

Introduction to the legal regulation of information society

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Regulation in the information society

This chapter deals with the theoretical and practical issues of the information society's legal regulation, with special regard to the Internet. Our textbook will reach readers in several member states of the European Union, so we shall refrain from discussing law at the national level. Our aim is for the readers to understand the principles of legal development of the European Union and the global regulatory policy defining the regulatory framework, and for them to be able to develop their own view of the various issues.

I. What does legal regulation of information society mean?

In a broader sense, legal regulation of information society, also known as **information society law** means all those regulated interactions that may arise in an information society. If we accept that our current society is an information society, then we could say that all laws, judicial decisions, **self-regulation** and social norms are part of the legal material of the information society, which might in effect embrace the complete legal system.

However, we use the expression information society law in a narrower sense, referring to the rules regulating the social relations and technological capabilities now founded on modern communications networks. Within information society law, the reader often comes across the expression *Internet law* as a special area. This is deceptive, however, for it implies that there is regulation which differs from other legal relations, and only encompasses the rules regulating the Internet. It is better to talk about information society law, a sub-area of which is the regulation of legal transactions on the Internet.

Information society law encompasses, among others, questions of accessibility, intellectual property rights, personal data protection, freedom of speech, electronic commerce, press law, certain types of computer crime, electronic signature, as well as questions concerning the jurisdiction of international law. *While criminal law, constitutional law or civil law are sub-areas with unique regulatory arrangements and principles, the rights of the information society are horizontally interwoven through the vertical legal system.*

When we talk about the system of norms and rules regulating the information society, we cannot disregard the fact that our society is rapidly changing. The objective of the rule of law and legal systems is stability, consequently, they are only able to regulate, with due circumspection, actual circumstances that occur en masse. Accordingly, there are two possible methods of regulation: legislators either try to regulate in advance the expected life conditions, through **ex-ante** regulation, or wait for the processes to develop and regulate afterwards, which is called **ex-post** regulation.

In the case of legal relations within the information society, *ex ante* regulation is only possible in a very limited sphere, due to the rapid change of technical solutions. *Ex ante* regulation creates a clear and transparent situation, but can easily become an obstacle in the way of development, since it tries to regulate unknown situations with regulatory devices. In the case of *ex post* regulation, legislators react to real demands. As long as the market regulates itself properly, the legislator does not intervene. Ideally, even at the moment of intervention, the legislator intervenes only to the extent which is absolutely necessary. Beside the rules created and sanctioned by the legislative bodies, the self-regulation of market participants is also significant. By **self-regulation**, we mean the independent systems of rules of the various sectors of business life, like the chambers of trade and industry with regard to the legislative instruments. The system of rules created by the mar-

ket participants can adapt more flexibly to the rapid changes of the information society. These self-regulating mechanisms can serve as an indication for the legislator. Wherever the market is able to regulate itself, there is no need for state intervention. A good example of this is the distribution of *domain* names¹. Due to the global nature of the network, the tasks connected to the distribution and maintenance of domain names must be regulated on an international level. Self-regulation was responsible for this task from the start.² The Directives of the European Union and other documents underline the importance of self-regulation³.

2. The need for regulation

As the information society gained ground, social structures underwent a transformation as well:⁴ the Internet transformed the dimensions of communication, of business and the functioning of the state. In the 1980's the Internet was used mainly in the academic sphere, and use of the network required quite a lot of technical knowledge. The great breakthrough came with the *World Wide Web* in 1992.⁵ Use of the network became easily accessible to everyone and soon enough, commercial and administrative contents appeared, and at the same time, the need to regulate the Internet emerged in the world of business and in the mind of the regulator.

The response to the need for regulation was to raise two concerns. The first question was: is it necessary, or indeed possible to regulate the Internet? The second was: if intervention with regulatory means is possible and necessary, in what form should it be implemented?

The main arguments around the possibility of regulation centred on how to ensure controllability in the case of a decentralized network over which no single state has exclusive jurisdiction? At first, it was impossible to tell which of the theories concerning Internet regulation would finally win. The way we think of the Internet is constantly changing, as is discussion about it. New theories emerge all the time, arguments are settled, and others take their place. Kuhn's conception regarding the paradigm change of scientific theories may be applied to this process; namely that several theories simultaneously compete with one another until one of them wins. When one of the new theories is accepted as normative by those working in that field of science, we talk about a change of paradigm.⁶ The rival theories regarding the regulation of information society can be divided into three groups (Kuhn, 1996).

¹ The *domain* name is a technical identification made up of alphanumerical characters, which is used in Internet communication instead of the essential IP-addresses, primarily because it is easier to remember.

² In certain countries (e.g. Finland and Spain) the delegation of the ccTLD country code is performed by state-level organisations.

³ Certain sub-areas of electronic commerce and content regulation are typical examples.

⁴ In their work entitled "Law and the Internet: A Framework for Electronic Commerce", Terrett and Monaghan compare the legal relations of the Internet to the development of 17th century English commercial law. In the 17th century, a whole series of laws and legal cases ensured the rules of legal relations regarding commerce. However, with the discovery of new continents and the development of new forms of commerce, new institutions and banks were created. Both the volume of commerce and the speed of transactions increased. Consequently, the shortcomings of the regulation system became evident. Legislators had to find answers to the old and the new social conditions, either by insisting on the application of accepted rules, which would have meant decreasing the importance of the new conditions, or by changing the regulation and introducing a system of norms appropriate to the new life situations. Compared to the changes in 17th century England, the difference is that it is not certain countries, but all countries that have to face new challenges concerning the Internet.

⁵ The *World Wide Web* differs from the Internet in that the Internet is the network of networks, connecting millions of computers and making communication between them possible, while the *web* interconnects hypertext documents via the Internet. Thus, the *World Wide Web* is a system of information distribution based on the Internet.

⁶ Such was the "Copernican turn" or the theory of relativity. During the period of rivalry prior to the change of paradigm, the disputing partners do not share common ground; a certain communication disorder develops between them, which can be remedied, although with difficulty. Followers of the competing paradigms regard different phenomena as similar, and categorise them differently.

The myth of the legal vacuum

According to the myth of the legal vacuum⁷, the fact that no single state has *exclusive* jurisdiction over the Internet means that *no state* has jurisdiction over the Internet at all. This point of view is held not only by those who are not familiar with technology and the Internet, but also by the community of Internet users. The myth of the legal vacuum rejected state intervention and regarded the Internet as a space where only the users could determine the system of regulation, and where no state could reach it⁸. Adherents of this regulatory view argue that the only way of regulating the Internet is to follow “netiquette”, the ethical norm system developed by the users themselves, and no state or international organisation may regulate the space developed by the users.

Special regulatory space

The theories of the second group regard the Internet as a special kind of regulatory object. Those that promote these theories argue for the development of a regulatory system which addresses the questions of freedom of speech, anonymity and electronic commerce as an issue of Internet law. The wish to create the Internet’s own laws can be traced back to the myth of the legal vacuum. This theory considers the Internet as a sovereign state that exists on the networks, irrespective of the physical place of the computers and users. The need for the creation of Internet law gained ground when problems of law enforcement arose.

Integrated regulation

The third group consists of representatives of the victorious paradigm, who did not try to separate the legal relations of the Internet from the existing social structures, but considered them as an integral part of the latter. It is here that the theories regarding the regulation of the net – resolved by a minor or major adaptation of the existing legal system – can be grouped.

When an ample number of problematic real life circumstances had developed on the internet, it became clear that the internet cannot be excluded from the existing criminal law and civil law legal relations. Today it has become evident that the Internet is not so very different from our existing world. People buy books on the Internet, advertisers advertise and users have conversations or simply read newspapers, hence many laws created decades ago can also be applied to the Internet.

3. Recommendations for regulation

Regulation of the Internet is different in each country, because of local political, social and cultural attitudes and because legislators transpose into the world of the Internet legal terminology and basic values created prior to its appearance.

Advancing this argument, David Johnson and David Post, in their article “Law and Borders: The Rise of Law in Cyberspace” (Johnson – Post, 1996), suggest a solution through the self-regulation of Internet users, in preference to adopting the legal systems of particular countries. According to their argument the Internet should be regarded as a sovereign state where user names and e-mail addresses create life, instead of the reality of physical life.

⁷ This theory was decisive in the 1990’s.

⁸ John Perry Barlow formulated the Declaration of the Independence of Cyberspace in 1996. The declaration states: “We have no elected government, nor are we likely to have one... I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear... Governments derive their just powers from the consent of the governed. You have neither solicited nor received ours... Cyberspace does not lie within your borders.”.

Logically, the suggestions that urge the creation of a common, supranational regulatory authority can be traced back to this theory. In his book entitled “*The Law of Cyber-Space*” (Kamal, 2005) Ahmad Kamal argues that global dialogues should be initiated in the interest of comprehensive and concerted legal regulation. The solution according to Kamal, is the creation of international agreements, based on the consolidation of different legal systems and accepted by everyone. Kamal compares the legal regulation of the Internet to the problems faced in dealing with the high seas, where the absence of international legislation created a vacuum. The international community finally started negotiations on the Law of the Sea and did finally succeed.

“The challenge is far greater. The speed of change is phenomenal, the dangers affect all countries without exception, new shoals and icebergs appear every day, and global responses are sporadic or non-existent. There can be no doubt whatsoever that a globally negotiated and comprehensive Law of Cyber-Space is essential.”⁹ Kamal argues that this can only be realized efficiently by a supranational organisation.

The authors who tried to create Internet regulation by opposing the myth of legal vacuum primarily stressed the counter-arguments. According to Christopher Reed, all the operators of internet legal relations (the user, the internet service provider, the content service provider, etc.) exist in the real world and fall within some kind of jurisdiction: The network and the computers exist physically, consequently, they also fall within some kind of jurisdiction. “In reality, the Internet is not deregulated, it is one of the most regulated spaces of the world, and due to the fact that it can be reached from anywhere, it is actually covered by all jurisdictions.” (Reed, 2000).

Among those arguing for integrated regulation, Lawrence Lessig distinguishes four regulatory solutions: *i*) Legal regulation, which means, by analogy, the appropriate application of earlier regulatory systems. This includes laws, and in common law, case law as well. *ii*) The second type is regulation through the system architecture. This means the rules emerging through hardware and software technology, i.e. through standards and protocols defined in the course of developing the architecture of the Internet, and enabling operation. These are, among others, the application of IP addresses, with which every user becomes easily identifiable.¹⁰ Thus, regulation of architecture creates system operational conditions irrespective of legal regulation. *iii*) The third type consists of those social norms which similarly to other social interactions regulate the operation of the Internet. (Some typical norm systems that have developed in the course of social coexistence: we say hello when we meet someone, during an argument we listen to the other party, etc.). *iv*) The fourth type of regulation is the regulating mechanism of the market. The laws of supply and demand in the Internet marketplace are partly similar to those of other markets, while new market behaviours have also been introduced (Lessig, 1999). The significance of Lessig’s theory lies in that he did not aim to create a new regulation system, instead he systematized and ordered the operational mechanism of the Internet into a new system.

4. The object of regulation

Social scientific literature normally distinguishes between four theories explaining the reasons for state intervention into market processes by regulation:

- *Failing market*: when the market is unable to change certain structural problems (lack of competition, monopolies, asymmetrical legal relationships: typically in the field of consumer protection, etc.).
- *Public interest*: when the state intervenes to protect the public interest.

⁹ If we examine this argument properly, we can establish that the Internet appears as a source of danger, and this is what lies behind Kamal’s need for regulation.

¹⁰ Every computer that connects to the Internet receives an IP-address. Computers use this formula in the course of communicating with each other. There cannot be two identical IP-addresses on the network: this guarantees that any two distant computers can contact each other. This also means that anyone can immediately be identified in the course of Internet transactions.

- *Individual interest*: when the aim of regulation is for the state to regulate market conditions in the interest of certain participants (for example by preventing competitors from entering the market).
- *Life cycle*: during the initial phase regulation serves the public interest, which later becomes the individual interest of certain market participants. It is in order to restore these structural shifts of interest that intervention takes place again and again.

Solutions for internet regulation can be divided into two broad groups: one of them is the group of rules regulating internet access and primarily concerning infrastructure; the other is the regulatory system concerning questions of content appearing on the internet. The first group includes communications rules, technical questions regarding access, and the complete or partial restriction (**internet filtering**) of Internet access, which may occur for political or other reasons.¹¹ The regulatory system belonging to the second group can be divided into several fields. The limits of this chapter do not permit us to deal with all the regulatory forms pertaining to the Internet; therefore, we shall deal only with the legal system belonging to the second group, and only with certain sub-areas of it. We shall focus on the content regulation and information rights.

Regarding questions of content regulation it is important to note that the laws regulating internet activities, the self-regulating mechanisms of the market, and social norms are not necessarily special, or rather, they are novelties in certain respects only. Imagine that if a libellous statement about someone appears in the printed press or on television, the aggrieved party may successfully demand compensation. If the same thing appears on the Internet, then the rules of libel, as are the rules of compensation are applicable. The problem is it was published in another country, or the given homepage can be found on a server in a different country. If we take it into consideration, we can affirm that the situation is similar even if the infringement was committed in a paper published in another country or on a television programme broadcast from another country.

The main problem in connection with the internet is not that completely new rules have to be created but rather how the legal authority should be determined, and how the rules can be enforced. The existing legal regulation regarding international commerce, taxation, copyright issues, contracting and penal offences are similar in democratic nations and are defined in international agreements.

5. Questions of jurisdiction

The notion of national sovereignty formed the basis of the creation and adoption of legal systems. One of the controversial issues in connection with the regulation of the Internet is to what extent we need to abandon the notion of national sovereignty with the disappearance of borders.

One of the most famous examples was the *Yahoo!* case. On the homepage of the American-based Yahoo!, users were uploading Nazi memorabilia for auction, and because of this two French organisations (LICRA and UEJF) filed a suit against them in 2000, saying that the distribution of Nazi relics put up for sale on the *Yahoo!* auctions was a violation of French law. In its judgement the French Supreme Court declared that *Yahoo!* was to develop a filtering system which excluded French internet users from auctions of Nazi relics, failing which it would have to pay one hundred thousand Francs a day in fines. Although *Yahoo!* changed its auctioneering practice, it refused to acknowledge the judgement and asked the Court of California to establish that a judgement made in France is not enforceable for an American-based company. In 2001, the American court declared that *Yahoo!* was not obliged to observe the French judgement regarding restriction of content:

¹¹ Up to the end of the 1980's, communications services were provided by the government or the public sphere everywhere except in the United States. The result of privatisation starting in the 1980's (in the 1990's in the post-communist countries) was that the communications systems, which were no longer owned by the state, deemed the creation of some kind of legislation necessary, so as to be able to ensure proper service. With the end of monopolies, regulation continued to develop and extend to issues of competition law and consumer protection.

American laws apply to websites that are operated from America, and according to the First Amendment¹² to the American Constitution, the owner has a right to freedom of speech, and judgements of foreign courts cannot be executed. The American Court of Appeal reached the same decision in 2005. Naturally, the judgement applies only to the American *Yahoo!*, its French subsidiary is obliged to comply with French laws and the judgement of the French court.¹³

¹² Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances (1791).

¹³ The judgement exemplifies that in the event of a debate, national courts strive for the acknowledgement of their own jurisdiction.

Regulatory fields relating to information society

As we have already said, the legal material concerning information society is interwoven into our legal system horizontally. The rules related to information society are enshrined to a greater or lesser extent in the several areas of law. We cannot discuss all the regulatory issues of information society but the reader can review the list of recommended scientific literature for further reading in order to gain in-depth knowledge of the various areas of law.¹⁴ As in any regulatory domain, the legal content concerning information society can be grouped according to the system of law.¹⁵ There are two distinct groups: the laws organising legal relations between the state and its citizens, and between the various state or public organisations (called public law), and the laws organising legal relations between citizens and partnerships, and between members of civil society (civil law). Differentiation is based on the relationship between those involved. While in the first case we can speak of an unequal legal relation based on subordination and superiority, in civil law the typical legal relation is one of equality and coordination.

In the continental legal system, we can distinguish between four main categories: (i) civil law, (ii) criminal law (iii) administrative law, and (iv) constitutional law.

(i) Civil law regulates the property personal and family relations of natural and legal persons in cases where the partners are equal and state intervention, except for legislation, occurs only in the event of a legal dispute. The most important areas affecting information society are as follows:

- e-commerce,¹⁶
- digital signature,¹⁷
- content regulation;¹⁸
- protection of copyright and industrial property rights,¹⁹
- media law,²⁰
- competition law.²¹

¹⁴ See list of recommended readings.

¹⁵ In this chapter we specifically deal with the regulatory instruments created by legislative bodies, we shall refrain from introducing the rules of technology, the market and society. Beside each topic we shall also enumerate the relevant directives of the European Union.

¹⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

¹⁷ Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures

¹⁸ Decision No 456/2005/EC of the European Parliament and of the Council of 9 March 2005 establishing a multiannual Community programme to make digital content in Europe more accessible, usable and exploitable (Text with EEA relevance).

¹⁹ Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, Council Directive 92/100/EEC of 19 November 1992 on rental rights and lending rights and on certain rights related to copyright in the field of intellectual property, Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, Council Directive 93/98/EEC of 29 October 1993 harmonizing the terms of protection of copyright and certain related rights, Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, Corrigendum to Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167 of 22.6.2001), Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Text with EEA relevance).

²⁰ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

²¹ Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (Text with EEA relevance).

(ii) *Criminal law* regulates acts that are a danger to society. We can group all those acts committed with²² or against IT technology which are dangerous for society and for which the law orders the sanction of punishment. Legal regulation of information society is primarily concerned with the following categories of crime:²³

- misuse of personal data,²⁴
- content-related crimes (e.g. distribution of child pornography, hate speech, etc.),²⁵
- crimes against computer systems and data,²⁶
- infringement of copyright.²⁷

(iii) *Administrative law* is the regulatory system of state functions. State administration extends beyond central government and local government to larger systems; for example the operation of transport, security, military and information systems. The following functions essential to information society belong to this group:

- electronic administration,²⁸
- electronic register of companies,²⁹
- administrative procedure,
- electronic public procurement.³⁰

(iv) The fourth field is *constitutional law*, which arose out of continental legal development. The object of regulation is to the structure relations between the citizens and the state and the organisational structure of the state. The constitution is the document describing basic rights, responsibilities and procedures thus creating the basis for the process governing political, economic and social life. Areas of constitutional law related to the information society are as follows:

- electronic freedom of information,³¹
- personal data protection,³²

²² Of course, not every crime committed with a computer can be listed as being specifically part of information society's area of law, for if this were the case, grievous bodily harm caused by a computer would, *ad absurdum*, belong here.

²³ Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems.

²⁴ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

²⁵ Amended proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities ("Audiovisual media services without frontiers"), Opinion of the European Economic and Social Committee on the 'Proposal for a Decision of the European Parliament and of the Council on establishing a multiannual Community programme on promoting safer use of the internet and new online technologies'(COM(2004) 91 final — 2004/0023 (COD)), Council Decision of 29 May 2000 to combat child pornography on the Internet.

²⁶ Convention of the Council of Europe concerning cyber crime, COM(2000) 890 *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee of the Regions Creating a Safer Information Society by Improving the Security of Information Infrastructures and Combating Computer-related Crime*.

²⁷ See remarks on copyright.

²⁸ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - i2010 eGovernment Action Plan - Accelerating eGovernment in Europe for the Benefit of All {SEC(2006) 511}.

²⁹ Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies.

³⁰ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Action plan for the implementation of the legal framework for electronic public procurement {SEC(2004)1639}/* COM/2004/0841 final *//, Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

³¹ Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information.

³² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), Implementing rules relating to Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data — Bureau decision of 22 June 2005.

- freedom of the press and freedom of expression.³³

³³ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

Introduction to some special legal areas

The next part of this chapter will present three areas of regulation, the aim of which is to describe three fundamentally different models. Since the regulation of the audiovisual media concerns the content-related issues of regulation, it serves as an accurate illustration showing the significance of self regulation and co-regulation that exist in addition to state regulation. Within information rights personal data protection in the EU is regulated in detail and the most important rules of regulation with regard to accessing public data are applied at national level.

I. Regulation of audiovisual media services

In the discussion of regulations with regard to the content-related issues of the information society it is important to keep in mind that it is not only communication via the Internet that forms part of the subject but also television and radio. *Technological innovations and converging platforms are making it clear that regulation should be introduced independent of the various platforms:* services provided by interactive television, IP TV and even YouTube and Joost represent frontiers where the various regulatory models run into one another. Audiovisual policy is linked to several other EU legislative areas such as competition law, telecommunication law, as well as the regulation of e-commerce and consumer protection.

The regulation of television and that of the Internet were implemented along different principles. The scarcity of resources is one of the fundamental reasons why the state can interfere in the freedom of the media. While a newspaper and a homepage can be launched relatively easily and with a smaller investment, the availability of frequencies determines the number of television channels and radio stations that can be launched. However, the digital changeover and the appearance of new platforms will significantly alleviate the shortage of resources. Therefore, the level of regulation in the case of Internet content provision is lower than that of television broadcasting.

The European Commission's audiovisual policies include issues pertaining to television programmes, films and *online* content provision but do not cover radio broadcasting and the printed media.

A whole range of documents, some obligatory and some discretionary, have been issued in the EU with regard to digital media. The Commission's communication COM (1999) 657 entitled "Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age" lays down six basic principles of regulation: the principle of proportionality, separation of transport and content regulation, the protection of general interest, recognition of the role of public service broadcasting and the need for transparency in its financing, self-regulation and the activities of independent authorities.

The two most important documents, forming the backbone of media regulation and within that the regulation of television broadcasting are the European Convention on Transfrontier Television and the proposed Audiovisual Media Services Directive amending the Television without Frontiers Directive and expected to take effect at the end of 2007. Within the requirements with regard to the content and structure of programmes this Directive will address the quota system of European works, the broadcasting of highlighted events, the principle of the country of origin, the protection of minors and the prohibition of hate speech as well as advertising regulation.

The reality of converging services and platforms have led EU legislators onto a new path of regulation. The review of the Directive is expected to have a significant impact on *online* media, too. The basis of the new regulatory framework is that the EU will create a common “minimum regulation” with regard to **linear** and **on-demand services** (non-linear services), while stricter rules will continue to be applied in the case of linear services.

Regulation at the Directive level only sets up the regulatory framework which is then to be filled with content by each member state obliged to formulate concrete media market regulations. At the same time, the Directive and the non-obligatory EU documents also attribute great significance to the self-regulation of market players as well as the co-regulation of the authorities and the market.

The European Commission emphasises that the regulation to be carried out should be decided upon only after a careful analysis: “in particular whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation or self regulation should be considered. [...] Member States should, in accordance with their different legal traditions, recognise the role which effective self-regulation can play as a complement to the legislation and judicial and/or administrative mechanisms in place and its useful contribution to the achievement of the objectives of this Directive.”³⁴

Flexible co-regulatory and self regulatory mechanisms may play an important role in the regulatory framework in line with the various legal, cultural and social traditions of the member states; therefore, several references are made to their significance in the audiovisual media regulation directive.

2. Information rights

Information rights include both personal data protection, also known as the protection of privacy,³⁵ and ensuring access to public data, also known as freedom of information. The protection of privacy and freedom of information represent the two sides of the same law: while the protection of personal rights ensures the inviolability of citizens by the state, freedom of information ensures the transparency of the state for the citizens. This section will first look at personal data protection and then freedom of information and within that the freedom of electronic information.

Personal data protection

Personal data protection in the information society poses new problems for those dealing with legislation and jurisdiction alike. The *scope of personal data increased* due to the operational features of the network, and the *number of controllers* has also risen to a significant degree; furthermore, new ways of data collection and storage have emerged.

The increasing *scope of personal data* results from the special features of network operation; ID numbers and various traffic data related to communication, e-mail addresses, IP addresses, and user names, might constitute personal data. The increase in the number of *controllers* is due to the network operation: the access, Internet and content providers all process personal data.

³⁴ COM(2007) 170 final.

³⁵ The protection of the private sphere means the protection of *privacy* in the Anglo-Saxon legal systems and the protection of personal data in the continental systems of law.

Regulation with regard to personal data protection in the area of telecommunication and the information society began in the EU at the end of the 1990s.³⁶ The foundation of EU regulation on personal data protection is provided by “Directive 95/46 EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data”. This Directive established the minimum standards of personal data protection within the EU, this being higher than that in the United States³⁷ and most of the non-EU countries. However, this prescribed minimum level of security does not limit member states’ freedom to adopt stricter regulations than those laid down in the directive.

The Directive includes the most important definitions relating to personal data protection, regulations relating to automated technical data processing and data quality, principles requiring authority to give information to the data subject, the data subject’s right to object and principles relating to the transfer of data to foreign countries.

According to the regulations of the Directive, data may be transmitted to areas outside the European Union only when the level of protection in that country reaches the EU level or if the data subject has given their explicit consent. The purpose of this provision is to ensure that the personal data of EU citizens will not be abused abroad.

As regards the information society, work on sectoral data protection regulations started at the end of the 1990s. “Directive 97/66/EC of the European Parliament and of the Council of 15 of December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector” is of outstanding significance. This Directive is to be applied in the area of services related to the information society. The Directive concerning data protection and electronic communications was adopted as a sectoral regulation in 2002.³⁸

The European legislation has seen progress in recent years. In accordance with the fight against terrorism and to ensure national security, elements pertaining to security policy entered legislation, opening up the previously closed data protection system and thus creating the opportunity for the wide range storing, preserving, and transferring personal data in the investigation of serious criminal acts.³⁹

Freedom of information

Freedom of information ensures the transparency of the state for its citizens.⁴⁰ It provides the opportunity for citizens to access information about the activities of the state and to become familiar with data of public interest, thus ensuring the transparency of the state.⁴¹ Regulations in regard to the freedom of information

³⁶ Prior to this, in 1980, the OECD (*Organization for Economic Cooperation and Development*) Guidelines on the Protection of Privacy and Transborder Flows of Personal Data were adopted, see http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html.

³⁷ In the United States there is no normative data protection system at the federal level that establishes data protection guarantees in the business sector like the ones in the EU.

³⁸ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data in the electronic communications sector (Directive on privacy and electronic communications).

³⁹ Directive 2006/24/EC of the European Parliament and of the Council amended Directive 2002/58/EC on the provision of publicly available electronic communications services as well as the keeping and modifying of data produced or processed within public communications network services. The object of the new directive is to harmonise the provisions of the member states with regard to the data retention responsibilities of the providers of publicly available electronic communications services and to the providers of public communications networks, and to ensure that communications turnover data be made available for the investigation, uncovering and prosecution of severe criminal acts as defined by the national law of member states.

⁴⁰ Freedom of information is usually not a civic liberty. Therefore, everyone can exercise it, regardless of their citizenship status.

⁴¹ The fundamental ideas of information freedom, which ensure the transparency of the state, can be traced back to the period of the Enlightenment. It was first in Sweden that an act on the freedom of the press furnished the right for every Swedish citizen to access official documents. The Act was adopted in Sweden 1776, not long before The Declaration of the Rights of Man and of the Citizen adopted during the French Revolution, which proclaimed that “citizens are entitled to examine the necessity of all public expenses, in person or through their representatives, give their consent and check the way these expenses are used.”

differ from that of personal data protection: there are no EU directives specifically providing for the access of public data by electronic means; however, several member states regulate this issue at national level.

International legal documents ensuring the transparency of the state after World War II defined the right to the freedom of information within the scope of the freedom of expression. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights all lay down the right to become familiar with and disseminate information and ideas. At the same time, some states ensured the freedom of information in their national rules of law⁴². In former socialist countries access to public data and the transparency of governments appeared in the national level legislation only after the change in their respective political systems.⁴³

The information society has changed the ways in which the right to freedom of information is exercised. With the emergence of the network environment the activities of the government can become far more transparent than ever before. *It is generally true about the information society that fundamental rights can be exercised on a much wider scale than before.* This is particularly true for the freedom of information. Governmental organisations, courts and public administration can easily make the data relating to their management, activities and staff accessible on their homepages. Regulations arranged in databases can be easily searched, and communication with administrative organs can take place electronically, for example if someone needs to receive data or wishes to arrange other administrative affairs.

A series of state measures are necessary in order to ensure the protection of the electronic freedom of information. In order to ensure the freedom of information the state is obliged to work with those organisations processing administrative data and other data of public interest so that such data are reliably electronically accessible. Thus, on the one hand, the freedom of electronic information means making data accessible. This is similar to posting information relating to cases of public interest on public notice boards in the past. The advantage now is that such information can be easily accessed via the Internet by anyone regardless of their place of residence. On the other hand, it means that if anyone wants to find special types of information, they should be able to inquire about them by electronic means and require such data. Electronic freedom of information not only provides new ways of accessing public data but is also a means to speed the process of democratisation and to facilitate the exercise of individual rights. However, the right to access information is not unlimited. The state must have secrets, and how such information is temporarily classified does not damage fundamental rights since it serves the wider public interest (for example, national security, criminal prosecution, etc). It must be noted, however, that the restriction of access to information is now exceptional: the general rule is for public data to be freely made accessible.

The first Act specifically about electronic freedom of information was adopted in 1996 in the United States (*Electronic Freedom of Information Act*). In Europe it was the Treaty of Amsterdam that first declared that everyone who has at least a place of residence in the EU has the right to access the documents published by the European Parliament, the Council and the Commission provided that certain requirements are met.⁴⁴

Directive 2003/98/EC on the re-use of public sector information is closely linked to the freedom of information; however, its scope of regulation does not apply to the exercise of the freedom of information but the use of public data. Its object is to provide for the creation of EU level information products and services based on public sector documents in a unified internal market by companies operating within the EU, the development of information products and services with surplus value, as well as the restriction of distorting

⁴² Here are a few examples of Acts on the freedom of information adopted: Finland 1951, United States 1966, the Netherlands 1978, New Zealand 1983.

⁴³ Hungary 1992, Czechia 2000, Estonia 2001, Poland 2002, Slovakia 2001, Romania 2001.

⁴⁴ It must be noted that there is a fundamentally different approach taken at the various levels of regulation, depending on whether the right is exercised by a citizen, a person with permanent residence, or is a right that can be universally exercised.

competition. There are no EU rules regarding access to public data and state guarantees; these are provided for by regulations at national level.

Summary

The system of rules that regulate the information society is comprised of international documents, EU Directives, national rules of law and the self-regulation of market players as well as co-regulation. The rules regulating the information society horizontally permeate the vertically established legal system. The local regulations touching on the global network issues are only partly able to enforce sanctions thus, the regulation that is present at an international level is highly important whether circumstances are resolved by state level coercive regulations or by market level self-regulation.

Existing legislation applies to the information society as well as the communications network that forms its basis. Special regulation emerges in those circumstances in which hitherto unfamiliar legal problems appear. Among these are the issues of digital signature, electronic freedom of information and telecommunications.

The information society policy of the European Union is unified: in those issues where there is a unified comprehensive EU policy the regulation of the information society is included. As we have already seen, in many cases this is by Directives; however, the European Union draws the attention of member states to the importance of self regulation and co-regulation.

The rationale is that rapid technological change makes it increasingly necessary to rely on rules that have been developed by the market players, since prior intervention could become a hindrance to technical and social development. This area primarily requires *ex post* regulation: state or EU regulatory instruments must only be used to intervene where there is a danger that the balance of the market could be upset. A consequence of the convergence of platforms and services, it is primarily the technologically neutral regulatory solutions that should be effective.

Revision questions

1. What does information society law mean?
2. What areas need to be regulated?
3. What kind of regulatory solutions can you name?
4. Are regulations necessary? If so, what solutions do you suggest and why?

Key terms

Ex ante: see “information society law”

Ex post: see “information society law”

Freedom of information: Public accessibility to data in order to ensure the transparency of state. Public data includes information in regard to activities performed by the state, local government or other public service organisations.

Information society law: A group of laws that includes the protection of personal information and the freedom of information. The sum of regulation governing social relations built on communication networks. We can differentiate between two kinds of regulations of the information society: either the legislator attempts to regulate the anticipated developments of interactions in advance, which is called ex ante regulation, or alternatively waits to see how these processes will develop and retrospectively regulates them, this latter approach is called ex post regulation.

Internet filtering: The application of software restricting access to Internet contents, depending upon various settings (URL, words, images, etc.).

Linear service: An audiovisual media service provided by a media service provider for simultaneous viewing programmes on the basis of a programme schedule.

On-demand service: A non-linear audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his/her individual request on the basis of a catalogue of programmes selected by the media service provider.

Personal data protection: The protection of any data relating to a specific natural person, ensuring the right of self-determination over data processing about them. The expression *privacy* used in Anglo-Saxon legal systems covers a wider spectrum: it means the protection of the private sphere from the outside world. In these legal systems euthanasia and abortion come under the scope of protection of privacy among other things. The expression “data protection”, used in continental legal systems, is a part of the protection of the private sphere.

Self-regulation: An independent system of rules that take into consideration the norms applicable in sectors of business life, like chambers of commerce and associations.

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