52] Bari and Dey,[53] Runa,[54] and Azad[55] have criticized the Digital Security Act, 2018, which is also known as the Cyber Security Act, due to the incorporation of some sections, especially sections 25 and 31 of the Act, which are against the right of freedom of speech enshrined in Article 39 of the Constitution of Bangladesh.[56] Besides, this Act has no clear instructions about e-commerce and its regulatory measures. Only, it has highlighted some points in sections 4 and 11 without much explanation or clear punishment for their violation. To combat IFF, there is no clear section presented in this Act, which provokes money laundering.

7. Concluding remarks

This study aimed to understand the strengths and weaknesses of the existing e-commerce regulatory framework for minimizing the IFF of Bangladesh. Over the past six years through unknown channels $49.65 billion was siphoned off from Bangladesh.[57] Most of these currencies are generally earned and distributed by online platforms, which demonstrates the weakness of the legislative structure. Through an intensive review, the author has found that following the risk-based supervisory model the latest e-commerce policy of Bangladesh has guided the digital commerce atmosphere in Bangladesh. To prevent fraud and money laundering issues, the Digital Commerce Guidelines 2021 have clearly stated several issues. For instance, consumer right protection has become a priority and, so, permission to use consumers' personal data has become mandatory. Several indications have also been postulated in this legal framework to ensure a competitive marketplace abolishing monopoly. Illegal

[51] Aliur Rahman and Harun Or Rashid, "Digital Security Act and Investigative Journalism in Bangladesh: A Critical Analysis," *CenRaPS Journal of Social Sciences* 2, no. 2 (2020): 216–36.

[52] Muhammed Ataulla and Besim Yildirim, "The Digital Security Act 2018 and the Obstacles to Freedom of Speech and Freedom of Media in Bangladesh," *Atatürk İletişim Dergisi* (2021): 69–92.

[53] M. Ehteshamul Bari and Pritam Dey, "The Enactment of Digital Security Laws in Bangladesh: No Place for Dissent," *The George Washington International Law Review* 51 (2019): 595.

[54] Sharmin Jahan Runa, "The Challenges of Freedom of Expression and the Digital Security Act 2018," *BiLD Law Journal* 4, no. 2 (2019): 75–92.

[55] Ananya Azad, "Digital Security Act in Bangladesh: The Death of Dissent and of Freedom of Expression," Central European University, Vienna, 2021.

[56] Republic of Bangladesh, Ministry of Law, Justice and Parliamentary Affairs, 1–24. Dhaka: Government of the People's Republic of Bangladesh, 2018, http://bdlaws.minlaw.gov.bd/.

[57] The Financial Express, "$49.65b Siphoned Off from Bangladesh in Six Years: Gfi," 2021, https://thefinancialexpress.com.bd/public/index.php/trade/4965b-siphoned-off-from-bangladesh-in-six-years-gfi-1639797327.

products, gambling, and lottery have been prohibited in these guidelines. So, such major issues have been addressed clearly, which is likely to have an impact on money laundering. But still, several fraud cases related to online business have been experienced by the local consumers of Bangladesh. How has it happened?

The findings of this study show that neither the Digital Commerce Guidelines, 2021 nor the Digital Security Act, 2018 has postulated any specific definition of online transactions. Subsequently, provocation of IFF becomes so easy. Lack of detailed instructions and mode of complaint by a customer has also helped organizations like Evaly and others to commit fraud. The lack of legal provisions on the supervision of excessive discounts or predatory pricing has been found as another weakness of the existing regulatory framework of Bangladesh. Lastly, no standards or guidelines for cross-border e-commerce have been placed in the existing legal supervisory structure. Thus, it is recommended to rethink these weaknesses of the latest policy to reduce IFF.

Further, it is also recommended to follow the Strategic Enforcement method to regulate this constantly changing and diversified marketplace. Through this method, a regulatory body can constantly supervise supply chains, branding, franchising, third-party management, and other business systems. Nevertheless, the current policy follows the traditional supervisory model where actions are taken only after a threat has been identified. Based on these recommendations the policymakers can rethink the core structure of the existing regulatory framework in Bangladesh to minimize IFF.

Abuses in virtual space and aiding suicide

SZABÓ, BARBARA

ABSTRACT *Cyberbullying abuses in virtual space can also qualify as stalking in a criminal law obscurity, my thesis notes that the concept of harassment is examined from as many aspects as possible. It raises awareness of the current icings of the harassment, and to provide a summary of the subject that can be used in the older ones for the mouths of the livers.*

KEYWORDS *Cyberbullying, Abuses, Virtual, Harassment*

1. Aims and methodology of the research

The aim of my study is to identify the new crime waves, namely abuses in virtual space and aiding in suicide, which have an increased occurrence in the 21st century, and to find out the effectiveness of improving knowledge about them. We must highly emphasise that the community of the social internet area has been widening in recent times causing the need to have more comprehensive legal steps against the dangers for the minors and adolescence in this respect. The paper uses a descriptive and critical method to analyse the virtual threats to children and minors on online platforms.

2. Introduction

The emergence of a global network has opened up new spaces for people to communicate with each other. Communication, a Latin word (communicatio) meaning disclosure and fulfilment, has its origins in the world community (communio). Communication in its modern sense means the exchange, communication and dissemination of information.[1] With the development of science, communication can also be carried out through various technical means.

Billions of computers, tablets and smartphones are available to us to enable the exchange of information anywhere and anytime for the user. Data is a form of representation of our knowledge, a kind of raw material that is processed to produce information, anything we gain knowledge about is present as data.

Information is more than data; it is knowledge that can be used to make decisions. This can take the form of a phone call, sending an SMS, but the latest revolution in communication is chat, which is a real-time written conversation over the internet.

[1] https://hu.wikipedia.org/wiki/Kommunik%C3%A1ci%C3%B3.

Social media, in a broad sense, is the media that is primarily shaped by a community as a group, not a collection of journalists, writers and media companies at the community level, it is the system of computer programs that facilitates the building of collaborative communities and the subjective experience of community space through electronic media.

In a narrow sense, the term is used to describe community-driven online content and has been in use since July 2006.[2] Social media is primarily based on human interaction.[3]

Through different platforms, we can discuss even more diverse topics with people of any nationality from anywhere in the world. In addition to exchanging messages, we can also share links, large documents, pictures, videos, and posts with each other, either in a private personal message or in a closed or open group.

Various instant messaging applications have been revolutionised to facilitate online communication. These apps can be installed on computers, tablets, and smartphones.

There is a wide range of chat applications to suit one's needs, including Internet Relay Chat, Google Talk, Snapchat, Skype, Viber, Yahoo! Messenger, WhatsApp and not to forget Facebook Messenger, which is an integral part of Facebook.

Moreover, the society of the 21st century can easily access online social media, spaces, blogs, social networking sites, such as Facebook, Instagram, Twitter, Tumblr, Pinterest, YouTube, etc., without almost any limitations.

The internet is essential for accessibility, and its great positive aspect is that it is affordable for society, and what is more, it is free of charge in various institutions and cafés.

After a few clicks, we have access to a vast, wide global network where information is easy, fast, persistent and, depending on the social space, can reach millions of people directly through the information superhighway, which can easily attract the masses.

3. Is the information we provide on social media secure?

Social networking sites, therefore, provide a greater space for individual online communication and human interaction, but the question arises: with this huge growth, can being part of a community really provide security?

Internet users are in a much more vulnerable position than in real life, in many cases becoming more easily victimised by the commission of certain crimes online.

[2] Andreas M. Kaplan and Michael Haenlein, "Users of the world, unite! The challenges and opportunities of social media," *Business Horizons* 53 (2010): 59–68.

[3] Gabriella Szalóki, "Virtual togetherness, real success: online communities," *Scientific and technical information* 9 (2006): 409–421.

I would like to emphasise four main forms of abuse from among several ones committed on the online surfaces:

- Credit card fraud
- Sharing contents
- Identification stealing
- Location endangerers

3.1 Credit card fraud

The use of the credit cards has spread around the world since the early nineties.[4] According to Dávid Tóth's doctoral thesis, the Criminal law against the security of money and stamp circulation and its criminological aspect, ever since the early nineties, the credit card fraud has been evolving in the XXI century.[5] It is important to highlight the increasing frequency of credit card fraud and the daily flow of emails trying to extort money from victims in a digital environment[6] (you owe money to your mobile phone operator, please transfer a certain amount, or your personal data and money are stolen during a credit card transaction in a disguised online shopping environment).

3.2 Sharing contents

We are more at risk than we think on social networking sites, where people share information about themselves, their personality, their environment, their hobbies, their workplace, their family life, without any restrictions or special consideration.[7] The mass of information shared voluntarily, such as photos and multimedia content shared on social networking sites, is an excellent tool for abuse.[8]

[4] Dávid Tóth, "Credit card fraud in Hungary," in *XIV. Országos Grastyán Konferencia Előadásai*, ed. Gabriella Tuboly-Vincze (Pécs: PTE Grastyán Endre Szakkollégiuma, 2015), 86–96.

[5] Dávid Tóth, "A pénz és a bélyegforgalom biztonsága elleni bűncselekmények büntetőjogi és kriminológiai aspektusai" (PhD diss., Pécsi Tudományegyetem, 2018), 1–256.

[6] Géza Finszter and Ferenc Irk: "Gazdasági-társadalmi változások, a bűnözés új kihívásai. Szervezett bűnözés Közép-Kelet-Európában az Európai Unió peremén," in *Kriminológiai Tanulmányok 38*, ed. Ferenc Irk (Budapest: OKRI, 2001), 11–59.

[7] Ilona Görgényi, "Ötletek a készülő áldozatvédelmi törvényhez - az áldozat büntető eljárásjogi helyzete, de lege ferenda," in *Kriminológiai Közlemények*, ed. Eszter Sárik and Krisztina Marosi (Budapest: Magyar Kriminológiai Társaság, 2004), 105–131.

[8] József Vígh, "Honnan indult el és merre halad a kriminológia?," *Magyar Jog* 9 (1991): 519–523.

3.3 Identification stealing

Our identities can be stolen, a more revealing picture can be published and in a matter of minutes easily fall into the wrong hands, and the individual can be advertised on other online platforms without their knowledge or will.[9]

3.4 Location endangerers

In other cases, the constant uploading and location sharing of online content can make the individual's whereabouts perfectly traceable, making it an excellent target for people who, in the individual's absence, are planning to break in.[10]

"People and society need communities. For man, because community can give him security, meaning, purpose in his life, greater effectiveness in his intentions, and the possibility of a richer unfolding of his personality.

And for society as a whole, because without a rich network of communities it becomes atomized, falls apart into individuals, forms into a helpless mass, is unable to amplify the diversity of individual interests into socially effective group interests, to confront them with each other and thus ensure its own internal self-movement and development."[11]

4. The power of online community due to children and the adolescence

As time goes by, real society and social life is increasingly overshadowed by the surreal world of online society. The natural human need is to belong to a community. It is the community that gives the individual the security and support, whether in the real world or in an online community.

Rushing among life could result in aimlessness, emptiness loneliness.[12] The desire to belong to somebody or something makes people dependent, they can be influenced so that they are willing to do things that they would not do on their own. In pathological cases, the sense of reality can become so blurred that the individual cannot separate the real world from the virtual world. Social media is a cure to it because it gives connections and interactions to people and

[9] László Korinek, "A XXI. század kriminológiája," in *Tanulmányok az 1956. évi forradalom és szabadságharc 50. évfordulójára*, eds. István Kajtár, Antal Ádám and Ferenc Cseresnyés (Pécs: PTE Állam- és Jogtudományi Kar, 2006), 295–305.

[10] László Korinek, "Az áldozattan fontosabb összefüggései," in *Elkötelezettség és sokoldalúság: Tanulmánykötet Barakonyi Károly tiszteletére*, eds. Gyöngyi Bugár and Ferenc Farkas, (Pécs: Pécsi Tudományegyetem Közgazdaságtudományi Kar, 2009), 1871–93.

[11] Elemér Hankiss, *Társadalmi csapdák és diagnózisok*, ed. Mária Hegedős (Budapest: Magvető Könyvkiadó, 1983), 5–396.

[12] World Health Organization – National suicide prevention strategies 2018. 47–4

their lives but if it is used in the wrong way it can cause more harm than good, especially to children and adolescents.

This is the factor that all social media and platforms use as a tool. Minors and adolescents are particularly at risk, as they are more impressionable due to their age.[13] These individuals' desires and anxieties, fears, and desires to belong to a community are exploited by offenders. [14]

Due to the children and the adolescence age gap, they are much more interactive and can be motivated in online games and challenges. It is not only the age that is the main reason for aiming this generation but the younger generation grows up with technologies around them. They experience that the people around them use them for the everyday life. As a child or an adolescence, it is common to copy the habits or to try to look like and behave as their parents, showing this way that they are also mature just like them.

Usually a child who goes to the kindergarten knows how to reach its parents, other adults by using a siblings' phone, a tablet or a computer, moreover it knows how to turn these on, it searches for sites, videos, using applications and playing games. Young children turn to electronic gadgets in order to socialize and to play besides playing outside on the playground.

The perpetrators benefit from the fact that their victim base has become broader and wider, (not to mention that the biggest tech agencies are able to access the information that Apple, Microsoft, Facebook have in storage.[15]) as the rise of the internet has enabled them to connect with any person or persons anywhere in the world through social media platforms and chat applications, almost without restrictions, which is a real advantage for suicide propaganda groups.

5. Act C of 2012 of the Hungarian Penal Code deals with assisted suicide as a crime against life, limb, and health

Act C of 2012 of the current Penal Code deals with assisted suicide as a crime against life, limb and health. According to the Section 162 (1), any person who induces another person to commit suicide or assists in the commission of suicide, if the suicide is attempted or committed, shall be punishable for the offence by imprisonment for a term of one to five years.

(2) A person over the age of eighteen who persuades a person under the age of eighteen to commit suicide or aids or abets the commission of suicide, if the

[13] Zsolt Németh, "A gyermek- és fiatalkorúakkal kapcsolatos bűnmegelőzés gyakorlatának két évtizede Magyarországon," in *Tanulmányok Vigh József 70. születésnapjára*, ed. István Tauber (Budapest: ELTE Állam- és Jogtudományi Kar, 2000), 200–208.

[14] Mohammed Al-Biltagi and Essam Ali Sarhan, "Anxiety Disorder in Children," *Journal of Paediatric Care Insight* 1, no. 1 (2016): 18–28.

[15] Bányász Péter, " A közösségi média, mint a nyílt forrású információszerzés fontos területe," *Nemzetbiztonsági Szemle* MMXV/II (2015): 21–36.

suicide is attempted or committed, shall be punished by imprisonment for a term of two to eight years.[16]

The offence of assisting suicide is dual in law, i.e. "inducing another to commit suicide" and "assisting another to commit suicide". Inducement is defined as an incitement to commit suicide by the act of inciting, i.e. the act of wilfulness leading to suicide.

To establish the offence, the offender must provide the decisive motive, which must be of such a degree as to influence the passive subject of the offence to such an extent that the intention to kill is formed. As a qualifying circumstance, the law protects persons under the age of 18, i.e., the passive subject of the offence, minors, and children.

In criminal jurisprudence, a number of views have emerged as to what the offender's criteria is that must be met in order to establish complicity: a) it is sufficient that the act of the perpetrator must be both factual and - in addition to the latter two conditions, the offender must also be guilty of an offence - criminal. According to György Berkes, in some cases, even if the criminal liability of the parties can be established in some cases, the act committed is merely a misdemeanour.[17]

In my view, we cannot say that these facts are no longer relevant in the 21st century. Over time, economic and social conditions have changed, or are changing rapidly, however the law has not adapted to these conditions. It is no longer just a question of assisting a suicide, but rather that of assisted suicide. But what exactly is "assisted suicide"?

The meaning of the verb "to entrap" is to force a person into a harmful situation, to persuade him or her to do something or behave in a certain way, by constantly encouraging, urging, coercing, or blackmailing him or her. The perpetrator seeks or creates a hopeless situation for the passive subject, taking advantage of his or her youth and childhood, creates such a high degree of pressure and tension in the individual through psychological terror that he or she sees no other way but suicide.

6. Inciting to suicide

For the first time, the phenomenon of inciting to suicide was associated with an Argentine death on 25 July 2018. According to the Police, the death of the 12-year-old girl was caused by a task created by the Momo phenomenon. The victim had intended to broadcast the completion of the Momo challenge via social media, and the outcome of the completion led to suicide.

On 28 August 2018, the suicide of a juvenile in India was also linked to the Momo phenomenon. The 18-year-old victim was found hanged in a shed with the hangman's toy graffitied on the wall, an image of which the victim's

[16] Section 162 (1) Act of Act C of 2012 the Hungarian Criminal Penal Code.

[17] György Berkes "A büntetőjogi felelősség feltételei," *Büntetőjogi kodifikáció*, no. 3 (2002): 25–28.

granddaughter's brother had seen earlier in connection with Momo. On the wall he also left two words illuminati Devil's one eye.

The game spread mainly in South America, but also reached Arab countries, Germany, and Hungary. In Hungary, the game was linked to the suicide of a 15-year-old girl.[18] The anonymity of the internet can cause several problems in tracking down the perpetrator.

7. Conclusion

The suspicion, which is a transition between not knowing and knowing, is a kind of partial and provisional suspicion,[19] knowledge, assumption of the investigating authority, which is essential for the initiation of criminal cases, but in the case of crimes committed in community spaces it is very difficult to develop the psychological sense of reliability, credibility, relevance, which logically leads to the conclusion of the existence of the crime, the identity of the perpetrator.

On the one hand, the recorded information, communication and communication established in online social spaces can provide the investigating authorities with excellent, systematic and simple initial data to enable them to very easily form a well-founded suspicion of the offence.

However, due to the anonymity of the Internet, it is not so easy to establish reasonable suspicion, as the use of pseudo-profiles, various fake email addresses, in some cases registration or the use of multiple IP addresses, multiple network devices, can make it very difficult to establish not only reasonable suspicion, but also simple suspicion.[20]

An adult who is more suspicious, he / she is concerned about the consequences the strategy, the business factors behind the internet companies' aim for these online platforms, social media sites and the real reason why they have chosen the children and the adolescences to a focus point for usage. Even if these platforms contain main principles to protect the children and the adolescence against life, limb, and health crimes, the aim is not enough. The parents need approval and more control over the usage and the content what a child can see on these platforms. It would make sense if they received daily reports in shorts just like the "reels" feature about what their children have seen even if it is against the people's free will and authority and if these upgraded functions could save children from downgrades and the possibility of becoming a victim of an online abuse. Such daily reports would be worth for the community.

Signed in Budapest in November 2001 and proclaimed in Hungary in 2004, the Convention on Cybercrime had once again broadened the scope of the

[18] https://www.thesun.co.uk/news/6926762/momo-suicide-game-whatsapp-deaths-uk/.

[19] Csongor Herke, Büntető eljárásjog, *Egyetemi jegyzet* (Pécs: Pécsi Tudományegyetem Állam-és Jogtudományi Kar, 2018), 1–163.

[20]https://digitalfilipino.com/introduction-cybercrime-prevention-act-republic-act-10175/.

definitions of computer crime.[21] It categorised the types of the crimes which were connected to the information user technologies and malicious attacks. I think that malicious attacks have another type according to the suicide propaganda groups, which can be considered as a legally regulated and indeed defined concept, just as the legislator describes the interpretative provision of the Criminal Code on conspiracy to emphasise the importance of safety and to call the attention to what types of danger children and adolescence are in.

[21] On 24th of November 2001 Budapest, the European Council accepted the Convention of Cybercrime.

The renaissance of compulsory licenses (in the pharma sector)

SZUPERA, BLANKA

ABSTRACT *This paper examines the function of compulsory licensing of the manufacture of pharmaceutical products. The COVID-19 pandemic has challenged the pharmaceutical patents and the compulsory licenses in the pharmaceutical sector. In International law the TRIPS Agreement introduced a special possibility to use the subject matter of a patent without the authorization of the right holder. The development of this license was determined by the public health problems of the least-developed countries (hereinafter referred to as the LDCs). Today the global pandemic has challenged this system. Some developing countries proposed that the World Trade Organization temporarily shall waive intellectual property rights for COVID-19 vaccines. The legislation of some countries allowed the governance to order the limitations of patents, but such a solution could harm the legitimate interests of the patent owners. The global need for rapid treatment of COVID-19 showed that patentees cannot make pharmaceutical inventions sufficiently available on the market. There are other solutions like patent pools, by which patent owners could keep control of the use of their inventions and the patents would be still available for third parties. This would serve the general public interest, but it is a money and time-consuming, long-distance cooperation. The broadened use of compulsory licensing could also expand vaccine manufacturing within the patent system. Hungary has chosen this path and the new legislation means the renaissance of compulsory licenses.*

KEYWORDS *pharma law, patent, compulsory license, COVID-19 pandemic*

1. The development of compulsory licenses

Compulsory licensing provides the use of a patented product or process – based on a decision of a court or a competent authority – without the expressed consent of the patentee.[1]

The history of this type of restriction of patent law dates back to the Venetian Patent Statute of 1474.[2] Once the right in the patent letter was granted,

[1] Levente Tattay, György Pintz, and Anett Pogácsás, *Szellemi alkotások joga*. ed. Tihamér Tóth (Budapest: Szent István Társulat, 2017), 272.

the exploitation of the patent was required, otherwise it was revoked[3] by the Senate of the Venetian State.[4] The English Statute of Monopolies of 1623 is one of the key legal instruments in which the concept of compulsory licensing was incorporated.[5] The obligation of industrial use was a safeguard against the misuse of the monopoly granted by patents. In case of breaching this obligation, a license of exploitation could be given.[6] The concept had influence on many national patent laws during the nineteenth century[7] and was also recognized by the first international document about patent law,[8] the International Convention for the Protection of Industrial Property (Paris Convention) concluded in 1883. The original text[9] required only the exploitation of the patented invention and did not link to it any sanctions. However, the Paris Convention has been revised 6 times, in Brussels in 1900, in Washington in 1911, in The Hague in 1925, in London in 1934, in Lisbon in 1958 and in Stockholm in 1967, and was amended in 1979, during which the regulation of compulsory licence has been developed. At the first revision, the article in question was not amended, while for the second time, the aim was to restrict the patent by revoking it if the patentee did not start exploiting the invention within a reasonable time. As a result of the Hague Act, the concept of a compulsory license also appeared in the official text of the Convention.[10]

Subsequently, a significant milestone in the development of intellectual property rights was Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), signed in Marrakesh, Morocco on 15 April 1994, which supposed to provide stricter, more detailed rules for

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[2] Christine MacLeod, *Inventing the Industrial Revolution: The English Patent System, 1660-1800* (Cambridge: Cambridge University Press, 1988), 11.

[3] Claudia Angélica Córdova González and Mónica Guadalupe Chávez Elorza, "Review of the International Patent System: From the Venice Statute to Free Trade Agreements," *Mexican Law Review* XIII, no. 1 (July 2020): 70.

[4] Michael Halewood, "Regulating Patent Holders: Local Working Requirements and Compulsory Licences at International Law," *Osgoode Hall Law Journal* 35, no. 2 (1997): 251.

[5] Shikha Mishra, "Effects of Compulsory Licensing in International Trade" (LLM. diss., The National University of Advanced Legal Studies of Kochi, 2016), 20.

[6] Carlos M. Correa, "Intellectual Property Rights and the Use of Compulsory Licenses: Opinions for Developing Countries" (Working paper, University of Buenos Aires, Argentina, 1999), 3.

[7] Mishra, "Effects of Compulsory Licensing in International Trade," 20–21.

[8] Muhammad Zaheer Abbas and Shamreeza Riaz, "Evolution of the Concept of Compulsory Licensing: A Critical Analysis of Key Developments Before and After Trips," *Academic Research International 4*, no. 2 (March 2013): 485.

[9] Art. 5. of Paris Convention accessed June 30, 2022, https://wipolex.wipo.int/en/treaties/textdetails/12995

[10] Hague Act accessed June 30, 2022 https://wipolex.wipo.int/en/text/287779.

the protection of intellectual property than the Paris Convention.[11] The patent restrictions and exceptions included in the Agreement serve the flexible application of patent law. Besides the research exception[12], and the "Bolar" provision,[13] there are provisions for anti-competitive practice, parallel imports,[14] grey imports and exhaustion of rights[15] and other uses without the permission of the patentee.[16]

2. The need for Doha Declaration

On 14 November 2001 the Doha Declaration on the TRIPS Agreement and Public Health[17] was adopted by the WTO Ministerial Conference to clarify several aspects related to the TRIPS Agreement. The purpose of the Doha Declaration was to provide easy access to medicines to all, but intended to support especially the LDCs.[18] It also gives freedom to Member States to determine the grounds for compulsory licensing,[19] defining what a national emergency or other circumstances of extreme urgency or cases of public non-commercial use constitute.[20] The use without authorization of the right holder regulated by Article 31 refers to compulsory licences and to governmental use as well. The first condition is that each case for granting a compulsory license must be decided on a case-by-case basis and there is also a precondition that the applicant made efforts to obtain authorization from the right holder on reasonable commercial terms without success within a reasonable period of time.[21] This precondition is not compulsory in the above listed special

[11] Abbas and Riaz, "Evolution of the Concept of Compulsory Licensing: A Critical Analysis of Key Developments Before and After Trips," 482.
[12] Art. 30 of the TRIPS Agreement allows Members to grant certain exceptions to the scope of exclusive rights derived from patent.
[13] Nóra Tosics, "Gyógyszertermékek szabadalmi oltalma a csatlakozási tárgyalások tükrében. A komprumisszumhoz vezető út – a közösségi álláspont fejlődésének visszatekintő elemzése," *Iparjogvédelmi és Szerzői Jogi Szemle* 108, (December 2003), https://www.wipo.int/wipo_magazine/en/2014/03/article_0004.html.
[14] Beáta Udvari, „Mindenki ugyanannyit veszít? – A fejlődő országok és a TRIPs Megállapodás gyógyszerkereskedelemre vonatkozó szabályai," *Fordulat* 8 (2010): 90.
[15] Art. 6. of TRIPS Agreement.
[16] Art. 31. of TRIPS Agreement.
[17] Doha Declaration accessed June 30, 2022 .https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.
[18] "Obligations and exceptions," fact sheet of WTO, accessed June 30, 2022 https://www.wto.org/english/tratop_e/trips_e/factsheet_pharm02_e.htm#compulsorylicensing
[19] Abbas and Riaz, "Evolution of the Concept of Compulsory Licensing: A Critical Analysis of Key Developments Before and After Trips," 484.
[20] TRIPS Agreement Art 31 (b).
[21] TRIPS Agreement Art 31 (a) and (b).

circumstances: national emergency, extreme urgency or in cases of public non-commercial use. In the first special situations the patentee shall be notified as soon as reasonably possible, and in case of non-commercial use the right holder shall be informed promptly if without a patent search, it is obvious that a patent will be used. The scope and the duration of the use shall be determined in accordance with the purpose for which it was authorized and shall be authorized predominantly for the supply of the local, domestic market.[22] The obtained right is never exclusive, non-assignable and the authorization shall be terminated when the circumstances which led to it cease to exist.[23] In return for a license the applicant shall pay a fee to the patentee in accordance with the economic value of the authorization.[24] Against the decision on the remuneration or on the authorization a proper remedy shall be provided.[25] The Agreement determines two special subcategories. One is permitted to remedy a practice determined to be anti-competitive and the other one is permitted to the exploitation of a dependent patent, which cannot be used without infringing another patent.[26] Compliance with the Agreement shall be monitored by the Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "TRIPS Council")[27] established by the Marrakesh Agreement, which shall, if necessary, mediate between its members and ensure that they comply with their obligations under this Agreement.[28]

This legal concept of compulsory licensing could not be properly applied in the least-developed Member States, because of the provision which linked the purpose of exploitation predominantly for the supply of the domestic market. Countries with limited, or without local pharmaceutical production capacity could not produce the quantities in need and could not rely on exports from countries with adequate infrastructure with regard to their emerging public health problem.[29] To address this issue, section 6 of the Doha Declaration called on the Council of TRIPS to urgently seek a solution and report the result to the WTO General Council within a year.[30] Based on the outcome of this procedure the General Council adopted a decision on the implementation of paragraph 6 of the Doha Declaration.[31] Sec. 2 of the Decision allows the concluded members to export patented pharmaceutical products or products manufactured through a

[22] TRIPS Agreement Art 31 (c) and (f).
[23] TRIPS Agreement Art 31 (d) (e) and (g).
[24] TRIPS Agreement Art 31 (h).
[25] TRIPS Agreement Art 31 (i) and (j).
[26] TRIPS Agreement Art 31 (k) and (l).
[27] Marrakesh Agreement paragraph 5 of Art IV.
[28] TRIPS Agreement Art 68.
[29] Abbas and Riaz, "Evolution of the Concept of Compulsory Licensing: A Critical Analysis of Key Developments Before and After Trips," 483.
[30] Marrakesh Agreement paragraph 2 and 5 of Art IV.
[31] Decision of the General Council of 30 August 2003 accessed June 30, 2022, https://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm

patented process[32] and the obligations of Art. 31 (f) of the TRIPS Agreement shall be waived subject to certain conditions. In the Annex titled the Assessment of Manufacturing Capacities in the Pharmaceutical Sector, it is defined which countries could be the destinations for exports under the compulsory license. According to this, besides LDCs other members are entitled to import if they determine that there is no production capacity in the sector for the pharmaceutical product concerned or that the available production capacity is not able to meet the needs. All in all, the eligible importing member shall confirm the need of importation in accordance with the Annex, notify the TRIPS Council of the quantity of the required products, and have to grant or have to intend to grant a compulsory license to import the patented product. The exporting WTO member may produce only the quantity authorized under the compulsory license and a distinctive mark shall be singed on the thus produced products, which must be delivered in full to the destination country. The distinguishing mark may be a label, a different colouring or a shape, but it must not significantly affect the price of the product. The licensee must publish the terms of the license, the used special mark and the quantity produced on its own website, and about the availability of these data the TRIPS Council must be notified.

The content of the decision was later incorporated into Article 31a by amending the TRIPs Agreement.[33]

The European Community took an active part in the preparatory negotiations and was one of the first to adopt the amendment.[34] Committed to implementation, a special compulsory license was drafted on October 29, 2004 within the framework set out in Articles 31 and 31a, with the aim of making a uniform compulsory license of the manufacturing and distributing of pharmaceutical products for export in the Member States.

3. Compulsory licence on public health under EU law

The Regulation (EC) No 816/2006 of the European Parliament and of the Council of 17 May 2006 on compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems established a compulsory license aimed to support the fight against HIV / AIDS, malaria, tuberculosis and related diseases in developing countries.[35] The Regulation explicitly prohibits the use for industrial and commercial policy purposes.[36] Such a license may be granted for a person who

[32] Decision of the General Council Sec 1.
[33] WTO: 2005 Press Releases/426, https://www.wto.org/english/news_e/pres05_e/pr426_e.htm.
[34] Amendment of the TRIPs Agreement, https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm.
[35] Regulation (EC) No 816/2006 Preamble (7).
[36] Regulation (EC) No 816/2006 Preamble (7).

intends to manufacture or to sale for export a product affected by a patent or supplementary protection certificate.[37] If the product concerned is protected in the importing country as well, a compulsory license is also required there for importation.[38] Licenses may be issued only for the quantity indicated in the application, for export only into the requested country and for a specified period of time.[39] The product produced under the license or the product produced by a patented process shall be uniquely marked and distinctively packaged and the fact of the license shall be indicated on it.[40]

The licensee shall pay to the right holder an adequate remuneration set by the competent authority. In determination of the fee the economic value of use for the importing country, and the humanitarian and non-commercial nature of the issuance of the license shall be taken into account. The amount of the fee in the event of a national emergency, or other urgent emergency and in cases of public non-commercial use is limited to 4% of the total price to be paid by or on behalf of the importing country. [41] If a compulsory licence is granted the TRIPS Council must be informed about the authorization and its special conditions.[42] In Hungary, the assigned competent authority to decide on these type of compulsory license is the Hungarian Intellectual Property Office (hereinafter: HIPO) in accordance with Section (1) of Art. 33 / A. § of Act XXXIII of 1995 on the Patent Protection of Inventions (hereinafter: PPI).[43]

4. Compulsory licenses in the Hungarian legal system

The Hungarian legislation describes four kinds of compulsory licenses. Compulsory licenses for lack of exploitation shall be granted if the patentee does not start exploiting the protected invention within a period specified by law and does not justify the lack of exploitation. This ensures that newer and newer technical solutions will be applied or the exclusive right derived from the patent will be lost.[44] Technical solutions with greater economic value are also supported by compulsory licensing due to the dependence of patents. If the application of an invention required the use of another invention which is subjected of a patent (the so-called “impeding patent”), this may be allowed if the dependent patent constitutes significant technical progress of considerable

[37] Regulation (EC) No 816/2006 Art 6 (1).
[38] Regulation (EC) No 816/2006 Art 10 (7).
[39] Regulation (EC) No 816/2006 Art 10 (2) to (4).
[40] Regulation (EC) No 816/2006 Art 10 (5).
[41] Regulation (EC) No 816/2006 Art 10 (9).
[42] Regulation (EC) No 816/2006 Art 12.
[43] See the ministerial justification of 33 / A. §.
[44] Art 31 of PPI.

economic interest.[45] These two may be used only for the purpose to meet domestic demand.[46] The third type is implemented compulsory license governed under Regulation 816/2006/EC. With regard to the fact, that this licence can be granted only for export purposes to certain countries, with a complementary manner a new category was created in 2020 due to the corona virus pandemic.[47] The PPI regulates basically two new subtypes of licenses under the title of public health compulsory licensing. One is a domestic compulsory license, which allows the exploitation for the supply of the local, domestic market, focusing on providing the right amount of product, medicine or equipment in a public health crisis determined in Subsection (2) of Section 228 of Act CLIV of 1997 on Health Care. The other one is the foreign compulsory license which may be granted for the purpose of exportation related to a compulsory license where this is considered necessary to address public health concerns in another country.[48] However, such authorizations shall only cover the use of a healthcare product[49] or the manufacture of a patented process, equipment or device.

This kind of exploitation can never endanger the domestic supply and this shall be justified by the government body for pharmaceuticals.[50] Actually, this authority is the National Institute of Pharmacy and Nutrition (hereinafter: OGYÉI). Such permission never grants an exclusive right and based on the license the licensee may not give rights to a third party.[51] Just like in the case of the license governed under Regulation 816/2006/EC, here also the HIPO is entitled to act. The HIPO determines the duration of the license. In case of domestic compulsory license this decision is based on the OGYÉI's certification on the necessary number of products for managing the public health crisis, but it cannot be less than six months. In case of foreign compulsory license the term is adjusted to the duration of the compulsory license issued abroad.[52] The HIPO shall establish the appropriate remuneration for the public health compulsory license, which expresses its economic value and which is proportional to the fee payable by the licensee to the patentee in the case of a (fictitious) exploitation contract, taking into account the licensing conditions in the technical field to which the invention pertains.[53] In

[45] Art 32 (1) of PPI.
[46] Art 33 (2) of PPI.
[47] Alexandra Rudi and Dávid Ujhelyi, "A szellemi tulajdonjog területén megvalósult különleges jogrendi jogalkotás – háttér és eredmények," *Fontes Iuris*, no. 2 (2020): 57.
[48] Art 33/B (1) of PPI.
[49] A health care product is a patented or supplementary protected medicinal product, active substance or investigational medicinal product.
[50] Art 33/B (2) b) of PPI.
[51] Art 33/B (3) of PPI.
[52] Art 33/C (1) and (2) of PPI.
[53] Art 33/C (3) of PPI.

determining the fee the typical ratio of exploitation fee to net sales in a given industry, and the overlap ratio between the generated economical advantage and the use of the patented product affected by the compulsory license shall be taken into account.[54] Healthcare products manufactured under a compulsory public health license shall bear a unique distinguishing mark from the product manufactured by the patentee. The packaging and all related documents must clearly indicate that the health product has been manufactured under such a license and intended solely for domestic exploitation or export distribution purposes to the licensed country.[55] In the event of failure to indicate the individual mark, OGYÉI may oblige the licensee to repackage the products.[56] The license may be terminated by surrender (partial surrender), expiration of the specified period, or termination of the patent or supplementary protection. The foreign compulsory license terminates upon the revocation of the foreign compulsory license on the basis of which it is issued, of which the SZTNH shall be notified within 8 days. In the event of surrender, the HIPO shall notify the patentee and OGYÉI of this legal declaration.[57] Thereafter, and in the event of the expiration of the specified time, OGYÉI shall order the destruction of the non-marketed health care products, the equipment and devices used for their production, and the termination of the manufacturing process.[58]

5. Gilead Sciences vs. Richter

Due to COVID-19 this new category was a necessary opening in the light of the recognition of Article 31 (f) of the TRIPS Agreement and in the light of the limited authorization provided by Regulation (EC) No 816/2006. Protected health products can also be on a shortage of goods in developed countries, and with this license it is possible not only to satisfy domestic supplies, but other developed countries in a similar situation can be helped out as well. This brings the health system closer to the demands of the people, so that health products are distributed as evenly as possible to control and treat the pandemic. This is well illustrated by the fact that in December 2020, the HIPO granted three compulsory public health compulsory licenses for the minimum 6 months long period of time in Hungary, while there was no example of the issuance of licence under Regulation (EC) No 816/2006.[59] All three were linked to the active ingredient named remdesivir and the licensee was Richter Gedeon Nyrt.

[54] Art 33/C (4) of PPI.
[55] Art 33/C (10) of PPI.
[56] Art 33/C (11) of PPI.
[57] Art 33/C (5) and (6) of PPI.
[58] Art 33/C (7) of PPI.
[59] Gazette for Patents and Trade Marks *Hungarian Intellectual Property Office* Vol. 125. Issue 24 (December 28, 2020), 209.

(hereinafter: Richter). The patentee, Gilead Sciences challenged the HIPO's decision granting the compulsory license with action for reversal both on procedural grounds and in view of the merits of the decision. The Gilead Sciences objected that the Office conducted a de facto ex parte procedure, without hearing the applicant, based on the relevant rules of the PPI, and considered it unlawful that as the patentee, could not participate as a client in the compulsory licensing proceedings. The company had neither the opportunity to comment nor to make a statement regarding the granting of a compulsory license. Both the Court of First Instance[60] and the Court of Appeal[61] ruled that the provisions of a compulsory public health license are expressly different from the general compulsory licensing procedure. In this special procedure the Office only notifies the patentee of the action and informs them of the decision on the grant of the license. However, it is not an inter partes proceeding, the Office shall decide on the grant of the license without a hearing and the patentee shall not be entitled to any legal status or any rights deriving therefrom. In the field of compulsory public health licensing, only the applicant for a compulsory license is considered as a client. In addition, the court marked, that the action of reversal is a judicial remedy which ensures the right of appeal.

The substantive objection of the Gilead Sciences was that the HIPO failed to clarify the circumstances of the domestic need and did not provide evidence as to whether the resources of the patent holder alone would be sufficient to meet the domestic needs of the epidemic. The debate thus traced back to an assessment of the legislature's intention, as it raised the need for the issuance of a compulsory public health permit, the basic purpose of which is to provide a sufficient health product to meet domestic needs in a health crisis should in fact be a statutory requirement or the existence of a crisis situation and the fact that the patentee has not satisfied the entire domestic claim by the time the application is received is sufficient.[62] According to the PPI, the applicant is expected to submit a certificate covering the applicant's suitability to meet domestic needs related to the health crisis and the quantity of product required.[63] If the applicant has sufficient capacity for this quantity, it is irrelevant for the grant of the license that the original patent also has the

[60] According to Art 86 of PPI the proceedings for the reversal of the decisions of the HIPO shall fall within the exclusive jurisdiction of the Capital Regional Court of Budapest. Decision numbers: Pk.20219/2021/16. and Pk.20224/2021/17. and Pk.20225/2021/18.

[61] Decision numbers of the Budapest-Capital Regional Court of Appeal: Pkf.25536/2021/6. and Pkf.25537/2021/6. and Pkf.25538/2021/6.

[62] Ádám György, "Jogalkotási és jogalkalmazási kérdések a közegészségügyi kényszerengedély kapcsán," *Jogászvilág*, March 21, 2022, https://jogaszvilag.hu/szakma/jogalkotasi-es-jogalkalmazasi-kerdesek-a-kozegeszsegugyi-kenyszerengedely-kapcsan/.

[63] Art 83/I (1) f)-h) of PPI.

necessary capacity. Research of these data if it is available for the HIPO at all would run counter to the purpose of the license, as it would be particularly time-consuming and goes beyond the competence of the authority. This case shed light on the difference between the regulations and the principles of the earlier (compulsory licenses for lack of exploitation and due to the dependence of patents) and the public health issue related compulsory licenses and highlighted the special function of the latest category. As a result of the 3 compulsory public health licenses, 13,000 moderately or severely covid-infected lives were saved. [64]

6. What should be the solution?

With the health-related compulsory licenses, the accessibility of pharmaceutical products can be remedied within the framework of Patent law, in case of urgent need, like a pandemic meanwhile the benefits and the long-term trust in law, legal certainty is also protected.[65] The compulsory patent license protects against the abusive exercise of rights and promotes the applicability of existing knowledge. Some states allow exploitation in the public interest instead of, or in addition to a compulsory patent license. We can find such a patent limitation in German law in the Infection Protection Act.[66] The Federal Ministry of Health or its subordinate authority are entitled to order the use of a patent-protected invention or process without the authorization of the patentee for public welfare.[67] This option is limited to a specific range of patented inventions, such as drugs and medical devices, and processes used for their production.[68] In any case, the registered owner of the patent must be informed of such an order before the beginning of exploitation, which covers production and sale within the framework of public health use, excluding the purpose of making a profit.[69] As in the case of a compulsory license, there is

[64] Balázs Gabay, "Lejárt a remdesivir engedélye, nem gyárt többet a Richter," May 10, 2021,
https://index.hu/gazdasag/2021/05/10/richter-covid-remdesivir-tocilizumab-vakcina/.
[65] Jenő Bobrovszky, "Az enyém, a tied, és a miénk a szellemi tulajdonjogban," *Liber amicorum – Ünnepi dolgozatok Gyertyánfy Péter tiszteletére*, ed. Gábor Faludi (Budapest: ELTE, 2008), 25.
[66] Patent Gesetz 13. §.
[67]Christian Dekoninck, Paul England, Judith Krens, Anja Lunze, and Jan Phillip Rektorschek, "COVID-19 and public compulsory licensing of drugs in Europe," *Taylorwessing* April 17, 2020, https://www.taylorwessing.com/en/insights-and-events/insights/2020/04/covid-19-and-public-compulsory-licensing-of-drugs-in-europe.
[68] Art 5 (2) 4. Infektionsschutzgesetz.
[69] Dekoninck, England, Krens, Lunze, and Rektorschek, "Public compulsory licensing of drugs in Europe".

also compensation for the patentee, covered by the Federal Government.[70] The English Patent law also recognizes a special possibility for the exploitation of patented inventions without the right holder's permission.[71] The search for alternative solutions indicates that compulsory licenses are not a complete solution to the problem that arises.

As a result of the pandemic, the most radical possible solution has emerged, which means the temporary waving from certain provisions of the TRIPS Agreement. This was requested by India and South-Africa.[72] According to this, the application of certain provisions in relation to the acquisition, scope, use and enforcement of intellectual property rights would be waived for the prevention, containment and treatment of COVID-19. The TRIPS Council discussed the issue several times in 2021, but these did not lead to results, and no decision was made on the suspension.[73] This effort also appeared in Brazil,[74] where the Senate passed a bill to suspend patent protection for pharmaceutical products that help fight against COVID-19, but the proposal failed. However, this solution draws attention to the fact that if it is not possible to meet the needs of developing countries particularly affected by COVID-19 at an adequate pace for effective action, then the patent protection system itself may be at risk and it is questionable whether the public health problem that arose due to the pandemic can be solved within the traditional legal framework. To avoid this undesirable result, we must find a delicate balance which enables the preservation and encouragement of the innovative achievements of inventors,[75] while promoting the equitable distribution of medicines, medical devices and procedures all around the world.

Based on all of this, it is in our common interest to solve the problem uniformly by the least radical, restrictive legal institution, which is according to my opinion the patent compulsory license.

[70] Art 13 (3) of Patent Gesetz.
[71] Art 55 (1) a) Patents Act.
[72] Communication from India and South Africa, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True.
[73] TRIPS Council agrees to continue discussions on IP response to COVID-19, https://www.wto.org/english/news_e/news21_e/trip_20jul21_e.htm.
[74] Brazilian senate votes to suspend patents in bid to widen access to Covid-19 vaccines, https://www.statnews.com/pharmalot/2021/04/30/brazil-covid19-coronavirus-vaccines-wto-patent/.
[75] Gábor Szilágyi, "Adok is kizárólagosságot, meg nem is, avagy a pandémia kezelésének lehetőségei a szabadalmi jog rendszerében, különös tekintettel a közegészségügyi kényszerengedély, valamint a Bolar kivétel hazai implementációjára," *Kúriai Döntések Bírósági Határozatok* 70, no. 4 (April 2022): 630.

Anti-money laundering and countering financing of terrorism legislation in Vietnam: Criminalization, Practice and Challenges

THAI, HA VAN

ABSTRACT *This paper aims to examine the effectiveness and suitability of the Vietnamese anti-money laundering (AML) and countering financing terrorism (CFT) regime. This paper has three parts. The first part of the paper will provide an overview of the Law on Anti-money laundering 2012 (the Law on AML) and the criminalization of money laundering offences in the Criminal Code 2015, amended in 2017. The second part of the paper seeks to examine the practice and challenges of the Vietnamese AML/CFT framework in terms of the (i) implementation of preventive measures adopted by the reporting institutions in order to preclude and identify money laundering cases; (ii) use of reporting and combating identifiable or suspected money laundering transactions to the relevant authorities; and (iii) domestic and international cooperation in AML. The third part of the paper will provide recommendations as referencing for other jurisdictions.*

KEYWORDS**:** *Anti-money laundering, counter financing of terrorism, FATF, Vietnam*

1. Introduction

The definition of money laundering varies depending on the objective of each organization. For example, money laundering is the process of disguising the illegal origin of the financial proceedings of crime.[1] After the United States and Europe paid a lot of attention to illegal drug trade, money laundering became an important global issue in the 1980s, when it was first made illegal. This led to the creation of a special organisation, the Financial Action Task Force (FATF), an affiliated organization of the Organisation for Economic Cooperation and Development (OECD) in 1989 in Paris. The general definition proposed by FATF is the process of criminal proceedings in order to disguise illegal origin.[2]

[1] Jeffrey Simser, "Money laundering: emerging threats and trends," *Journal of Money Laundering Control* 1, no. 16 (2013): 41–54.

[2] FATF, FATF Report: Operational Issues Financial Investigations Guidance. Paris, 2012.

Currently, the FATF is made up of 37 countries and two regional groups. Together, they represent most of the world's major financial centers.[3] Its job is to provide regularly updated recommendations that aim to set legislative and regulatory standards for AML. The recommendations cover a wide range of topics, such as the general adoption of background AML policies, criminalization of money laundering, and setting up legal frameworks for seizure and confiscation, as well as more specific topics like rules for identifying customers and keeping records, exchanging information, and helping each other in legal issues. After the terrorist attacks on September 11, 2001, the FATF's function was expanded to include fighting the financing of terrorism. Thus, nine more special recommendations were created. FATF's work is supported by a number of other groups and policies, and such as regional task forces, which use the same format as FATF but on a smaller scale,[4] such as the Asia/Pacific Group on Money Laundering - APG) that compel their members to comply with FATF recommendations. The FATF and FATF-style regional bodies periodically evaluate their members' levels of technical compliance and the effectiveness of implementation of FATF recommendations through a process of Mutual Evaluation Report. The FATF has created a global Mutual Evaluation Methodology to guide these evaluations. Vietnam is assessed within the APG framework.

In general, the AML/CFT regime in Vietnam consists of: (i) the establishment of a comprehensive AML/CFT framework that covers legal and regulatory issues; (ii) the responsibility of reporting institutions in terms of preventive measures; (iii) the roles of the financial intelligence unit and related law enforcement agencies; and (iv) the national and international cooperation between related agencies and other jurisdictions.[5]

In order to clarify the effectiveness and suitability of AML/CFT regime in Vietnam, this paper has three parts. The first part of the paper will provide an overview of the AML/CFT framework in which the Law on AML 2012 and the criminalization of money laundering offences in the Criminal Code 2015, amended in 2017 are the key elements. The second part of the paper seeks to examine the practice and challenges of the AML/CFT framework by exploring (i) the implementation of preventive measures adopted by the reporting institutions to detect and prevent money laundering cases; (ii) the role of law enforcement agencies in combating money laundering; and (iii) domestic and international cooperation. The third part of the paper will give recommendations as referencing for other jurisdictions.

[3] https://www.fatf-gafi.org/about/membersandobservers/.

[4]https://www.apgml.org/fatf-and-fsrb/page.aspx?p=94065425-e6aa-479f-8701-5ca5d07ccfe8.

[5] Chat Le Nguyen, "The international anti-money laundering regime and its adoption by Vietnam," *Asian Journal of International Law* 4, no. 1 (2014): 197–225.

2. Overview of AML/CFT framework in Vietnam

Vietnam has undergone significant market reforms since the start of the *Doi Moi* era, which has led to incredible economic growth and transformation. Nevertheless, despite expanding levels of foreign investment and trade, Vietnam's economy is still centered on cash. Additionally, due to its extensive border with China, Lao PDR, and Cambodia, Vietnam is susceptible to illegal activities like money laundering.[6]

Vietnam's AML/CFT framework has undergone significant transformation since its first mutual evaluation and inclusion in the FATF's International Cooperation Review Group (ICRG) process in 2009.[7] The adoption of a new Criminal Code in 2015, which revised money laundering and terrorist financing offences and established corporate criminal liability, as well as the Law on AML in 2012, the Law on Anti-Terrorism of 2013, and their implementing Decrees, have resulted in some improvements in Vietnam's AML/CFT system and an increase in technical compliance. However, significant technical deficiencies remain and improvements are needed in many areas.[8]

The key AML/CFT regulation in Vietnam is the Law on AML of 2012 and the Criminal Code in 2015, amended in 2017.

2.1 The Law on AML

The Vietnamese National Assembly passed the law on AML No. 07/2012/QH13 on June 18, 2012. The law came into effect on January 1, 2013, giving a strong legal framework for AML. The Law on AML consists of five chapters with fifty articles that specify procedures to prevent, identify, stop, and handle organisations and individuals that conduct money laundering; the obligations of agencies, organisations, and individuals in AML; and international cooperation on AML. Subjects of application of the Law on AML include: (i) financial organisations; (ii) organisations and individuals doing business in relevant financial sectors; (iii) organisations and individuals and foreigners living in Vietnam or foreign organisations, international organisations, and non-governmental organisations operating in Vietnamese territory who have financial transactions and other property transactions with

[6] Hai Thanh Luong, "Transnational crime and its trends in South-East Asia: A detailed narrative in Vietnam," *International Journal for Crime, Justice and Social Democracy* 9, no. 2 (2020): 88.

[7] Chat Nguyen Le, "The growing threat of money laundering to Vietnam: The necessary of intensive countermeasures," *Journal of Money Laundering Control* (2013): 321–332.

[8] APG. Mutual Evaluation: Report Anti-Money Laundering and Combating the Financing of Terrorism, 2009, http://www.apgml.org/mutual-evaluations/documents/default.aspx?s=title&c=8b7763bf-7f8b-45c2-b5c7-d783638f3354&pcPage=4.

organisations and individuals; and (iv) Other organizations and individuals related to the prevention of money laundering.[9]

When carrying out high value transactions, these subjects are required by law to report to the State Bank of Vietnam (SBV). The Prime Minister shall prescribe the value rate of high value transactions that must be reported in line with the state of the nation's social and economic growth in each period of time. Additionally, the aforementioned parties are required to notify the SBV whenever there are suspicions or good reason to believe that the property included in the transaction was obtained through illegal means or is connected to money laundering. The typical suspicious signs include: (i) The client provides inaccurate, insufficient, and inconsistent client identification information; (ii) There was a sudden change in the account's transaction turnover; (iii) Money was deposited into and withdrawn from accounts quickly; (iv) The client frequently exchanges small denominations of currency for larger denominations.[10]

2.2 The Criminal Code of 2015, amended in 2017

Recommendation 3 of the 40 FATF recommendations on AML/CFT mandates that countries criminalise money laundering in accordance with the obligations outlined in the 1988 United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances and the 2000 United Nations Convention against Transnational Organized Crime. Definitions of these two treaties on money laundering, proceedings of crime, and predicate offences have become worldwide norms.[11]

According to Article 324 of the Vietnamese Criminal Code of 2015, amended in 2017, the following acts will be punished as money laundering crimes: (i) Directly or indirectly participating in financial transactions, banking transactions, or other transactions to conceal the illegal origin of money or property obtained through the offender's commission of a crime, or obtained through another person's commission of a crime with the offender's knowledge; (ii) Using money or property obtained through the offender's commission of a crime or obtained through another person's commission of a crime with the offender's knowledge of doing business or other activities; (iii) Concealing information about the true origin, nature, location, movement, or ownership of money or property obtained through the offender or commission of a crime or obtained through another person's commission of a crime with the offender's knowledge, or obstructing the verification of such information; and (iv) Committing any of the offences specified in points (a) through (c) of this clause

[9] National Assembly: "The Law on Anti-money laundering No. 07/2012/QH13," Article 2., 2012, https://www.economica.vn/Portals/0/Documents/H68T22321452588666.pdf.
[10] Article 22 of the Law on AML, 2012.
[11] Thu Thi Hoai Tran and Gregory L. Rose, "The legal framework for prosecution of money laundering offences in Vietnam," *Australian Journal of Asian Law* 22, no. 1 (2022): 35.

while knowing that the money or property is obtained through transfer or conversion.[12]

These above offences are punishable by one to five years in jail.[13] The penalty will be between five and ten years in prison if: (i) The offence is committed by an organized group; (ii) The offender misuses his/her position or power to commit the offence; (iii) The offence has been committed more than once; (iv) The offence is committed in a professional manner; (v) The offence involves deceitful methods; (vi) The illegal money or property is assessed from VND 200,000,000 to VND 500,000,000; (vii) The illegal profit earned is from VND 50,000,000 to VND 100,000,000; and (viii) Dangerous recidivism.[14] This offence committed in any of the following circumstances carries a penalty of 10 - 15 years' imprisonment: (i) The illegal money or property is assessed at ≥ VND 500,000,000; (ii) The illegal profit earned is ≥ VND 100,000,000; (iii) The offence has a negative impact on security of the national currency or finance system.[15] Preparatory acts to the commission of a money laundering offence are penalised by imprisonment ranging from 6 to 36 months.[16] A corporate legal entity that violates any of the provisions of this article will be punished by a maximum fine of VND 20,000,000,000 or by having its operations suspended for a period of one to three years.

Furthermore, Resolution No. 03/2019/NQ-HDTP dated 24 May 2019, issued by the Supreme People's Court on establishing guidelines for Article 324 of the Criminal Code explains some terms, crime determination circumstances, penalty determination circumstances pertaining to money laundering crime. The Resolution became effective on 7 July, 2019. Accordingly, "money laundering" subject to penalty consists of Vietnam currency, any foreign currency; cash or money in an account. The term "predicate offence" refers to the crimes specified in the Criminal Code, and the property earned through such crimes is subject to money laundering charges such as murder; intentionally inflicting injury or harm to the health of other persons; human trafficking, corruption. Predicate crimes can be committed by Vietnamese nationals, Vietnamese commercial entities, stateless people residing continuously within or outside the borders of the Socialist Republic of Vietnam. The prosecution of criminal liability for money laundering might occur concurrently with the criminal prosecution of the predicate crimes.[17] The Resolution is a positive step toward providing law enforcement authorities with advice and clarity regarding the application of AML legislation.

[12] National Assembly, Law No. 100/2015/QH13, The Criminal Code, Article 324, 2015.
[13] Clause 1 of the Article 324, the Criminal Code 2015.
[14] Clause 2 of the Article 324, the Criminal Code 2015.
[15] Clause 3 of the Article 324, the Criminal Code 2015.
[16] Clause 4 of the Article 324, the Criminal Code 2015.
[17] Supreme People's Court, Resolution No. 03/2019/NQ-HDTP - Guiding the application of Article 324 of the Criminal Code on money laundering. https://vbpq.toaan.gov.vn/webcenter/portal/htvb/chitiet?dDocName=TAND071208&Keyword=.

3. The practice and challenges in the implementation of preventive measures

National Risk Assessment on Money Laundering and Terrorist Financing (NRA), completed in April 2019, was Vietnam's first formal money laundering and terrorist financing risk assessment. The task was accomplished under the collaboration of a group of sixteen ministries and agencies. Overall, the NRA issued a medium-high money laundering risk rating and a low terrorist financing risk rating.[18] The NRA evaluates the threats posed by the proceedings of seventeen predicate offences and foreign criminal proceedings. Corruption, illegal gaming, drug trafficking, tax evasion, wildlife trafficking, fraud, currency and goods smuggling, and human trafficking were identified as the greatest risks. The NRA serves as a foundation for Vietnam's understanding of its money laundering, and terrorist financing risks.

The following table shows the level of risk for specific economic sectors according to NRA:

Sectors	Money laundering threat	Money laundering Vulnerability	Risk of Money laundering
Banking	High	Medium High	High
Insurance	Medium Low	Low	Medium Low
Securities	Medium	Medium	Medium
Real Estate	High	Medium	Medium High
Accountants and Auditors	Low	Low	Low
Precious metals and stones	Low	Medium	Medium Low
Casino	Medium	Medium	Medium
Trust and Company service Provider	Low	Medium Low	Medium Low
Lawyer, Notaries and other Independent Legal Experts	Low	Low	Low
People Credit Funds	Low	Low	Low
Pawnshops	Low	Medium	Medium Low
Micro Finance Institution	Low	Low	Low
Foreign currency remittance company	Medium High	Medium	Medium High
Local development investment funds	Low	Medium High	Medium Low
Underground remittance	High	High	High

Source: Vietnam's National Risk Assessment on Money Laundering and Terrorist Financing (2019)

[18] Vietnam Government, National Risk Assessment Report, 2019, https://www.sbv.gov.vn/.

It can be seen from the table that the banking sector is among the most exposed to a high risk of money laundering.

The preventive measures are stipulated in Chapter 2 of the Law on AML, including the following (i) Clients identification and update of clients information; (ii) Responsibility for keeping of information, report and transfer of information on prevention of money laundering and (iii) Application of provisional measures and violation handling.

3.1 Client identification and update of client information

On the one hand, Article 8 of the Law on AML and Article 3 of Decree No.116/2013 detailing the implementation of a number of articles of the Law on AML require financial institutions to identify clients when: (i) Customers open an account or establish business relationships with a financial institution; (ii) Customers conduct occasional high value transactions or wire transfers but there is lack of information about the name, address, and account number of the originator. A designated occasional high value transaction is defined as a transaction involving a customer who does not hold an account with a financial institution or a customer who holds a current account but has not conducted a transaction in six months or more and the transaction value is at least VND 300,000,000 VND per day; (iii) there is a suspicion that the transaction or transaction-related parties are connected to money laundering activities; or (iv) there are suspicions about the accuracy or adequacy of customer identification information previously collected. In practice, however, there are no explicit requirements for financial institutions to conduct client identification measures when a single transaction is conducted as part of a series of operations that appear to be linked, or when money laundering is suspected in circumstances other than transactions, or when terrorist financing is suspected.[19] Although financial institutions are obligated to identify all customers using standard information for the various customer types and then they must verify identification through management agencies or other relevant authorities by using source information[20] these verification techniques are neither obligatory nor enforceable. In addition, financial institutions are not required to employ credible, independent source documents, data, or information when authenticating the identification of customers.

On the other hand, financial institutions are required to regularly update client identifying information to ensure that sufficient information is available

[19] APG, Anti-money laundering and counter-terrorist financing measures – Vietnam, Third Round Mutual Evaluation Report, APG, Sydney, 2021, https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/APG-Mutual-Evalutaion-Report-Vietnam-2022.pdf.

[20] Vietnamese Government, Decree 116/2013 Detailing the implementation of a number of articles of the Law on AML, Article 4, 2013, https://thuvienphapluat.vn/van-ban/Tien-te-Ngan-hang/Nghi-dinh-116-2013-ND-CP-huong-dan-Luat-phong-chong-rua-tien-209305.aspx.

about the customer at the time a commercial connection is established. Financial institutions are also required to ensure that customer transactions are compatible with information previously gathered, such as the customer's activities, risks, and sources of assets.[21] However, it is unclear what is meant by routinely updating customer identity information, since financial institutions are not required to update information on "high-risk" customers or conduct assessments of current records.[22]

3.2 Responsibility for keeping information, and report and transfer of information on prevention of money laundering

In term of keeping information, the Law on AML requires reporting entities to keep the records of identification, account documents and reports relating to only large value transactions, suspicious transactions, and wire transfers above thresholds set by the SBV.[23] for at least five years after the closure of the account or transaction or date of reporting.[24] However, there is no specific requirement for the keeping of all records collected from customer due diligence processes, and commercial correspondence. In addition, it is unclear whether this covers record-keeping of infrequent transactions that fall below the threshold of high value. Reporting entities must provide files, stored documents, and related information to the SBV and authorized state agencies on request.[25] However, according to the assessment made by APG, there is lack of requirement for reporting entities to provide these documents and information to authorized state agencies swiftly.

Reporting entities are also required to submit suspicious transaction reports to the SBV where they suspect that funds are derived from criminal activities or are related to money laundering. The SBV is responsible for receiving suspicious transaction reports related to terrorist financing.[26] Article 34 of the Law on Anti-Terrorism 2013 imposes an obligation on reporting entities to report to the Ministry of Public Security (MPS) and SBV when there is a suspicion that a customer or their transaction relates to terrorist financing or the customer is on a designated list regardless the amount of money transacted.[27]

[21] Article 10 of the Law on AML.
[22] APG, Anti-money laundering and counter-terrorist financing measures – Vietnam, Third Round Mutual Evaluation Report, APG, Sydney, 2021, https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/APG-Mutual-Evalutaion-Report-Vietnam-2022.pdf.
[23] Article 21, 22, 23 of the Law on AML.
[24] Article 27 of the Law on AML.
[25] Article 28 of the Law on AML.
[26] National Assembly, Law No. 28/2013/QH13, 2013 of on Anti-Terrorism, Article 45, 2013.
[27] Article 14 of Decree No. 116/2013.

3.3 Application of provisional measures and violation handling

According to Article 34 of the Law on AML, reporting entities have the authority to freeze accounts, apply sealing, or seize the assets of persons and legal entities at the request of competent authorities. The Law on AML, however, exclusively addresses account freezing. Article 23 of Decree No 116/2013 expands these powers to permit the sealing and seizing of other property. Clause 5 of Article 324 of the Criminal Code 2015 covers the confiscation of part or all the property of a person who has committed any money laundering offence.

4. The roles of the financial intelligence unit and related law enforcement agencies

4.1 Financial Intelligence Unit and anti-money laundering

Vietnam is exposed to a range of money laundering risks. Continuing economic expansion and diversification, increased international trade, and a lengthy land border all suggest that Vietnam's exposure to illicit funding is growing and will continue in the forthcoming years. Global Financial Integrity estimates that the combined value of illicit inflows into Vietnam and outflows from Vietnam in 2015 exceeded USD 9 billion.[28] The Financial Intelligence Unit (FIU) is one of the AML entities with the authority to collect, analyse, and transfer information to the appropriate authorities and agencies for use in prosecuting suspected offenders. This information is used to determine whether money laundering and/or its associated offences have been committed.[29]

The Vietnam Anti-Money Laundering Department (AMLD), a specialised national organisation tasked with collecting, examining, and disseminating information on suspicious transactions, was established in 2005 with the goal of actively participating in the global AML effort and building a transparent financial system in the domestic economy. The AMLD act as Vietnam's Financial Intelligence Unit (FIU).[30] Vietnam's FIU is stipulated as the sole body to receive and process the information concerning transactions and other information related to AML/CFT according to the Law on AML and the Law on Anti-Terrorism of 2013.[31] The responsibilities of AMLD include analysing

[28] https://gfintegrity.org/report/2019-iff-update/.

[29] E. E Mniwasa, "The financial intelligence unit and money laundering control in Tanzania: The law, potential and challenges," *Journal of Money Laundering Control* 22, no. 3 (2019): 543–562.

[30] Vietnamese Government, Decree No. 74/2005/ND-CP on Anti-money laundering, 2005, https://www.icj.org/wp-content/uploads/2005/06/Decree-No.74-2005-ND-CP-on-Prevention-and-Combat-of-Money-laundering.pdf.

[31] Article 14 of the Decree No.74/2005.

information and reports, requesting information and transferring information or case records to competent authorities.

The AMLD receives reports in both manual and electronic formats, with manual reporting being more widespread than electronic reporting, with the exception of commercial banks, who tend to report STRs online. However, manual reporting and the lack of integrated information technology tools to facilitate the analysis process cause difficulties for AMLD retrieval and analysis. As a result, this limits the ability of the AMLD to analyse and disseminate financial intelligence in relation to these sectors. While the real estate sector, remittance companies, and casinos face greater money laundering risks,[32] the number of STRs received are not commensurate with the level of money laundering risk in these sectors, resulting in no intelligence developed to support an increase in money laundering investigations.

In addition, the AMLD has not reconciled with international colleagues about money laundering. Consequently, AMLD analysis often excludes data gathered from overseas counterparts. In relation to terrorist financing, AMLD has disseminated 29 cases of financial intelligence dissemination to MPS between 2013 and 2019 based on terrorist financing-related matters reported by banks. These reports have not led to any investigations, prosecutions or convictions.[33]

4.2 Law enforcement agencies and anti-money laundering

Vietnam's legal system provides a range of powers and responsibilities for law enforcement agencies (LEAs) to investigate and prosecute money laundering offences.

MPS is the competent authority to investigate money laundering as the primary money laundering investigation agency. MPS is responsible for investigating all crimes, including money laundering, predicate offences and terrorist financing, except where those offences fall into the jurisdiction of the investigation authorities of the People's Army.[34] The Law on AML of 2012 designates MPS as responsible for presiding over and coordinating with other agencies, organisations and individuals concerned in the detection, investigation and handling of money laundering crimes.[35] There is a specialist investigative team, consisting of officers from the Anti-Terrorism Department and the Investigating Security Agency, which is also dedicated to investigating terrorist financing.

[32] Chat Nguyen Le, "The growing threat of money laundering to Vietnam: The necessary of intensive countermeasures," *Journal of Money Laundering Control* (2013): 321–332.

[33] Vietnam Government, National Risk Assessment Report, 2019, https://www.sbv.gov.vn/.

[34] National Assembly, Law No. 101/2015/QH13, Criminal Procedure Code 2015, Article 163.

[35] Article 38 of the Law on AML.

MPS is the largest recipient of the AMLD's intelligence dissemination. However, the number of ML cases is disproportionately low when compared with the financial intelligence provided by the AMLD. During 2014-2018, MPS received 349 cases comprising of 1,832 STRs from the AMLD.[36] Despite the enormous number of crimes in Vietnam that generate money, such as drug trafficking, corruption, and embezzling assets, as well as the considerable amount of financial intelligence products shared with the MPS, there have been relatively few money laundering investigations and prosecutions.. Only four money laundering investigations have been conducted in the last 10 years, and only three money laundering investigations have led to convictions as defined by Article 324 of the Criminal Code of 2015. The four money laundering investigations were related to smuggling, embezzlement, fraudulently appropriating property and organising gambling. However, there have been no money laundering investigations concerning drug trafficking, corruption and tax evasion as the predicate offence. There have been no cases that pursued money laundering as a stand-alone offence. This raises questions on the efficiency of Vietnam's AML enforcement measures.[37]

In terms of terrorist financing, the Vietnamese government assessed that the risk is low. Although the authorities admitted that rising globalisation and quick technical development may expose Vietnam to more terrorist financing risks in the future, Vietnam is mostly vulnerable to domestic terrorism from anti-Vietnamese government groups. The Homeland Security Department and Investigative Security Agency within the MPS are the designated counter-terrorism forces. They take the lead in coordination with related agencies in terrorism and terrorist financing investigation. Until now, there have been no prosecutions or convictions for terrorist financing offences in Vietnam. Nevertheless, there have been investigations, prosecutions and convictions for terrorism.

Several other organisations are in charge of carrying out some investigative tasks within their specific areas of responsibility.[38] These organisations include border-guard agencies, customs, forest protection offices, marine police agencies, fisheries surveillance, the People's Public Security Offices and People's Army offices. However, they must contact the MPS or the People's Army, depending on the jurisdiction, and transfer the case file to them within seven days for review if they discover money laundering or terrorist financing.

[36] Vietnam Government, National Risk Assessment Report, 2018, https://www.sbv.gov.vn/.
[37] Tran and Rose, "The legal framework for prosecution," 35.
[38] Article 164 of the Criminal Procedure Code, 2015.

5. Domestic and international cooperation in combating money laundering

The framework for national coordination and cooperation at a policy level is well structured. At an operational level, ministries and agencies regularly hold inter-ministerial meetings to discuss specific issues, such as meetings between LEAs (including SBV, Ministry of Finance, MPS, Supreme People's Procuracy, and Supreme People's Court) to accelerate the investigation, prosecution, and adjudication of money laundering offenses and predicate crimes. The SBV has responsibility for the coordination of the exchange of information between agencies during the investigation, prosecution and conviction of money laundering offences. The exchange of information is facilitated through individual memorandum of understanding (MOU) agreements between ministries and agencies. MOU's between relevant ministries and agencies include coordination principles, information exchange content, information exchange forms and terms, authorities exchanging information, responsibilities of parties and validity of the MOU. However, the process of exchanging information and communication with the LEAs is manual, which gives rise to delays in dissemination and concerns about data security. Whilst some protections are in place to secure the confidentiality of information, the exchange of information manually raises the risk of breaches of confidentiality and security of information and intelligence.[39]

Regarding international cooperation, with the proactive and active policy of international economic integration, Vietnam's bilateral, regional and global economic relations with other countries and international organizations are increasingly expanded. Vietnam is currently a member of international organisations such as the United Nations (UN), World Trade Organization, Association of Southeast Asian Nations (ASEAN), Asia-Europe Cooperation Forum (ASEM), Asia-Pacific Economic Cooperation Forum (APEC), World Bank, International Monetary Fund, Asian Development Bank and many more. Until December 2021, Vietnam established diplomatic ties with 189 countries: of which it has a "special relationship" with three countries; a "strategic partnership" with 17 countries; a "comprehensive partnership" with 13 countries, and promoting economic, trade and investment relations with 224 markets in all continents.[40]

Vietnam has signed and joined many international and regional treaties on combating crimes in general, and money laundering offenses and terrorist financing offenses in particular. Specifically, Vietnam has signed and joined the UN Conventions on AML/CFT including the Convention against Transnational

[39] APG, Anti-money laundering and counter-terrorist financing measures – Vietnam, Third Round Mutual Evaluation Report, APG, Sydney, 2021, https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/APG-Mutual-Evalutaion-Report-Vietnam-2022.pdf.

[40] https://thediplomat.com/2022/05/vietnams-growing-strategic-partnerships-with-european-countries/.

Organized Crime of 2000 (Palermo Convention) on 8 June 2012; Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (Vienna Convention) on 4 November 1997, International Convention for the Suppression of the Financing of Terrorism of 1999 on 25 September 2002, Convention Against Corruption of 2005 (Merida Convention) on 19 August 2009, ASEAN Convention on Counter-Terrorism of 2007, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children in 2000. Vietnam has also ratified all nine international conventions attached the 1999 International Convention for the Suppression of the Financing of Terrorism.

Vietnam became the 34th member of APG in May 2007. Vietnam is responsible for complying with FATF recommendations and completing its membership duties as a member of APG. Vietnam undertook an AML/CFT mutual evaluation in 2008 in accordance with FATF 40+9 Recommendations. Vietnam is now a member of the Egmont Group as an observer and has taken the necessary measures to seek for membership.

LEAs send their requests to the AMLD to request foreign counterparts to provide the required information. The exchange of information on AML/CFT with FIUs or AML foreign agencies has been strengthened through bilateral and multilateral MOUs. Basic information such as identity verification or legal status of a firm is processed via AMLD rather than direct access between LEAs, which demonstrates the challenges of other agencies to exchange information. There has been limited international cooperation to identify and exchange beneficial ownership information in relation to legal persons and no cooperation in relation to legal arrangements. Deficiencies in relation to transparency of beneficial ownership information may, in practice, impede the ability of competent authorities to provide formal or informal cooperation in this area.

6. Recommendation for the legal system and operational issues

There are some recommendations that could be taken to address the current inadequacies remaining in Vietnam's AM framework as follows:

Enhancing customer identification framework: The Law on AML stipulates that reporting entities are required to identify and record customer information based on valid transaction registration and other information provided by the customer such as phone number, email, address, beneficial owners and make sure that these pieces of information are accessible among related authorities.

Reducing cash transactions: Over recent years, the Vietnamese government has made efforts to limit cash transactions in the economy. In 2012, the government issued Decree No 101/2012/ND-CP and other guideline documents encouraging the use of banking accounts, non-cash payment services, and intermediary payment services. While cashless payments have seen a rapid increase in popularity in Vietnam, cash remains widely used and is experiencing a comeback as pandemic restrictions ease. The National Payment Corporation

of Vietnam reported that cashless transactions rose by 169 percent between 2020 and 2021. Global Payments Report reported that 58 percent of Vietnam's point-of-sale transactions were made in cash,[41] while data from the SBV found cash accounted for 11.35 percent of all payments nationwide as of April 2021.[42] The use of cash in transactions creates difficulties for LEAs in locating and identifying source of money. Therefore, it suggests that stronger laws and policies are needed to significantly reduce the rate of cash transactions in the economy.

Enhancing communication, information sharing, and financial intelligence between the AMLD and other LEAs to support their operational requirements. In order to prioritise financial investigations to produce evidence and track criminal proceedings related to money laundering, predicate offences, and terrorist financing, LEAs and other investigation authorities should improve the development and regular use of financial intelligence and other relevant information. This can be done both through LEAs' own processes and intelligence developed by AMLD. AMLD needs to gather enough financial data and give it over to LEAs. In accordance with Vietnam's risk profile, policies and programs should also be developed to increase awareness among all LEAs and related authorities and agencies about the importance of prioritising and carrying out money laundering investigations and prosecutions both in case of predicate offences and stand-alone money laundering.

7. Conclusion

The Vietnamese AMLCFT regime has witnessed a significant development in accordance with international standards. Vietnam has signed and joined many international and regional treaties on combating crimes in general, and money laundering offenses and terrorist financing offenses in particular. The framework is now mostly compliant with international standards despite some shortcomings. The paper has examined challenges in the practice and implementation of these regimes in Vietnam from the context of prevention, investigation, prosecution and conviction. Based on that, the paper suggested some legal policy reforms to better combat money laundering and terrorist financing issues.

[41] https://worldpay.globalpaymentsreport.com/en.

[42] https://www.findevgateway.org/news/vietnam-habits-using-cash-still-popular-despite-boom-cashless-payments.

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