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TREATY AND CONTRACT CLAIMS IN INVESTMENT ARBITRATION AND THE VIVENDI CASE

Yatırım Tahkiminde Andlaşmalardan ve Sözleşmelerden Kaynaklanan Uyuşmazlıklar ile Vivendi Davası

By Kazım Berkay ARSLAN*

Research Article

Abstract

The dispute settlement mechanisms under the international investment law are very decentralized. This is because both a very large number of BITs as well as investment contracts contain a clause for the resolution of investor-State disputes. As a result, this concurrent dispute settlement clauses may cause problems with regard to the jurisdiction of investment arbitral tribunals. This article focuses on the distinction between treaty and contract claims as well as different possibilities regarding the fora selected under BITs and investment contracts. It touches upon the possible effects of umbrella clauses and the existence exclusive jurisdiction on these issues. Then it concentrates on the Vivendi case, which raises the question of determining the limits of an arbitral tribunal constituted under a BIT when an investment contract provides for the exclusive jurisdiction of domestic courts. Finally, it concludes by underlying the importance of the distinction between treaty and contract claims in investment arbitration.

Keywords Investment Arbitration, Treaty Claims, Contract Claims, Jurisdiction, Vivendi Case

Özet

Uluslararası yatırım hukukunda uyuşmazlıkların çözümü bakımından merkezi bir sistem mevcut değildir. Bunun sebebi hem birçok yatırım andlaşmasında hem de yatırım sözleşmelerinde yatırımcılar ile Devletler arasında doğabilecek olan uyuşmazlıkların çözümü için farklı çözümler öngörülmesidir. Bunun bir sonucu olarak da farklı tahkim şartları sebebiyle hakem heyetlerinin yetkisini belirleme hususunda sorunlar ortaya çıkabilmektedir. Bu makalede yatırım andlaşmaları ile yatırım sözleşmelerine dayanan uyuşmazlıklar ve bunlarda öngörülmüş olabilecek farklı uyuşmazlık çözüm yolları üzerinde durulmaktadır. Ayrıca şemsiye hükümlerin ve münhasır yetki kurallarının etkisi de değerlendirilmektedir. Yatırım andlaşması altında kurulmuş bir hakem heyetinin yatırım sözleşmesinde yerel mahkemelere münhasır yetki verilmiş olduğu hallerde yetkisinin sınırının ne olduğu konusunun tartışıldığı Vivendi davası incelendikten sonra yatırım andlaşmalarından ve sözleşmelerden doğan uyuşmazlıklar arasındaki ayrımın önemine dikkat çekilmektedir.

Anahtar Kelimeler Yatırım Tahkimi, BIT Uyuşmazlıkları, Sözleşme Uyuşmazlıkları, Yetki, Vivendi Davası

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INTRODUCTION

The golden rule of arbitration is party consent.[1] This also goes for arbitral proceedings concerning a dispute relating to an international investment.[2] There are different ways in which the parties of an investment arbitration can express their consent, which would constitute the basis of the jurisdiction of an arbitral tribunal. In investment arbitration, the consent of States is often found in bilateral investment treaties (BITs),[3] whereas investors give their consent to arbitration by accepting the offer contained in the BIT.[4] By the same token, parties may include a compromissory clause in an investment contract which would be valid as their consent to arbitration.[5]

In some cases, it is possible for States to consent to arbitration, both through a BIT as well as a contract.[6] Although it may not seem to be a problem at the first glance, the existence of consents to arbitration contained in different documents carry the risk to raise questions with regard to the jurisdiction of arbitral tribunals constituted to solve investment disputes. The *Vivendi* case is a good illustration of this risk.[7]

This paper aims to address the distinction between treaty and contract claims in investment arbitration by elaborating on different possible scenarios (Section 1). Then, it will focus on the *Vivendi* case and the solutions brought by *Vivendi* arbitral tribunals (Section 2). Finally, it will point out the importance of the distinction between treaty and contract claims for Turkish investors and Turkey (Section 3).

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1 P. Daillier and A. Pellet, *Droit International Public* (7th edn, LGDJ 2002) [531]

2 See, for example, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (18 March 1965) 575 UNTS 159, Article 25(1)

3 Kenneth J. Vandevelde, *Bilateral Investment Treaties* (1st edn, OUP 2010) 433

4 *Generation Ukraine, Inc. v Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003 [12.2]

5 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) (Dolzer & Schreuer) 254

6 See, for example, *Noble Energy, Inc. and Machalapower Cia. Ltda. v The Republic of Ecuador and Consejo Nacional de Electricidad,* ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008 [22], [23], [150], [178]; *Duke Energy Electroquil Partners & Electroquil S.A. v Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 [99], [102], [111]; *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 [60]; *Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on Jurisdiction, 16 July 2010 (*Millicom v Senegal*) [26]

7 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3 (*Vivendi*)

I. TREATY AND CONTRACT CLAIMS

The existence of concurrent consents of arbitration given by the same parties of a dispute in a BIT and a contract creates several issues that need to be solved. First, it is necessary to determine the tribunal which has the jurisdiction to solve the dispute in question. Secondly, the scope of the jurisdiction *ratione materiae* of the tribunal needs to be ascertained (whether the tribunal can decide on breaches of both the BIT and the contract). Thirdly, the jurisdiction *ratione materiae* of the tribunal will play a role on the applicable law as treaties are subject to international law, whereas contracts are often governed by the national law of the host-State.[8]

Since there is not a single model for dispute settlement clauses contained in BITs and investment contracts, the answers given to the aforementioned questions may differ depending on the formulation of the consent contained in the BIT and the contract.

A. Reference to the Same Dispute Settlement Mechanism

It is possible that a BIT and an investment contract provide for the same dispute settlement mechanism. In that case, the legal basis of the jurisdiction would be both the BIT and the contract. Thus, the tribunal would have the competence to rule on breaches of the BIT as well as the contract. Indeed, in *Millicom v Senegal*, the arbitral tribunal constituted under the ICSID Rules based its jurisdiction both on Article 10 of the Netherlands-Senegal BIT and on the Concession Agreement between the parties, which accepted *inter alia* arbitration under ICSID Rules as a dispute settlement mechanism.[9]

B. Reference to Different Dispute Settlement Mechanisms

It is often the case that BITs and investment contracts envisage different mechanisms for the settlement of disputes. If that is the case, a basic distinction can be made between two types of dispute settlement provisions.

The first group of BITs uses a narrow language in its provision regarding to the consent to arbitration of the contracting parties. In other words, they limit the jurisdiction *ratione materiae* of the arbitral tribunal to certain types of disputes.[10] Most commonly, these treaties only allow to arbitrate disputes

8 James Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 Arb Int'l 351 (Crawford) 358

9 *Millicom v Senegal* [74], [100]

10 Zachary Douglas, *The International Law of Investment Claims* (1st edn, Cambridge University Press 2009) (Douglas) 235

concerning the alleged breaches of their own substantive treaty provisions.[11] In this regard, it is possible to cite Article 26(1) of the Energy Charter Treaty[12] and Articles 1116 and 1117 of NAFTA[13].

In such cases, the investors have two options. They can either bring a contract claim based on the compromissory clause of the contract or they can argue for the breach of the BIT before the tribunal having jurisdiction under the dispute settlement clause of the BIT. However, investors cannot claim the breach of an investment contract before a tribunal which has a BIT as the basis of its jurisdiction.[14]

The second group of BITs adopts a wider language for their forum selection provisions which permit "all or any disputes relating to investments to be submitted to an investment treaty tribunal".[15] In those cases, the jurisdiction of the tribunal is not limited to treaty claims, but it extends to the alleged violations of investment contracts.[16]

For instance, Article 8 of the Italy-Morocco BIT provides that "all disputes or differences […] concerning an investment" may be submitted to arbitration under the ICSID Rules. This provision was interpreted by the arbitral tribunal to mean that it allows for all claims based on the BIT, but also all claims alleging the violation of an investment contract.[17]

However, it should be noted that there are two limits to bringing a contractual claim based on a dispute settlement clause contained in a BIT. First, the contractual claims must be characterized as relating to an investment[18] and secondly, the other party of the contract should be the State itself.[19]

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11 Berk Demirkol, 'Non-treaty Claims in Investment Treaty Arbitration' (2018) 31 LJIL 59 (Demirkol), 62

12 *"Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under [this treaty]"*

13 *"An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under [this treaty]"* and *"An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under [this treaty]"*

14 *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (*Crystallex v Venezuela*), [471]

15 Douglas, 234

16 Christoph Schreuer, 'Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi I Case Considered', in T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) (Schreuer) 296

17 *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001 [61]

18 Crawford, 362

19 *Supra* note 17

C. The Existence of an Umbrella Clause

An umbrella clause is a provision contained in a BIT under which the host State guarantees to respect all of its obligations with respect to an investment or against an investor.[20] It is accepted that such a clause would bring "contractual and other commitments under the treaty's protective umbrella".[21] It is accepted that the breach of an investment contract would result in the breach of the umbrella clause.[22]

However, its implications on forum selection are still disputed. This is evident by the contrasting decisions rendered by different arbitral tribunals for the application of the Philippines-Switzerland BIT and Pakistan-Switzerland BIT, which involved the same umbrella clause.[23] Nevertheless, Schreuer[24] and Crawford[25] support the view that arbitral tribunals constituted in accordance with the dispute settlement mechanism of a BIT containing an umbrella clause should be entitled to hear contractual claims.

D. The Existence of Exclusive Jurisdiction

The parties of a dispute may subject the dispute to the exclusive jurisdiction of a tribunal. This is possible either through an exclusive jurisdiction agreement or through the qualification of a compromissory clause as exclusive by the applicable law.[26]

To illustrate, if an investor concludes an investment contract with a State including an exclusive jurisdiction agreement and there exists a BIT between the home State of the investor and the host State which provides for a different forum for the settlement of disputes, the forum selection for the investor becomes somewhat complicated. There is no doubt that the investor may bring contractual claims in accordance with the exclusive jurisdiction agreement. Moreover, the investor may also allege purely treaty-based claims before the tribunal constituted under the rules set out in the BIT.[27]

In contrast, contract claims may be considered as inadmissible, if they are brought before a tribunal constituted in accordance with the BIT's

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20 Schreuer, 299

21 Dolzer & Schreuer, 166

22 R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (1st edn, Martinus Nijhoff Publishers 1995) 81 – 82

23 *SGS Société Générale de Surveillance S.A. v Republic of Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004 (*SGS v Philippines*), [128] and *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, [166]

24 Schreuer, 301

25 Crawford, 369

26 Demirkol, 75

27 *Crystallex v Venezuela* [480]

dispute settlement mechanism.[28] In this regard, the *Vivendi* case offers a better understanding of contractual claims brought before investment arbitral tribunals despite the existence of an exclusive forum selection clause contained in an investment contract.

II. THE VIVENDI CASE

A. The Overview of the Case

In 1994, the Argentine Province of Tucumán and a consortium led by the French Company *Compagnie Générale des Eaux* ("CGE" which was later owned by *Vivendi Universal S.A.*) concluded a concession contract ("Concession Contract") in order to privatize the water and sewage systems which were previously operated by the government of the Province of Tucumán.[29] Soon after the conclusion of the Concession Contract, several disagreements arose between the CGE and the Tucumán government.[30] The CGE for its part contended that the government's activities damaged the effectiveness of the Concession Contract, whereas the Tucumán government argued that the CGE failed to perform its obligations under the Concession Contract.[31] After the two parties tried to terminate the Concession contract, an Argentine federal government entity took control over the water and sewage systems in 1998.[32]

In 1996, the CGE filed a request to commence proceedings before the ICSID against Argentina by claiming that Argentina violated Article 3 (fair and equitable treatment) and Article 5 (unlawful expropriation) of the Argentina – France BIT ("BIT").[33]

B. The First Tribunal

The Tribunal started its analysis by examining whether it had jurisdiction to hear the dispute. The Claimant argued that the Tribunal had jurisdiction to rule on the case before it by relying on Article 8 of the BIT.[34] The Respondent

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28 *SGS v Philippines* [154]

29 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Award, 21 November 2000 (*Vivendi I*) [24] – [25]

30 *Ibid* [29]

31 *Ibid* [30] – [32]

32 *Ibid* [39]

33 Stanimir A Alexandrov, 'Vivendi (Compañía de Aguas del Aconquija) v Argentina Case' (MPEPIL, February 2008) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1785?rskey=C4ab5g&result=1&prd=OPIL> accessed 17 April 2020 [5]

34 *"1. Any dispute relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the two parties concerned.*
2. If any such dispute cannot be so settled within six months of the time when a claim is

challenged the jurisdiction of the Tribunal as a result of the exclusive jurisdiction of the Tucumán administrative courts over the dispute based on Article 16.4 of the Concession Contract.[35]

The Tribunal did not interpret the exclusive jurisdiction clause contained in Article 16.4 of the Concession Contract as preventing it from hearing claims based on the violation of the BIT and therefore, rejected the arguments of the Respondent.[36] It noted that:

> *"Article 8 does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT."*[37]

Concerning the merits of the case, the Tribunal concluded that in order to assess whether Argentina breached its obligations under the BIT, it was necessary to interpret the Concession Contract which was within the exclusive jurisdiction of Tucumán's administrative tribunals.[38] For these reasons, the Tribunal dismissed the claims.

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made by one of the parties to the dispute, the dispute shall, at the request of the investor, be submitted:
• Either to the domestic courts of the Contracting Party involved in the dispute;
• Or to international arbitration under the conditions described in paragraph 3 below.
Once an investor has submitted the dispute to the courts of the Contracting Party concerned or to international arbitration, the choice of one or the other of these procedures is final.
3. Where recourse is had to international arbitration, the investor may choose to bring the dispute before one of the following arbitration bodies:
• The International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and National of other States opened for signature in Washington on 18 March 1965, if both States Parties to this Agreement have already acceded to the Convention. Until such time as this requirement is met, the two Contracting Parties shall agree to submit the dispute to arbitration, in accordance with the rules of procedure of the Additional Facility of ICSID;
• An ad hoc arbitral tribunal established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).
4. The ruling of the arbitral body shall be based on the provisions of this Agreement, the legislation of the Contracting Party which is a party to the dispute, including rules governing conflict of laws, the terms of any private agreements concluded on the subject of the investment, and the relevant principles of international law.
5. Arbitral decisions shall be final and binding on the parties to the dispute."

35 *"[f]or purposes of interpretation and application of this Contract the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucumán"*

36 *Vivendi I* [53] – [55]

37 *Ibid* [55]

38 *Ibid* [77] – [80]

C. The First Annulment Committee

The *ad hoc* Committee was constituted upon the request of the Claimant for the partial annulment of the award rendered by the first Tribunal. The Claimant relied *inter alia* on manifest excess of powers under Article 52(1)(b) of the ICSID Convention as a ground for the partial annulment of the award.[39]

As a preliminary remark, the *ad hoc* Committee underscored the distinction between treaty claims and contract claims and held that a violation of a treaty and a violation of a contract are two separate concepts that are governed by two different sets of rules. The Committee stated that:

> *"A state may breach a treaty without breaching a contract, and vice versa. (...) Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the Concession Contract (...) the law of Tucumán."*[40]

Moreover, the *ad hoc* Committee underlined the distinction between the violation of an international treaty from a contract. It noted that:

> *"[T]he Committee does not understand how, if there had been a breach of the BIT in the present case (a question of international law), the existence of Article 16(4) of the Concession Contract could have prevented its characterisation as such."*[41]

As a second point, the *ad hoc* Committee considered the language of Article 8 of the BIT as to give jurisdiction to an arbitral tribunal for all matters concerning an investment.[42] Hence, it concluded that the existence of an exclusive forum selection clause in the Concession Contract did not prevent an arbitral tribunal constituted in accordance with Article 8 of the BIT to hear claims relating to the violation of the BIT's provisions. The *ad hoc* Committee held that:

> *"[W]here "the fundamental basis of the claim" is a treaty (...), the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state (...) cannot operate as a bar to the application of the treaty standart."* [43]

However, the Committee stated that this conclusion was only valid if "the fundamental basis of the claim" is a treaty.[44] If the essential basis of the claim

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39 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 [93]

40 *Ibid* [95] – [96]

41 *Ibid* [103]

42 *Ibid* [55]

43 *Ibid* [101]

44 *Ibid*

is a breach of an investment contract, the exclusive jurisdiction clause would bar the arbitral tribunal to decide on the merits of a case brought before it. This was made clear by the Committee when it stated that:

> *"In a case where the essential basis of a claim brought before an inter- national tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract."45*

Finally, the *ad hoc* Committee concluded that the findings of the Tribunal with regard to its jurisdiction on the case were valid, because the claims brought by the Claimant concerned the alleged violations of its rights under the BIT which could be determined without relying on the Concession Contract. It concluded that:

> *"[U]nder Article 8(4) of the BIT the Tribunal had jurisdiction to base its decision upon the Concession Contract, at least so far as necessary in order to determine whether there had been a breach of the substantive standards of the BIT."*[46]

Concerning the Tribunal's decision on the merits of the case, the *ad hoc* Committee emphasized that the Tribunal could have decided whether Argentina violated its obligation to offer a fair and equitable treatment and its obligation not to expropriate unlawfully without determining whether there has been a breach of the Concession Contract.[47] Thus, it concluded that the Tribunal manifestly exceeded its powers by refusing to decide on a matter over which it had jurisdiction and annulled the portion of the Tribunal's award with regard to the merits of the case.[48]

D. The Second Tribunal and the Second Annulment Committee

A second arbitral tribunal ("Second Tribunal") was constituted which rendered a decision on jurisdiction[49] upon the new arguments brought by the Respondent against the jurisdiction of the arbitral tribunal and an award[50] on the merits of the case. The Second Tribunal affirmed its jurisdiction over the case[51] and held that the actions taken by the Tucumán government amounted to violate Article 3 (fair and equitable treatment) and Article 5 (unlawful expropriation) of the BIT.[52] As a result, the Second Tribunal awarded US$105,000,000 in

45 *Ibid* [98]
46 *Ibid* [110]
47 *Ibid* [112]
48 *Ibid* [114] – [115]
49 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005
50 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007
51 *Supra* note 49[114]
52 *Supra* note 50 [7.4.42], [7.5.34]

damages.[53] The decision was later confirmed by a second *ad hoc* Committee constituted upon the request of the Argentine Republic for the annulment of the award.[54]

III. IMPLICATIONS FOR TURKEY

Turkey has signed 129 BITs so far.[55] Moreover, it is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[56] and the Energy Charter Treaty.[57] In addition, there are numerous Turkish investors operating in different countries all around the world.

The distinction between treaty and contract claims is important for both Turkey and also for Turkish investors. This is because Turkey would not want to face contract claims during an arbitral proceeding commenced by a foreign investor under one of the BITs to which it is a party. As for the Turkish investors, they would prefer to bring contractual claims before investment arbitration tribunals in order to better protect their rights.

Turkey is party to 76 BITs that are currently in force. Some 67 of these treaties adopt a wide language with respect to their investor-State dispute resolution provisions,[58] which would possibly allow investors to bring

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53 *Ibid* [11.1]

54 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007, 10 August 2010 [267]

55 <https://investmentpolicy.unctad.org/international-investment-agreements/countries/214/turkey> accessed on 28 August 2020

56 The Turkish Official Gazette dated 6 December 1988 and numbered 20011

57 The Turkish Official Gazette dated 6 February 2000 and numbered 23956

58 Mauritius - Turkey BIT (2013) Article 8; Azerbaijan - Turkey BIT (2011) Article 11; Senegal - Turkey BIT (2010) Article 9; Kuwait - Turkey BIT (2010) Article 8; Libya - Turkey BIT (2009) Article 8; Slovakia - Turkey BIT (2009) Article 8; Czech Republic - Turkey BIT Article 8; (2009) Romania - Turkey BIT (2008)Article 6; Singapore - Turkey BIT (2008) Article11; Oman - Turkey BIT (2007) Article 9; Saudi Arabia - Turkey BIT (2006) Article 10; Bahrain - Turkey BIT (2006) Article 7; Turkey - United Arab Emirates BIT (2005) Article 9; Thailand - Turkey BIT (2005) Article 9; Australia - Turkey BIT (2005) Article 13; Afghanistan - Turkey BIT (2004) Article 7; Lebanon - Turkey BIT (2004) Article 8; Slovenia - Turkey BIT (2004) Article 8; Syrian Arab Republic - Turkey BIT (2004) Article 7; Malta - Turkey BIT (2003) Article 6; Qatar - Turkey BIT (2001) Article 9; Serbia - Turkey BIT (2001) Article 7; Portugal - Turkey BIT (2001) Article 10; Ethiopia - Turkey BIT (2000) Article 7; Turkey - Yemen BIT (2000) Article 6; Mongolia - Turkey BIT (1998) Article 7; Malaysia - Turkey BIT (1998) Article 7; Bosnia and Herzegovina - Turkey BIT (1998) Article 8; Cuba - Turkey BIT (1997) Article 6; Russian Federation - Turkey BIT (1997) Article 10; Estonia - Turkey BIT (1997) Article 7; Sweden - Turkey BIT (1997) Article 8; Morocco - Turkey BIT (1997) Article 8; Latvia - Turkey BIT (1997) Article 7; Iran, Islamic Republic of - Turkey BIT (1996) Article 11; Egypt - Turkey BIT (1996) Article

contractual claims under the BIT. On the other hand, only 9 of these BITS provide for a narrow interpretation of an investment dispute,[59] barring foreign investors to bring contractual claims before an arbitral tribunal constituted under these investment treaties.

Accordingly, it is very possible for foreign investors to bring additional contractual claims against Turkey. Considering that Turkey has concluded several agreements with foreign investors on a "build-operate-transfer" basis[60] and its financial bottleneck coupled with the problems caused by the COVID-19 pandemic, it is highly probable that disputes between Turkey and foreign investors may arise. In this context, the wide language adopted in many of Turkey's BITs may operate against it, as it may allow investors to bring additional contractual claims against Turkey.[61] In order to overcome this burden, Turkey may include provisions in its investment contracts with foreign investors, which would have an effect of depriving investors of their right to bring contractual claims under the relevant BITs.

On the other hand, the wide language adopted in Turkey's BITs may help Turkish investors wishing to commence arbitral proceedings. Bearing in mind that Turkish investors are willing to operate in countries involving certain risks, such as Libya for example,[62] the wide scope of dispute settlement clauses

7; Tajikistan - Turkey BIT (1996) Article 10; Israel - Turkey BIT (1996) Article 8; Croatia - Turkey BIT (1996) Article 7; Macedonia, The former Yugoslav Republic of - Turkey BIT (1995) Article 7; Italy - Turkey BIT (1995) Article 8; Pakistan - Turkey BIT (1995) Article 7; Spain - Turkey BIT (1995) Article 9; Lithuania - Turkey BIT (1994) Article 7; Bulgaria - Turkey BIT (1994) Article 8; Moldova, Republic of - Turkey BIT (1994) Article 7; Jordan - Turkey BIT (1993) Article 7; Finland - Turkey BIT (1993) Article 8; Georgia - Turkey BIT (1992) Article 7; Albania - Turkey BIT (1992) Article 10; Argentina - Turkey BIT (1992) Article 8; Turkey - Turkmenistan BIT (1992) Article 7; Kazakhstan - Turkey BIT (1992) Article 7; Kyrgyzstan - Turkey BIT (1992) Article 7; Turkey - Uzbekistan BIT (1992) Article 7; Japan - Turkey BIT (1992) Article 11; Hungary - Turkey BIT (1992) Article 10; Tunisia - Turkey BIT (1991) Article 7; Korea, Republic of - Turkey BIT (1991) Article 10; Turkey - United Kingdom BIT (1991) Article 8; China - Turkey BIT (1990) Article 7; Denmark - Turkey BIT (1990) Article 8; Austria - Turkey BIT (1988) Article 9; Bangladesh - Turkey BIT (1987) Article 6; BLEU (Belgium-Luxembourg Economic Union) - Turkey BIT (1986) Article 9; Netherlands - Turkey BIT (1986) Article 8; Turkey - United States of America BIT (1985) Article 6

59 Turkey - Ukraine BIT (2017) Article 10; Mexico - Turkey BIT (2013) Article 12; France - Turkey BIT (2006) Article 8; Greece - Turkey BIT (2000) Article 7; Philippines - Turkey BIT (1999) Article 8; Belarus - Turkey BIT (1995) Article 10; Poland - Turkey BIT (1991) Article 8; Switzerland - Turkey BIT (1988) Article 8; Germany - Turkey BIT (1962) Article 11

60 Lütfi Duran 'Yap-İşlet-Devret' (2015) Ankara Üniversitesi SBF Dergisi 46(1), 169 – 170

61 *See* Section 1

62 Ayse Selcen Can & Muhammet Bembeyaz 'Investment Treaty Arbitration between Libya and Turkish Contractors: Temporal Validity of Turkey-Libya Bilateral Investment Treaty'

contained in these investment treaties may be considered as an advantage for Turkish investors.

CONCLUSION

The relationship between dispute resolution clauses contained in BITs and investment contracts has important implications for the determination of the jurisdiction *ratione materiae* of an arbitral tribunal.[63] This is because the formulation of a forum selection clause in a BIT may affect the arbitral tribunal's ability to hear contract-based claims.[64] If the forum selection clause encompasses the settlement of all or any investment disputes, the arbitral tribunal may decide on the violation of an investment contract. However, if the arbitration clause adopts a narrower language, it would limit the jurisdiction of the tribunal by the breaches of the BIT itself.

When faced with an exclusive jurisdiction clause contained in an investment contract, it is necessary for an arbitral tribunal to examine the nature of the claims brought before it in order to determine whether those claims fall within its jurisdiction. If the claims are purely or essentially treaty claims – meaning that they concern the alleged breach of a BIT without the need to refer to the breach of a contract – they would be within the jurisdiction *ratione materiae* of the tribunal. In contrast, the claims which are essentially based on the breach of an investment contract would be subject to the exclusive jurisdiction of another tribunal, meaning that the arbitral tribunal constituted under a BIT would lack jurisdiction for such claims. This outcome was confirmed by the result of the *Vivendi* case.[65]

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The PRESUMPTION of INNOCENCE in ADMINISTRATIVE JURISDICTION

İdari Yargıda Masumiyet Karinesi

Judge Gökhan ÇAYAN*

Research Article

Abstract

The presumption of innocence is accepted by its position in all international and regional human rights treaties as a standard of fair trials, which like that Continental Law System. According to Anglo-Saxons Law System, the presumption is described in principle of burden and standard of proof. Whereas; the presumption of innocence in every legal system may not be understood as an accepted by Anglo-Saxons and Continental Law Systems. A level of abstraction is necessary, for accepted to common principle, a search for the minimum standard that universally hold. According to this minimum standard level; the presumption has long been regarded as fundamental to protecting accused persons from wrongful conviction; and the basic principle is that the accused is to be considered innocent until proven guilty of a criminal offer. Understanding the presumption of innocence is possible with determining the nature of right. In this article, the presumption of innocence considering European Court of Human Rights and Constitutional decision is examined. There are general principles in first part, the purposes of the presumption of innocence in second part, presumption in administrative law jurisdiction in third part and court decisions in fourth part.

Keywords The presumption of innocence, the purposes of the presumption of innocence, presumption of innocence in administrative law jurisdiction, philosophy of the presumption of innocence, doctrine of the presumption of innocence, burden of proof, standard of proof.

Özet

Masumiyet karinesi, tüm uluslararası ve bölgesel insan hakları sözleşmeleri tarafından, Kıt'a Avrupası Hukuk Sistemiyle benzer bir biçimde, adil yargılanma hakkının unsuru olarak tanınmaktadır. Anglo-Sakson Hukuk Sisteminde ise karine, ispat yükünü ve standardını belirleyen bir ilke olarak kabul edilmiştir. Buna karşılık her hukuk sisteminde masumiyet karinesi, Anglo-Sakson ve Kıt'a Avrupası Hukuk Sistemlerinin öngördüğü şekilde kabul edilmeyebilir. Karinenin ortak bir değer olarak kabul edilebilmesi, belirli bir düzeyde asgari mutabakat seviyesinin belirlenmesiyle mümkündür. Bu asgari mutabakat seviyesine göre karine, suç ile itham edilenleri yanlış mahkumiyetten koruma amacına hizmet eder ve kişinin, suçlu olduğu kanıtlanıncaya kadar masum sayılmasını sağlar. Masumiyet karinesinin anlaşılabilmesi, ilkenin doğasının tespit edilmesiyle mümkündür. Bu makalede, Avrupa İnsan Hakları Mahkemesi ve Anayasa Mahkemesi içtihatları ışığında masumiyet karinesi inceleme konusu yapılmıştır. Makalenin birinci kısmında genel prensipler, ikinci kısmında masumiyet karinesinin amaçları, üçüncü kısmında idari yargıda masumiyet karinesi ve dördüncü kısmında mahkeme kararları yer almaktadır.

Anahtar Kelimeler Masumiyet karinesi, masumiyet karinesinin amaçları, idari yargıda masumiyet karinesi, masumiyet karinesinin felsefesi, masumiyet karinesinin doktrini, ispat yükü, delil standardı

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INTRODUCTIOAN

Different meanings are attributed to the presumption of innocence in doctrine. It is not possible to give an alliance description on the point of definition, purpose, aim and nature of the presumption[1]. In the most general sense, the presumption of innocence expresses that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law[2].

Naturel Law School accepts the presumption of innocence as an integral part of individual's freedom. According to this school, it is an innate principle that is used to secure right to life and liberty until proved guilty according to law[3]. And it is not important whether it is legalized in normative law[4].

The first point of origin of the presumption of innocence, which is a long history and an ancient legal doctrine, is based on Hammurabi Laws. Anglo-Saxon Legal System has an important place in the development of the presumption, which was also found in Greek City States and Roman times[5]. In Islamic Legal System, the presumption of innocence has found steady application[6]. On the other hand, it is possible to say that Continental European Legal System has helped the development and expansion of the doctrine.

In the 9th paragraph of the Declaration of the Rights of Man and of the Citizen, published as a result of the French Revolution, which started with the motto "Equality, Freedom and Brotherhood", it was declared that everyone charged with a criminal offence would be presumed innocent until proved guilty according to law. The Declaration, seen as the most important contribution

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1 Laudan, L. (2006), *Truth, Error and Criminal Law: An Essay in Legal Epistemology*, Cambridge University Press, p.92.

2 Jackson, D. J., Summers J. S. (2012), *The Internationalisation of Criminal Evidence Beyond the Common Law and Civil Law Traditions*, Cambridge University Press, p. 200; Lippke, R. L (2015), The Presumption of Innocence in The Trial Setting, *Tatio Juris Review*, 28/2, p. 160; Campbell, L. (2013), Criminal Labes, the European Convention on Human Rights and Presumption of Innocence, *The Modern Law Review*, 76/4, p. 682.

3 Laufer, S. W. (1995), The Rhetoric of Innocence, *Washington Law Review*, V.17, Washington D. C., p. 332-333.

4 Wilkinson, J. H. (2018), the Presumption of Civil Innocence, *Virginia Law Review*, V. 104/4, p. 603.

5 Gray, A. (2017), s. 1-2.

6 Eş- Şeybani, M., (Translated by Mehmet Boynu Kalın), *Beyrut, Dar İbn Hazm*, V. X., p. 477-478; ŞEBBE Ö., (Translated by Mehmet Boynukalın), *Tarihü'l-Medine Daru'l-Uleyeyani,* V. II, p. 345-346; Erturhan, S. (2002), İslam Hukukunda Şüpheden Sanığın Yararlanması İlkesi (In Dubio Pre Reo), *Cumhuriyet University Review*, V. 6/2, p. 185; ARI, A. (2003), Hz. Ömer'in Ebu Musa El Eş'ariye Gönderdiği Mektubun Yargılama Hukuku Açısından Analizi, *Islamic Law Review*, V. 0/2, p. 94-96; Çayan, G. (2016), *Adil Yargılanma Hakkı*, Istanbul, Legal Law Press, p. 16.

of Continental European Legal System to the presumption of innocence, also accelerated the announcement of another international manifesto[7].

In the first paragraph of Article 11 of the Universal Declaration of Human Rights, which was prepared by the United Nations and adopted at session held by the United Nations General Assembly on 10 December 1948, is deemed innocent unless found guilty by law.

In order to compensate for destruction caused by Second World War and to prevent such a devastation from happening again, some states signed the Council of Europe Statute in 1949 with the aim of establishing an organization. In the same year, it was decided to prepare a contract on human rights and founding states opened European Convention on Human Rights, where fundamental rights and freedoms were issued, on 4 November 1950, and the Convention entered into force on 3 September 1953. Including Turkey, it has signed a contract that also found all framer members. In the second paragraph of Article 6 of Convention (Article 6 § 2) ruled, everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

The presumption of innocence is ruled as a fundamental right in Turkish Constitution 1982, in the fourth paragraph of Article 38. According to this article "No one shall be considered guilty until proven guilty in a court of law".

In the continuation of examination, the presumption of innocence in administrative jurisdiction will be made within the context of the Constitution and the European Convention on Human Rights. The general principles in first part; the objectives of the presumption of innocence in second part; the application of the presumption of innocence in administrative judgment in

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[7] Quintard-Morénas describes how the maxim non statim *qui accusator reus est* gained ground in the early French universities and in French law practised by the Parliaments, even throughout the ancient regime when many practices contradicted this rule – the legalization of torture being the ultimate violation of the presumption's long tradition. In the pre-revolutionary writings and during the build-up to the Revolution, the position and treatment of suspects were among the most important topics in the discussion on criminal justice reform. Beccaria invoked the presumption of innocence ('no man has the right to consider someone guilty as long as the court has not reached a verdict' and 'in the eye of the law every man is innocent whose guilt has not been proved') in order to make a case against pre-trial torture and for the better treatment of suspects, especially those in pre-trial detention. Unsurprisingly, the 'shield' notion of the presumption of innocence is also clearly reflected in its subsequent expression in the *Déclaration de droits de l'homme* (Article 9): *'Tout homme étant présumé innocent jusqu'à ce qu'il ait été déclaré coupable, s'il est jugé indispensable de l'arrêter, toute rigueur qui ne serait pas nécessaire pour s'assurer de sa personne doit être sévèrement réprimée par la loi.'* (De Jong, F., Van Lent L. (2016), The Presumption of Innocence as a Counter Futual Principles, *Ultrecht Law Review*, V. 0/2, p. 36).

third part; the special appearance forms of the presumption of innocence and the adaptation to administrative cases in fourth part are examined.

I. GENERAL PRINCIPLES

The presumption of innocence, with different meanings over time, can not be defined today simply by saying "no one is considered guilty until proven guilty in a court of law". First problem that arises when explaining meaning of presumption stems from its paradoxical nature. According to Weingend, its paradoxical nature is to protect the person accused of a crime against experiences and intuition [8]. On the other hand, Ferzan and Campbell argues that the presumption of innocence is a criminal law principle, which is used to balance the power of State to use force, to provide evidence, to access confidential information, to accuse, to apply protection measures, to find guilty and to punish.

The presumption of innocence is ruled as a fundamental right in the Constitution, in the fourth paragraph of Article 38. According to this article "No one shall be considered guilty until proven guilty in a court of law". While Constitution 1982 accepts the presumption of innocence as "No one shall be considered guilty until proven guilty in a court of law"; the European Convention on Human Rights regulates that " Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.".

If we act in the light of positive regulations, the Constitution and the Convention, within Weingend, Ferzan and Campbell's expressions, there must be a criminal charge for application of the presumption of innocence. As a rule, it is impossible to say that the presumption of innocence will find application if there is no criminal charge or accusation.

As it is seen, there is no hesitation in point where the presumption of innocence protects person suspected of committing a crime. The guarded person continues to be a reasonable suspect of the crime allegedly committed, while assuming that she or he is innocent. At this point, its paradoxical contradiction emerges. This contradiction can theoretically be explained by the hypothetical and non-cognitive normative character of the presumption of innocence[9].

There are different opinions about the presumption of innocence's normative character in legal systems. Continental European Legal System accepts it as a hypothetical starting point for a fair trial[10], whereas Anglo-Saxon Legal System

8 De Jong, F (2016), p. 37.
9 De Jong, F. (2016), p. 37.
10 Jackson, D. (2012), p. 212.

recognizes it as a procedural protection[11]. European Court of Human Rights accepts like Continental European Legal System[12].

European Court of Human Rights has adopted various to define the content of the presumption of innocence. It discusses that three ways in which the content of the right has been defined: Firstly, a principle prohibiting official decisions reflecting guilt in the absence of a prior judicial determination; secondly, a principle placing the burden of proof on the prosecution and giving the defendant the benefit of any doubt; and lastly, a principle requiring presumptions of fact or law to be confined within reasonable limits. The second of these formulations, concerning the burden of proof, is more in line with the common law understanding of the presumption of innocence. However, it is the third formulation, concerning "presumptions", that has become the standard means in ECtHR cases for describing the content of the right protected by Article 6 § 2[13].

Leaving aside whether it is a procedural principle or a hypothetical starting point, the presumption of innocence is a principle to protect suspect's reputation[14]. As Weingend puts it, suspect is protected against experiences and intuition, thanks to it[15].

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11 De Jong, F. (2016), p. 37; Çayan, G. (2016), *Adil Yargılanma Hakkı, p*. 189; Sherman, J. C. (2014), The Juror, The Citizen, and The Human Being: The Presumption of Innocence and the Burden of Judgement, *Cirim Law and Philos Review*, V. 0/ 8, p. 423.

12 Phillips/United Kingdom, A. N: 41087/97, 12/12/2001, § § 39- 40: Once an accused has properly been proved guilty, Article 6 § 2 can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new "charge" within the autonomous Convention meaning. Grayson and Barnham/United Kingdom, A.N: 19955/05 and 15085/06, 23/12/2008, § § 37- 39; Poncelet/Belgium, A.N. 44418/07, 04/10/2010, § 50; Garycki/Poland, A.N.: 14348/02, 06/05/2007, § 68: The latter infringes the presumption of innocence, whereas the former has been regarded as unobjectionable in various situations examined by the Court.)

13 Stummer, A. (2010), *The Presumption of Innocence Avidental and Human Rights Perspective*, Oxford and Portland, Oregon Press, p. 89- 90.

14 Trachsel, S. (2005), *Human Rights in Criminal Procedure*, Oxford University Press, p. 164; Campbell, L. (2013), p. 684. In my opinion protecting the presumption of innocence involves taking steps to secure the liberty and reputation of the suspect. These measures can be both criminal and civil. On the criminal front, the protection of the freedom of the presumed innocent supposes the determination of the consequent offences. On the civil side, the protection of the presumption of innocence consists in the insertion of a repairing press release and the award of damages. These are additional measures to the main sentences.

15 De Jong, F. (2016), p. 7, 35. For Weigend, the fact that the presumption of innocence is a rule of procedure means that it applies 'from the initiation of a criminal process to its final conclusion'. According to him, the very aim of the presumption of innocence is to protect the suspect from overbearing situations as a consequence of state actions. Therefore, it prohibits state agents from taking action that necessarily presupposes that the suspect is in fact guilty. In this context Weigend defines the presumption of innocence as

II. PURPOSES of the PRESUMPTION of INNOCENCE

The most generally recognized qualification of the presumption of innocence is that it serves as a safeguard against wrongful convictions. This conception focuses on the dangers inherent in conviction as such. It is the nature of consequences being found guilty of a criminal offence that is believed to necessitate the safeguarding of defendant from wrongful convictions by, firstly, adhering to the in *dubio pro reo* principle and, secondly, by burdening the prosecution with proving guilt and thereby defeating the presumption of innocence. Ashworth takes this rationale to be the first and foremost reason for recognizing the principle. To Van Sliedregt, the prohibition of wrongful convictions constitutes core of the presumption of innocence; the rule of in *dubio pro reo* is a direct deduction of this. Keijzer speaks of the right to be acquitted if the charge has not been legally and convincingly proved[16].

In Anglo-Saxon Legal System, the most obvious aim of the presumption of innocence is to protect an innocent from wrongful conviction[17]. This aim is also adopted to Continental European Legal System. Because the formal or informal registration of conviction may also result in plumbs such as censorship, social exclusion, stigmatization or disqualification from some forms of employment[18]. There must be strong reason for these results to be imposed on person. For this, the principle of proving guilt with precise and clear evidence has been accepted[19]. Trachsel acknowledges that the presumption of innocence is derived from the principle of protecting personal honor[20].

One of aims of the presumption of innocence is to regulate the standard of proof [21]. In order for everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law, the standard of proof

a 'counterweight' against all the real risks involved in an individualized suspicion (it puts his social status in jeopardy, it submits him to the State's vast powers, and it sets in motion processes possibly leading to conviction and detention).

16 De Jong, F. (2016), p. 34- 35.

17 Stummer, A. (2010), p. 29.

18 Asworth, A. (2006), *Four Threats to the Presumption of Innocence,* Sweet and Maxwell Press, p. 247. Ashworth concludes that the application of the presumption of innocence to the pre-trial phase is dictated by the same aim that also underlies the interpretation of the presumption of innocence as a rule of evidence, that is: following up on the State's duty to recognize the defendant's legal status of innocence prior to conviction. (Asworth, A. (2006), p. 244). This is so because subjecting the individual to the vast state powers that are part and parcel of the criminal procedure seems to contradict the notion that only the court's decision occasions the consequences of the status of a guilty person (De Jong, F. (2016), p. 36).

19 Sherman, J. (2014), p. 434.

20 Trachsel, S. (2005), p. 164

21 Laudan, L. (2006), p. 116-117

must be determined[22]. For example, it is not possible to say that a legal system in which evidence standard is applied in suspicion with the presumption of innocence.

Whereas Anglo-Saxon Legal System acknowledges that the presumption of innocence serves to prove guilt with precise and clear evidence; Continental European Legal System focuses on reaching material truth[23]. Continental Europe does not explicitly accept the burden of proof with precise evidence, it is close to this standard by seeking material truth[24].

The presumption of innocence may not always ensure guarantees provided by Anglo-Saxon law in every legal system. Or every legal system may not explain the presumption of innocence in the style of Continental European Legal System. In general, a minimum level of unity should be sought to determine the common standard of presumption. As long as basic unity is provided, local differences in terms of interpretation and implementation may be excused. Searching for a minimum level of unity is not an empirical issue to find a common denominator. Because human rights also have normative and transformative dimensions[25].

Minimum unity required by the presumption of innocence is that State must prove crime in order to convict and punish. Because a suspect does not have to prove innocence[26]; thus, it is possible to say that the presumption of innocence affects not only the standard of proof, but also the burden of proof[27].

Article 6 § 2 of European Convention on Human Rights (ECHR) safeguards the right to be "presumed innocent until proved guilty according to law"[28]. European Court of Human Rights (ECtHR) has accepted that the presumption of innocence has two aspects. According to first aspect, viewed as a procedural guarantee in the context of a criminal trial itself, the presumption of innocence imposes requirements in respect of the burden of proof ; legal presumptions of fact and law; the privilege against self-incrimination; pre-trial publicity; and premature expressions, by the trial court or by other public officials, of a defendant's guilt.

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22 Scheiner, R. (2007), Standard of Proof, Presumption of Innocence, And Plea Bargaining: How Wrongful Conviction Data Exposes Inadequate Pre-Trial Criminal Procedure, *California Western Law Review*, V. 0/ 55, p. 58.

23 Stummer, A. (2010), p. 37-38

24 Campbell, L. (2013), p. 684.

25 Roberts, P., Hunter J. (2012), *Criminal Evidence and Human Rights*, Hart Press, p. 262.

26 Jackson, D. J. vd. (2012), p. 212.

27 Lippke, R. L (2015), p. 163; Ferzan, K. (2014), p. 274; Campbell, L. (2013), p. 684.

28 Matijasevic/Serbia, A.N: 23037/04, ECHR 2006 A- X, § 49; Mokhov/Russia, A.N: 28245/04, 04/03/2010, § 32.

The second aspect of the protection afforded by Article requires that a person must be treated in a manner that is consistent with his or her innocence after the conclusion of criminal proceedings which have terminated in an acquittal or discontinuation. The extension of the protection of Article to subsequent non-criminal proceedings constitutes an important safeguard for the person's established innocence in relation to any charge not proven. In order for the second aspect of Article to be applicable to subsequent proceedings, the Court requires an applicant to demonstrate the existence of a link between concluded proceedings and subsequent proceedings. Such a link is, for example, where the subsequent proceedings require examination of the outcome of the prior criminal proceedings and, in particular, where they oblige court to analyses criminal judgment, to engage in a review or evaluation of the evidence in the criminal file, to assess the applicant's participation in some or all of the events leading to the criminal charge, or to comment on the subsisting indications of the applicant's possible guilt[29].

III. IMPLEMENTATION of the PRESUMPTION of INNOCENCE in ADMINISTRATIVE JURISDICTION

When a crime is mentioned, first thing that comes to mind as a charge in the Criminal Code. However, the area of punishment and crime is not limited to the Criminal Code regulations. In countries such Turkey, Germany, France, Britain and Spain punishment area is divided into three parts. These are classical punishment under criminal law, simple crimes or misdemeanors punishment under specific law, and administration punishment under administrative legislation[30]. It is necessary to determine whether the presumption of innocence will be applied in actions included in the administrative punishment area although an action is not regulated under the Criminal Code as a crime[31].

To brighten this issue, the concept of criminal charge, in other words definition of crime, must be determined. ECtHR explains incrimination in its autonomous interpretation principle. According to autonomous interpretation principle, the matter in dispute is evaluated free from national qualifications in a separate manner for each concrete event. The court explains the notion of

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29 Tsvetkova and Others/Russia, A.N: 54381/08, 10/04/2018, § 192; Allen/United Kingdom (GC), A.N: 25424/09, § § 93, 94; Kemal Coşkun/Turkey, A. N: 45028/07, 28/03/2017, § 41.

30 Çayan, G. (2016), The Right to a Fair Trial, the Coverage of the Right and Application in the Tax Cases, *Law and Justice Review*, V. 0/12, p. 445-446.

31 Çayan, G. (2016), Tax Cases, p. 445 and Çayan, G. (2016), The Right to a Fair Trial in the Discrepancies Originating from Public Officials' Status, *Human Rights Review*, V. 0/11, 2016.

incrimination essentially and establishes the notion of incrimination by going beyond is visible[32].

In order for an action to be considered as a criminal charge and the 6th article to be applied to a case, one of three criteria needs to take place. These criteria do not have to take place in a cumulative way. Existence of a single criterion is enough for ECtHR to accept action as a criminal charge[33].

According to this; Firstly, Classification of the offence in the law of the respondent state; in this particular case, if the offence is classified as a crime in the law of the respondent state, it is sufficient to consider the act as a crime. There is no need for a further condition to take place. If an act is really classified as a crime by the law of the national legal system, the principles of criminal court will step in with the claim that particular offence took place and the investigation period about the person will begin. In a system where the right to a fair trial is granted to people from the point of the starting of the criminal investigation, the classification of the act as a crime in the national legislation is enough to apply the 6th article to the case. Likewise, the classification of the act that the person is claimed to commit as a crime in the national legislation generally causes the person to be exposed to criminal investigation and prosecution. If an act is not classified as a crime in the national legislation; then the attribution of the act needs to be determined by evaluating the act with regard to secondary and tertiary criteria. There are such cases that there may be doubt about if the act is classified as a crime in the national legislation or not. In such a case, an evaluation with regards to secondary or tertiary criteria will be inevitable[34].

Secondly, The Nature of the Offence; by taking into account the essentials such as the resemblance of the act to the acts that are classified as crime in the national law, how this act is tackled with in other conventional governments, what should be the response to such an act in a democratic nation, whether or not the act is a qualification that affects everyone in the society; the criteria used in determining the qualifications of the act is called nature of the act criteria. In this scale, whether or not by taking the nature of the act into account the act should be considered a crime is emphasized. If the act resembles that are considered crimes in the national legislation or if there is a resemblance between the procedure that will be applied to the relevant act and the procedures that will be applied in case of punishments; the act is considered as a crime by its nature[35].

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32 Deweer/Belgium, A.N: 6903/75, 27/02/1980, *§ § § k.b.a.*

33 Çayan G. (2016), Public Officials', p.191; Çayan G. (2016), Tax Cases, p. 453.

34 Çayan G. (2016), Public Officials', p.191; Çayan G. (2016), Tax Cases, p. 455.

35 If there is no resemblance between the relevant act and the acts that are considered crimes in the national legislation, whether or not the act is considered in conventional governments

And lastly, the type and the severity level of the possible punishment; the determination of the qualifications of the act by emphasizing the issues of the purpose of punishment and whether or not the punishment limits the freedom of the person is called the type and severity scale of the punishment. In this scale, the offence being charged is determined by taking the type and the severity of the punishment that will be given to the alleged crimes. ECtHR almost accepts all the acts that require punishments limiting the freedom of the person as criminal charges. However, it is not possible to say in advance that all the punishments limiting freedom originate from criminal charges; and for this reason, the 6th article of ECHR can be applied. For ECtHR determines the accusation's qualification by taking the severity and the longevity of the freedom limiting punishment[36].

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or what should be the procedure for this kind of act in a democratic state of law should be considered and be determined if the act is a crime or not. Another essential that must be tackled here is that; moving from the fact that if the act has a qualification that will affect everyone, what should be understood from the notion of determining the qualification of the act. If the punishment given to this particular act can only be applied to a certain part of a society the discipline aspect of the act is considered dominant; and if the punishment given to this particular act can be applied to all people in the society, the crime aspect of the becomes dominant. However, particular crimes that the legislation assumes that they can only be committed by a certain type of people should not be considered in this scope. In the cases where these particular crimes are present, according to the dependence rule, other people can be punished too; because of this, all the society potentially becomes the object of this crime. For instance, because the punishment precluding lawyers from doing their duty only interest the lawyers, it is possible to say that this act's discipline aspect is dominant as it is not possible to punish people with this punishment who are not lawyers. On the other hand, the act of embezzlement is a deliberate crime. The perpetrator of this crime is the public official by law. However, if another person who is not a public official participates in the crime, he or she will too suffer the consequences that are pre-determined for this kind of an act according to the dependence rule (Çayan G. (2016), Public Officials', p.191-192; Çayan G. (2016), Tax Cases, p. 455).

[36] For instance, in an application, two days of freedom limiting punishment was not seen enough to incriminate the person; while in another application, 3 months long of a punishment was seen enough to be considered a crime. While the time period of the freedom limiting punishment is determined in terms of criminal charges, not the duration of the final punishment that is given should be taken into consideration, but the minimum punishment duration that can be given to the act in question according to the national legislation should be considered. For instance, if a person is given two days of imprisonment as a punishment as consequence of an act, does not allow the acceptance of the act in question to be considered as a criminal charge just because of the severity of the punishment. Only if three months of imprisonment can be given as the punishment for that person as the consequence of his act then should the act need to be evaluated as a criminal charge. In other respects, the basic qualification of the punishment is not enough to push the alleged offence out of the coverage of the 6th article. Likewise, the dire situation of the punishment that will be given as a consequence of an act is not mandatory for the 6th article to be applied to the case (Çayan G. (2016), Public Officials', p.192-193; Çayan G. (2016), Tax Cases, p.455).

If an administrative offence contains one of the three criteria which determined by ECtHR, it should be accepted as a criminal charge and benefit from the presumption of innocence's guarantee. As a matter of fact, in the Jussila/ Finland case, ECtHR, accepted administrative fines as criminal charges according to these criteria[37].

In order to ensure the protection afforded by the presumption of innocence, a suspicion should not be considered guilty by criminal and public authorities and should not be treated as a convict until the guilt is fixed[38]. Because if judicial and public authorities are prejudicial, the protection afforded by the presumption can not go beyond theory[39].

It is not possible to say that the presumption of innocence will be applied in all administrative cases. In order for the presumption of innocence is applied in subsequent cases, there must be a reasonable link between the criminal case. Whenever the question of the applicability of Article 6 § 2 arises in the context of subsequent proceedings, victim must demonstrate the existence of a link, as referred to above, between the concluded criminal proceedings and the subsequent proceedings. Such a link is, for example, where the subsequent proceedings require examination of outcome of prior criminal proceedings and, in particular, where they oblige the court to analyses the criminal judgment, to engage in a review or evaluation of evidence in the criminal file, to assess applicant's participation in some or all of events leading to criminal charge, or to comment on the subsisting indications of applicant's possible guilt[40].

If person is found guilty in a criminal proceeding, there is no doubt about an administrative case. Because protection afforded by presumption of innocence

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37 Jussila/Finland, A.N: 73053/01, 23/11/2006, § 38.

38 Allen/United Kingdom, § 94: The presumption of innocence also protects individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been continued, from being treated by public officials and authorities as though they are in fact guilty of the offence with which they have been charged. Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the guarantees of Article 6 § 2 could risk becoming theoretical and illusory. What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by the public.

39 Kürşat Eyol, A.N: 2012/665, 13/06/2012, § 29

40 Allen/United Kingdom, § 104: Whenever the question of the applicability of Article 6 § 2 arises in the context of subsequent proceedings, the applicant must demonstrate the existence of a link between the concluded criminal proceedings and the subsequent proceedings. Such a link is likely to be present, for example, where the subsequent proceedings require an examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyses the criminal judgment; to engage in a review or evaluation of the evidence in the criminal file; to assess the applicant's participation in some or all of the events leading to the criminal charge; or to comment on the subsisting indications of the applicant's possible guilt.

is now disabled. In contrast, if the person is acquitted in criminal proceeding and later convicted in the administrative case; this conviction will have a negative effect on the acquittal decision. The main issue to be examined here is whether it is appropriate for the presumption that the administrative case can be brought against the person acquitted of criminal case and that sentence can be convicted as a result of case[41]. In other words, if person was acquitted from criminal proceedings with a provision other than conviction, the role of the presumption of innocence becomes more important in the administrative case. As is known, the criminal and administrative proceedings serve different purposes. The standard of proof in the administrative proceedings is lower than in the criminal proceedings. For this reason, proof used by the criminal court, deciding on acquittal, does not contradict protection afforded by the presumption of innocence[42]. Thus, ECtHR has held that it is neither the purpose nor the effect of the provisions of Article 6 § 2 to prevent authorities vested with disciplinary power from imposing sanctions on a civil servant for acts with which he or she has been charged in criminal proceedings, where such misconduct has been duly established[43].

IV. The PRESUMPTION OF INNOCENCE in the LIGHT OF ADMINISTRATIVE JURISDICTION DECISIONS

A. Discussion of Acquittal

The main purpose of the presumption of innocence is to protect innocents from wrongful conviction. If a suspicious is found guilty in criminal proceeding, there is no doubt about an administrative case. Because protection afforded by the presumption of innocence is now disabled[44].

However, if a criminal case has ended with a result other than a conviction, the role of the presumption of innocence becomes more important in a subsequent administrative case. Here, it should be determined how the presumption of innocence should be applied in the administrative case.

Indeed, it is necessary to accept that the presumption of innocence continues in the cases where a crime is not fixed as a result of a criminal case or it is not possible to be certain that the crime was committed. This should be respected in the subsequent administrative cases, and the decisions other than convictions

41 Smith, E. (2012), *The Presumption of Innocence, Scandinavian Studies in Law*, p. 490; Ringwald/Denmark, A.N.: 34964/97, 11/02/2003; Y./Norway, A.N: 56568/00, 11/02/2003, Campbell, L. (2013), p. 686.

42 Mustafa Akın, A.N: 2013/2696, 09/09/2015, § 38; Smith, E. (2012), p. 496; Campbell, L. (2013), p. 686; Ringvold/Norway, § 38; Y./Norway, § 41.

43 Akumas v. Lithuania, A.N: 6924/02, 18/07/2006, § 57.

44 Ali Atlı, A.N: 2013/500, 20/03/2014, § 35.

should not be discussed[45]. Turkish Constitutional Court ("Constitutional Court") also steadily emphasizes that a non-conviction decision from the criminal case will not prevent the imprisonment of administrative punishment, but the acquittal decision should not be discussed[46].

ECtHR has acknowledged in its caselaw the existence of two aspects to protection afforded by the presumption of innocence: a procedural aspect relating to the conduct of criminal trial, and a second aspect, which aims to ensure respect for a finding of innocence in the context of subsequent proceedings, where there is a link with criminal proceedings which have ended with a result other than a conviction. Under its first aspect, the principle of the presumption of innocence prohibits public officials from making premature statements about defendant's guilt and the acts as a procedural guarantee to ensure the fairness of criminal trial itself. However, it is not limited to a procedural safeguard in the criminal matters: its scope is broader and requires that no representative of the state should say that a person is guilty of an offence before his guilt has been established by the court[47]. In that respect the presumption of innocence may be infringed not only in the context of the criminal trial, but also in separate the civil, disciplinary or other proceedings that are conducted simultaneously with the criminal cases. While the scope of first aspect under Article 6 § 2 of the Convention covers period in which a person has been charged with a criminal offence until the criminal proceedings are final, second aspect of the protection of the presumption of innocence comes into play when the criminal proceedings end with a result other than a conviction, and requires that the person's innocence *visàvis* the criminal offence is not called into doubt in subsequent proceedings[48].

There is no difference between violation of the first and the second aspect, and it is also possible to violate both aspects together in the same trial. In case of Seven/Turkey, ECtHR has been decided that both aspects also violated. In this case, On 12 April 2002, the applicant, S.K., filed a criminal complaint claiming that he had been taken into a police car by two police officers on the pretext of her being a suspect, and that after one time she had been roamed in a vehicle, one of the police officers had raped her in an empty field. Applicant submitted that S.K., who had looked intoxicated, had hailed them, stopped

45 Uğur Ayyıldız, A.N: 2012/574, 06/02/2014, § 76.

46 Uğur Ayyıldız, § 79; Mustafa Akın, A.N, § 41.

47 Konstas/ Greece, A.N: 53466/07, 24/04/2011, § 32: The presumption of innocence does not cease to apply solely because the first-instance proceedings resulted in the defendant's conviction when the proceedings are continuing on appeal.

48 Sekania/Austria, 25/08/1993, S. 266-A, § 30: The voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation.

their car, and told them that she worked as a bar hostess who entertains male guests by keeping them company. She had asked for their help to go to a safe place and the applicant had offered to take her home, which she had declined. A criminal investigation was launched against the applicant; in S.K.'s forensic examination, it was found that there was no sign of coercion in her body; in the expert report prepared on 15 April 2002, it was determined that applicant's sperm samples were found in laundry and a bin in her home. On 13 September 2005 Ankara Assize Court acquitted the applicant and S.K. of all charges, holding that there was no evidence of force on her body, one of the constituent elements of the offences of rape and unlawful detention.

In the aftermath of the events of 12 April 2002 a preliminary disciplinary investigation was launched against the applicant, On 28 November 2002, the Supreme Disciplinary Council found the applicant guilty of abuse of his authority as a police officer and of sexually assaulting and it was decided that the applicant dismissed public duty.

The applicant filed a case at Ankara Administrative Court, claiming that the presumption of innocence had been violated due to disciplinary punishment. On 4 July 2003 Ankara Administrative Court dismissed the applicant's case, holding that decision to dismiss the applicant from police force had been in accordance with the law.

The applicant applied to the European Court of Human Rights, argued that the presumption of innocence was violated. ECtHR decided that, *"Regard being had to the disciplinary context of the case, in which one of the legal grounds for the applicant's dismissal was "rape or sexual assault" under the disciplinary regulations, and the way in which the administrative court summarized the events of 12 April 2002, the statement that the applicant had intercourse with S.K. without her consent can not but convey to a reader of the judgment the impression that the applicant was guilty of raping S.K. There has been a violation of Article 6 § 2 of the Convention as regards its first aspect."*

Having found that the first aspect was violated, the Court has also examined whether the second aspect has been violated by the national court. ECtHR, in terms of the second aspect, decided that: *"The applicant explicitly argued before the Supreme Administrative Court that he had been acquitted of all charges in criminal proceedings and that therefore the grounds of his dismissal under disciplinary regulations could no longer be considered compatible with the law. Against that background, the Court considers that the Supreme Administrative Court needed to explain why it regarded that reasoning employed by disciplinary authorities and the first-instance court could continue to be in accordance with the law, although the applicant had been acquitted in the meantime in criminal proceedings. That was the only way it could have avoided situation complained of by the applicant, namely that he was left with two*

contradictory judgments. By keeping silent on that point, it missed opportunity to rectify previous reasoning, which the Court has already found incompatible with the presumption of innocence by virtue of the first aspect of Article 6 § 2 of the Convention, and therefore cast doubt on applicant's innocence, which had already been established. The foregoing considerations are sufficient to enable the Court to conclude that there has also been a violation in respect of the second aspect of Article 6 § 2 of the Convention."

It is also possible for a criminal proceeding to end because timeout has expired. In such a fact, there have ended with a result other than a conviction. In such case-result, it is incompatible with the presumption of innocence to imply that person committed a crime. Indeed, in application of Sebğatullah Altın, Constitutional Court found that the questioning of innocence was against the presumption of innocence by the accusations of prosecutions that ended with a non-conviction decision.

In the application, a criminal case was brought against the applicant on the grounds that he charged with a member of the Hezbollah terrorist organization[49]. After the criminal case was opened, the applicant, who works as an imam, was decided to be dismissed from public official[50]. The criminal case has ended due to proceedings' timeout. And the applicant, applied to return to his job. But the application was rejected by the administration[51].

The applicant filed a case at the Ankara Administrative Court. The court stated that "*an administration has discretion over the appointment; the plaintiff showed his will to be a member of the terrorist organization by giving his profile and photograph to Hezbollah terrorist organization; it is clear, with criminal jurisdiction, that the crime has ended due to timeout; this situation does not eliminate the existence of the crime and for this reason present case must be rejected*"[52].

The applicant applied to the Constitutional Court, claiming that the presumption of innocence was violated by decision of the Ankara Administrative Court. The Constitutional Court has examined the application in terms of merit. Having found the application admissible, the Court decided that, the presumption of innocence was violated, "*While evaluating the presumption of innocence, it is necessary to judge whether the court has committed an offence and whether it discussed acquittal decision. In the first part of the court decision, facts and evidence related to disciplinary action were evaluated. The assessment in this part is not against the presumption of innocence. However,*

49 Sebğatullah Altın, AN: 2013/1503, 02/12/2015, § 7.
50 Sebğatullah Altın, § 8.
51 Sebğatullah Altın, § § 9, 10.
52 Sebğatullah Altın, § 11.

in the continuation of the court decision, it was stated that the crime ended with criminal timeout and this situation did not eliminate the existence of the crime and it must be admitted that the crime cannot be finalized. This statement gives to judge reader impression that the crime was committed. Due to this impression, the presumption of innocence was violated by the Ankara Administrative Court[53]*.".*

It is a universal legal basis that no more than one punishment is imposed for the same action in the criminal proceedings. However, the European Convention on Human Rights does not prevent both a criminal prosecution and an administrative investigation due to the same action. Likewise, even if the criminal case has ended with a result other than a conviction, it is possible to adjudge a conviction in subsequent administrative case[54]. In the Sebğatullah Altın application, the Constitutional Court emphasized that the concepts of questioning the acquittal decision and convicting against person are different from each other[55].

B. Standard and Burden of Proof in the Light of the Presumption of Innocence

According to the presumption of innocence, the burden of proof is in prosecution[56]. When the burden of proof[57] is removed from the prosecution to the defendant, the presumption of innocence is violated[58].

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53 Sebğatullah Altın, § 30-33.

54 Jakumas/Lithuania, A.N: 6924/02, 18/07/2006, § 58; Çelik (Bozkurt)/Turkey, A.N: 34388/05, 12/04/2011, § 30; Vella/Malta, A.N: 69122/10, 11/02/2014, § 56.

55 Sebğatullah Altın, § 33.

56 Telfner/Austria, A.N: 33501/96, 20/06/2001, § 15.

57 Burden of proof formulation originated in 1963 decision of the Commission in Pfunders Case. In that case, the Austrian Government alleged that the Italian courts had denied the presumption of innocence to six young men who had been convicted of the murder of an Italian customs officer. The Commission gave some general guidance on the meaning of Article 6 § 2: This text, according to which everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law, requires firstly that court judges in fulfilling their duties should not start with the conviction or assumption that the accused committed the act with which he is charged. In other words, the onus to prove guilt falls upon the prosecution, and any doubt is to the benefit of the accused. Moreover, the judges must permit the latter to produce evidence in rebuttal. In their judgement they can find him guilty only on basis of direct or indirect evidence sufficiently strongly in the eyes of the law to establish his guilt (Stummer A., (2010), p. 92).

58 Barbera, Messegue and Jabardo/Spain, A.N: 19590/83, 06/12/1988, § 77: The principle of the presumption of innocence requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defense accordingly, and

If the criminal trial is ended with a result other than a conviction, it is not for this reason that accused is convicted to pay compensation for the same events does not violate the Convention[59]. But even then, the burden of proof belongs to suspect is incompatible with the Convention[60].

Whenever the question of whether the presumption of innocence's effect on the burden of proof can be limited, various debates are raised in the doctrine. Because the burden of proof is removed from the prosecution to the defendant, it means that the presumption of innocence is limited.

According to Hart, society consists of one by one individuals. Onwards the restricted right belongs to individuals, the right of society will be limited. Since the limitation of the presumption of innocence also causes the rights restriction of the society and societies benefit does not justify the limitation of the presumption[61].

However, the dominant view in the doctrine admits that the presumption of innocence can be limited. In limitation of the presumption, "the theory of balancing" and "the competition of rights theory" or "optimisation requirements" have been introduced[62].

In my opinion, if there is a sentence of conviction thanks to criminal justice, a huge chaos occurs in the society. And this situation destroys the society and the State over time. For this reason, to apply the presumption of innocence broadly will increase their decisions with wrongful acquittal. Sometimes it can be said that it is better for ten criminals to be acquitted rather than being condemned to an innocent[63]. Sometimes there are thousands of criminals. Numbers are important. A system that allows thousands of criminals to be freed for fear of condemning an innocent may not be able to adequately protect the society. If the society is not sufficiently protected, social chaos becomes inevitable. For this reason, it is impossible to recognize the presumption of innocence as an unlimited right. If society requires benefit, the presumption of innocence can be limited and under certain circumstances, the burden of proof can be left to the defender.

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to adduce evidence sufficient to convict him.

59 Ringvold/Norway, § 38; Y./ Norway, § 41: Exoneration from criminal liability does not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof.

60 Capeau/Belgium, A.N: 42914/98, 13/06/2005, § 25: The presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defense (Telfner v. Austria, § 15). The burden of proof can not be reversed in compensation proceedings brought following a final decision to discontinue proceedings.

61 Stummer, A. (2010), p. 38; Asworth, A. (2006), p. 107, 209.

62 Ibid.

63 Gray, A. (2017), p. 19.

Leaving aside the doctrinal debates, the ECtHR acknowledges that the presumption of innocence and the burden of proof can be limited by legal and actual (*de facto*) presumption. The ECtHR does not find it contrary to the Convention that person holding a certain amount of drugs would be punished for drug trafficking. In such cases, The Court decide that the burden of proof could be left to defender thanks to actual and legal presumption. Here, carrying a certain amount of drugs is the presumption of drug trafficking. Under normal circumstances, drug trafficking had to be proved separately. But thanks to a legal presumption, it was considered sufficient to carry a certain amount of drugs for crime.

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As a known annulment actions concerning administrative acts that are brought by a person whose interests were violated, with the claim that act is illegal due to a mistake made in one of the elements of competence, form, reason, subject and aim. Administrative act takes advantage of the lawfulness presumption. The fact that the administrative acts takes advantage of the lawfulness can not be interpreted as being obliged to prove plaintiff's justification under all circumstances. Because an administration authority, established an act, must demonstrate its compliance with the law. Especially in administrative disciplinary acts, the legality of sanction should be revealed. It is possible for administration rely on legal or actual (*de facto*) presumptions while demonstrating legality of act. In cases where legal and actual (*de facto*) presumptions are based, the burden of proof passes to plaintiff.

While proving legality of administrative act by the administration, it is possible to rely on legal or actual (*de facto*) presumptions. In such cases, the plaintiff has to prove that these presumptions are incompatible with truth and that the administrative act is unlawful. Here, it is necessary to evaluate whether the burden of proof is reversed, whether it complies with the presumption of innocence in terms of administrative offence or integrated administrative proceedings.

In the Ahmet Altuntaş application, the Constitutional Court has accepted that the burden of proof can be reversed in administrative offence with legal and actual (*de facto*) presumptions. The Court also emphasized that the plaintiff should be given opportunity to prove the opposite of the presumptions and not rely on them automatically. Otherwise, the presumption of innocence would be violated[64].

In the Application, the applicants who owned some agricultural land in Batman Province were punished with an administrative fine on the grounds

[64] Ahmet Altuntaş, A.N: 2015/19616, 17/05/2018, § § § 28, 29, 33.

that stubble was burned in their land[65]. The applicants filed a case demanding the cancellation of the administrative fine in the Batman Administrative Court. The Administrative Court, which decided the dispute in merit, decided to reject the case on the grounds of *"As a rule, only those who burn the stubble can be fined. It should be determined whether the plaintiffs who are beneficial owner can be punished for this action. Following the action, crime scene was visited and those who burned the stubble could not be identified. It is clear that the stubble burner can be caught only in red-handed. It is understood that the plaintiffs did not make any notice or complaint to the official authorities that the stubble was burned in their lands. For this reason, it must be accepted that the person who burns the stubble is the plaintiffs who are the beneficial owner[66]."*. The Batman Administrative Court's decision was upheld by the Diyarbakir Regional Administrative Court[67]. And then, the plaintiffs applied to the Constitutional Court[68].

The Constitutional Court, which found acceptable, decided that the presumption of innocence was violated by expressing: *"In the present case, the Administrative Court found the applicants' ownership of the stubble-burned agricultural land sufficient to impose an administrative fine. No evidence of perpetrator has been identified. The actual presumption that act was carried out by property owners was used by the court of instance. The court used actual presumption that the crime was committed by the property owners. With the actual presumption, the applicants were automatically convicted. This situation made the applicants disadvantaged against administration in terms of defense and actual presumption used in evidence violated the presumption of innocence"*.

In Fameka İnş. Plastik San. ve Tic. Ltd. Application an administrative fine was imposed on the applicant in accordance with the Road Traffic Law, due to exceeding maximum permissible load weight. In lawsuit filed against this decision, first instance court decided to reject case on the grounds that there was no information and document to justify application and the decision was finalized. The applicant company filed an individual application to the Constitutional Court, claiming that it was the sender of cargo allegedly exceeding maximum limit, did not take any action on the carriage of cargo and the fines could not be imposed for this action that did not belong to its. The Constitutional Court ruled that the applicant's being the sender of item being transported was considered sufficient to impose the fines, in other words, the

65 Ahmet Altuntaş, § § 9-10.
66 Ahmet Altuntaş, § § 11-12.
67 Ahmet Altuntaş, § 14.
68 Ahmet Altuntaş, § 26.

fact that being of a specific status (sender) was justified, in this case, it would not comply with the presumption of innocence[69].

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The standard of proof must be determined in order to make sense of statement that no one is considered guilty until proven guilty in a court of law[70].

Criminal and civil proceedings are different as much as day and night. This difference occurs both in the trial proceedings and in the standard of proof. The standard of proof in civil courts is lower than the criminal courts. Because the criminal courts aim to reach material truth and to prove action with clear evidence beyond reasonable doubt. In the civil courts, it is also possible to prove with superior document and presumption proof.

Evidence through reach for material truth is consistent with the logical paradox of administrative jurisdiction. For this reason, in administrative criminal charges, action can not be expected to be proved with clear evidence beyond reasonable doubt[71].

In Grande Stevens/Italy application, the ECtHR ruled that the adoption of the standard of proof with evidence beyond reasonable doubt in the administrative jurisdiction, is incompatible with the nature of trial[72]. As long as the members of a court should not start with the preconceived idea that accused has committed offence charged; the burden of proof is on prosecution, and any doubt should benefit accused; the adoption of a standard lower than clear evidence beyond reasonable doubt does not mean that the presumption of innocence is violated just because of this.

In S.A. Capital O.Y./ Finland application, the applicant company, which operates as a limited company in asphalt sector, was punished with

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69 Fameka İnş. Plastik San. ve Tic. Ltd., A.N: 2014/3905, 19/04/2017, §§ 33, 34.

70 Assefa stated that presumption of innocence is a restatement of the rule that in criminal matters the public prosecutor has the burden of proving guilt of the accused for the accused to be convicted of the crime he is charged with. Burden of proof has two elements: the first element is evidentiary burden, i.e. producing evidence in support of one's allegation, while the second element relates to the burden of persuasion (also referred to as the legal burden), which is the obligation of the party to convince the court that the evidence tendered proves the party's assertion of facts. The allocation of burden of proof is complicated by factors, such as, affirmative defenses and presumptions which are exceptions thereby shifting the burden of proof to the defendant. Moreover, the determination of the elements of the crime is a formidable task because often, all the elements may not be found in a single provision that defines the crime. There is also lack of clarity regarding the rules and/or the practice relating to the standards of proof (ASSEFA S. K. (2012), The Principle of The Presumption of Innocence and Its Challenges in The Ethiopian Criminal Process, *Mirzan Law Review,* V. 6/2, p. 274).

71 Angel/Romania, A.N: 28183/03, 04/11/2007, § § 62, 69.

72 Grande Stevens/Italy, A.N: 18640/10, 07/07/2014, § 159.

administrative fines for making a cartel agreement in violation of competition rules. Thereupon, the applicant filed a lawsuit in a court with the request for cancellation of administrative fines, but in accordance with "superiority of evidence" standard, the court decided to reject the case. The decision was finalized after being approved in domestic law.

The applicant company filed an individual application, claiming that it would not be punishable by fines unless proved with precise and clear evidence beyond reasonable doubt, and that the presumption of innocence was violated by accepting the standard of proof.

ECtHR ruled that: *"The standard of proof, which is beyond reasonable doubt with clear and precise evidence, is a minimum guarantee provided to accused in the criminal proceedings. It is not against the presumption of innocence to apply this standard in administrative offence or subsequent civil cases. However, this does not mean that the presumption of innocence did not provide any guarantee regarding the standard of proof for the administrative proceedings. But for the practicality and effectively of the presumption of innocence, the standard of proof should not be arbitrarily set, court members should not be prejudiced, the right to defense should be recognized and all evidence should be examined. It is understood that proof of competition violations is very difficult in practice, the court does not arbitrarily set the standard of proof or prejudiced, and all evidence is examined. When these issues are evaluated as a whole, it was decided that the presumption of innocence was not violated."*[73].

C. The Effect of Prejudicated Declarations on the Presumption of Innocence

The presumption of innocence prevents the use of prejudicated declarations relating to a criminal case. Apart from the criminal case, prejudicated declarations should also be avoided in context of subsequent administrative cases and offences[74].

In ECtHR, a common and influential formulation of the presumption of innocence states that an official decision should not reflect opinion that the defendant is guilty, unless the guilt of defendant has previously been determined according to law[75].

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73 S.A. Capital O.Y./Finland, A. N: 5556/10, 14/05/2019, § § § § 107, 109, 121, 122.

74 İsmoilov and Others/Russia, A.N: 62902/00, 27/11/2003, § 160: Article 6 § 2 is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings. Where no such proceedings are or have been in existence, statements attributing criminal or other reprehensible conduct are more relevant to considerations of protection against defamation and adequate access to court to determine civil rights, raising potential issues under Articles 8 and 6 of the Convention.

75 This definition originates from the decision in Minelli/Switzerland. In the case, the applicant

The presumption of innocence can be violated from not by court members and prosecutors but by other public officials prejudicated declarations[76]. According to the ECtHR, Article 6 of the Convention prohibits public officials from making prejudicated declarations regarding the ongoing trials[77]. For this reason, the public officials must pay attention to words[78] when making statements about ongoing trials[79].

Court members' statements should be examined more strictly than those of the prosecutors and other public officials. Indeed, the ECtHR stated that court members should be more careful and attentive than other public officials in interim decisions, hearing, press statements or in any form[80]. Interim decisions or hearing statements that action was carried out before decision was made do not comply with the presumption of innocence[81].

There are different details in the doctrine on this subject. Even though Weigend, like Keijzer, qualifies the presumption of innocence as a rule of procedure, he considers that this rule does not restrict anyone (e.g. the media) but the judicial authorities in expressing an opinion as to the guilt of the defendant. The fact that the presumption of innocence is a rule of procedure means that it applies 'from the initiation of a criminal process to its conclusion' and only addresses the judicial authorities in their dealings with the suspect or the defendant. Likewise, Ashworth finds that the principle's aim, due respect for the legal status of innocence, necessitated by the harm done by a conviction

had been charged with criminal defamation and ordered to pay two thirds of the judgement costs of the private prosecutor, even though, due to the expiry of a limitation period, the case against the applicant was dismissed. The applicant alleged that the costs order was a breach of Article 6 § 2 because it involved and informal finding that the defendant had been guilty of the charge. The Court Stated that: In the Court's judgement, the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights to defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding the accused as guilty (Stummer, A. (2014), p. 90).

76 Daktaras/ Lithuania, § 42: Whether a statement by a judge or other public authority is in breach of the principle of the presumption of innocence must be determined in the context of the particular circumstances in which the impugned statement was made

77 Butkevicius/Lithuania, A.N: 48297/99, 26/06/2002, § 53; Daktaras/ Lithuania, § 41.

78 ECtHR goes so far as to emphasis the importance of the choice of words by public officials in their statements before a person had been tried and found guilty of an offence.

79 Fatullayev/Azerbaijan, A.N: 40984/07, 22/04/2010, § 159: The principle of presumption of innocence does not prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected.

80 Pandy/Belgium, A.N: 13588/02, 12/02/2007, p. 43 (Stummer, A. (2010), p. 67).

81 Nerattini/Greece, B.N: 43529/07, 18/12/2008, § 88.

and the proper relationship between State and individual, also prevents public officials from making statements on the guilt of the defendant[82].

D. Other Special Conditions

1. Enforcement of Administrative Sanctions for Not Providing Information

The presumption of innocence is closely related to self- incrimination and right to silence. However, in cases where public security requires declaration for identification, the presumption of innocence does not guarantee to silence.

In case of O'Halloran and Francis/ United Kingdom, applicants suspected of committing excessive speed crime in traffic were asked to declare their identity by the police, but they refrained from the submission of identity. Thereupon, the police punished the applicants with administrative fines for not reporting an identity. Although a lawsuit was filed against this decision before the administrative court, the case was rejected. The applicants alleged that the presumption of innocence, right to self- incrimination and right to silence were violated because of the request for identification. The Court concludes that there is no violation of Article 6 of the Convention, stating that traffic crimes are essential for public safety, and that it is imperative to provide information to identify the driver[83].

Likewise, it is not against the principle of presumption of innocence which the drivers are subjected to mandatory blood or alcohol tests in order to determine whether alcohol is used[84].

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82 A similar line of thought is followed by Campbell based on what she considers to be the traditional protected interests of the presumption of innocence: respect for the person and protection from the State. Her interpretation seeks to prevent the State from 'castigating someone as criminal before a finding of guilt and without a certain level of proof'. This interpretation is premised on the proper relationship between State and citizen combined with the particular censure that conviction entails, requiring that official statements that usurp the criminal court's role and evade the procedural protections are prevented. Like Weigend's, Campbell's conception pinpoints the applicability of this aspect of the presumption of innocence to state officials. This implication of the presumption of innocence is one of the aspects that is laid down in the proposed EU Directive (Article 4), following up on the ECtHR case law finding a violation of Article 6(2) in cases in which public officials had made public declarations on the accused's guilt. The ECtHR explains the finding of a violation by pointing out that these statements encourage the public to believe the suspect to be guilty before conviction and prejudge the court's assessment. The proposed EU Directive repeats (and thus endorses) this reasoning, which seems to refer to the importance of maintaining the court's authority to decide on guilt, while maintaining an open mind and material impartiality (De Jong, F (2016), p. 37-38).

83 O'Halloran and Francis/United Kingdom, A.N: 15809/02, 25624/02, 29/06/2007, § § 60-63.

84 Tirado Ortiz and Lozano Martin/Spain, A.N: 43486/98, 15/06/1999, § § § *k.b.a*.

2. The Presumption of Innocence in Recurrence of Offence

If a previously administrative offence is committed again, more severe punishment is called the recurrence of the crime. In the Kangers/ Latvia application, the European Court of Human Rights has thoroughly examined the practice of recurrence in the administrative jurisdiction in terms of the presumption of innocence[85].

In the aforementioned application, the police drew up an administrative offence report stating that the applicant had violated the Code of Administrative Offences by driving a car under the influence of alcohol with a blood alcohol concentration exceeding 1.5 permilles. The sentence was finalized by the District Court on 28 April 2009[86].

Since he was driving a vehicle against traffic rules on 31 July 2009, it was imposed to prosecute the applicant with the fine of 500 Lats by preparing the second report. Although the applicant appealed against offence, the appeal was dismissed by the national court and decision was finalized[87].

The applicant had committed an offence and imposed following penalties, fifteen days' administrative detention, the fine of 500 lats, a two-year driving ban in 20 November 2008. The decision was finalized in domestic law[88].

The applicant lodged an individual application with complaint that the presumption of innocence was violated. ECtHR, deciding the application as acceptable and examining the merit, stated that: "*While making decision, it was taken into consideration that the traffic crime was committed for third time in one year by the national court and the court referred to second report of 30 July 2009. It is clear that the recurrences' principles were applied based on second report when making decision, before the lawsuit filed against this report has not yet been concluded. In other words, the local authorities accepted that the offence set out in the report had been committed as the lawsuit filed against it had not been finalized. The presumption of innocence was violated due to admission that offence was committed without a final court decision*[89].".

3. Violation of the Presumption of Innocence through the Press

In a democratic society, informing the public about crime or administrative offence are inevitable in cases involving public interest. The ECtHR state that the freedom of expression, guaranteed by Article 10 of the Convention, includes the right to access information and the right to receive, so that the public

85 Kangers/Latvia, A.N: 35726/10, 09/09/2019.
86 Kangers/Latvia, § § 6-9.
87 Kangers/ Latvia, § § 12-15.
88 Kangers/Latvia, § § 6-9.
89 Kangers/ Latvia, § 61.

officials are informed by Article 6 of an ongoing administrative or criminal investigation or prosecution. it acknowledges that it is not obstructed to truth, but it is imperative to respect the dignity of person when giving information[90].

Publishing photographs of suspect in the press does not violate the presumption of innocence[91]. However, the presumption of innocence is violated if the interpretations or information in the media clearly accept that crime is committed[92].

4. Statutory Law Regulations and the Presumption of Innocence

There are various opinions in the doctrine about whether the presumption of innocence provides security against such statutory law regulations as lower the standard of proof and the punishment of danger crimes. One opinion argued that the presumption of innocence is a procedural protection of individual trial; another opinion acknowledges that it provides protection against the statutory law regulations as well as procedural protection[93]. In my opinion, the presumption of innocence should provide protection and find application in both procedural and statutory law. In fact, this situation is more related to the rule of law. Statutory law regulates that allocates the burden of proof to the party with the greater resources or punishments of danger crimes increase the risk of wrongly conviction. Of course, no legal system can completely eliminate a risk of innocent convictions. As before history, innocent convictions are convicted now and, in the future, innocent people will continue to be convicted. At this point, the main purpose of the presumption of innocence is to minimize the risk of innocent convictions[94]. Regardless of procedural or statutory law, regulations and practices that increase the risk of innocent convictions will violate the presumption of innocence's soul[95]. For this reason, it should be accepted that the presumption of innocence provides assurance for both statutory and procedural law.

The ECtHR is very cautious when evaluating regulations in statutory law terms of presumption of innocence[96]. In my opinion, the reason for this cautious approach is that states subject to Anglo-Saxon Legal System have also signed the European Convention on Human Rights. Because Anglo-Saxon Legal System, unlike Continental Europe, acts quite conservatively in the application of the presumption of innocence in statutory law regulations.

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90 Batiasvili/Georgia, A.N: 8284/07, 10/10/2019, § 86.
91 Y.B. and Other/Turkey, A.N: 48173/99, 483/99, 28/10/2014, § 47.
92 Rupa/Romania, A.N: 58478/00, 16/03/2009, § 232.
93 Jackson, D. vd. (2012), p. 205-206, 208-209.
94 Stummer, A. (2010), p. 33.
95 Wilkinson, J. (2018), p. 599
96 Engel and Others/The Netherland, A.N. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 08/07/1976, *§ 81*

5. Complementary Principles

a. The Right to Have Information About the Criminal Charge

According to the 6th article of the ECHR, everyone charged with a criminal offence has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him. The information that will be given to the defendant should include that information of what criminal charge is being put against him and what legal characteristics this act has[97]. It is not enough to inform the defendant with the reason and the characteristics of the criminal charge. The information needs to be in a certain abundance that will allow the defendant to defend himself. In other words, the defendant needs to be informed enough that he can start his defense.

The information about the charge needs to be given to the defendant in a language that he can understand. Although the enough information is given to the defendant, but the information is not in a language that he can understand, the Convention is violated[98]. What requires the utmost attention here is that the notification should be done in a language that he can understand, and not in his mother tongue. If the defendant can understand the language even if it is not his mother tongue, the Convention is not violated. If the information is in another language other than the language the defendant can understand, the defendant has the right to have the information translated into a language that he can understand[99].

If the failure of notifying the defendant about the criminal charge in its appropriate manner was caused by the defendant's own actions, as the government can not be blamed for this, the right to be informed about the criminal charge of the defendant is not violated[100]. In order to give a violation decision regarding the notification of the criminal charge in an appropriate way, there needs to be a failure of the government. If there is not a failure of the government, the violation decision is not made.

b. The Right to Have a Decent Amount of Time and the Convenience to Prepare the Defence

For the defendant to prepare his defense in the best possible way, he needs to have the information about the criminal charges brought against him and obtain the details about these charges and have a decent amount of time to

97 Stummer, A (2010), p. 86.
98 Zedner, L (2004), p. 196.
99 Wilkinson, H (2018), p. 96.
100 Vitkauskas, D, LEWIS- ANTONY S (2012), *Right to a Fair Trial Under the European Convention on Human Rights*, Integrights Press, p. 52.

prepare a defense. This situation shows that very basic right to defend is the right to have information about the criminal charge brought against the defendant. It is, indeed, possible to say that a defendant's who did not receive the complete information about the criminal charge brought against him right to defend himself in a whole manner is violated[101].

The right to have a decent amount of time and the convenience to prepare the defense has two main conditions. The first one is the consideration of the facts about the case such as the qualifications and complicatedness of the case, in which stage the case is in and which rights of the defendant is being threatened while deciding the decent amount of time that should be given to the defendant. Thus, the decent time changes according to every concrete case. It is possible that compared with the cases where the qualifications are complicated, the numbers of defendants and witnesses are abundant, where there is a complication in collecting evidence and where these qualifications are otherwise; and the cases requiring hard punishments compared with light punishments, and the cases which will end up with freedom binding punishments compared with the ones which will not end up with this type of a punishment, they can be given a longer time to prepare the defense[102].

Besides a decent time period, in order to provide a real possibility for the defendant to prepare a defense, the conveniences for him to prepare his defense should also be provided for him. What should be understood from the notion of "necessary conveniences" can change from defendant to defendant. However, generally this includes, the convenience to examine the file, obtain the necessary information and documents from the file, demanding to be listened legally. These can be shown amongst the conveniences that needs to be provided to the defendant in order for him to prepare his defense.

c. The Right to Defend Himself.

The right to defend himself is probably the most important right in the judicial process. There can be no judicial process in which the defendant does not defend himself. If there is not judging, it is not important to wonder if it is fair or not. For this reason, the right to defend himself constitutes the very roots of the judicial processes.

In the 6th article of the ECHR, in the b paragraph, it was stated that everyone has the right to have adequate time and facilities for the preparation of his defense; and in the c paragraph, to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require was stated openly.

101 Çayan, G (2016), Tax Cases, p. 458.
102 Vitkauskas, D (2012), p. 55.

When the c paragraph of the 6th article of ECHR is examined, it can be said that the right to defend himself contains three rights that are connected to each other. In other words, the right to defend himself is a broad concept which includes three rights[103].

1. The right to self- defend,
2. The right to have a legal assistance through a lawyer of his own choosing and the right to be informed about this right,
3. If he has not enough means to pay for legal assistance, the right to benefit from free legal assistance.

It is crucial that these rights are provided to the defendants in the discrepancies originating from tax penalties. Otherwise, the right to a fair trial of the defendant will be violated as a result of the violation of the right to defend himself.

d. The Right to Examine or Have Examined the Witnesses and the Obtainment of Witnesses

Although the right to examine the witnesses and have witnesses for himself is regulated in the Convention, this right also includes the right to bring evidence and to want to be legally listened.

According to us, in the tax penalties that are accepted as criminal charges, the right to examine or have examined the witnesses and the Obtainment of Witnesses should be provided alongside with the right to want to be legally listened. However, if the right to bring evidence and to want to be legally listened is provided, the inexistence of the right to examine or obtain witnesses does not cause the violation of the Convention on its own[104].

CONCLUSION

The presumption of innocence, which is based on the suffering caused by injustice, the dignity of personal honor and biased jurisdiction, has been accepted in almost all modern legal systems.

Others describe the presumption of innocence as a gift of Anglo-Saxon Law. On the other hand, it is possible to say that the presumption of innocence is applied in different ways in different cultures. Because both Anglo-Saxon, Continental European and Islamic Legal Systems have contributed to the development of presumption of innocence. The arrangement in Corpus Iuris Civilis, which rules that charges should be proved by honest witnesses or definitive documents or clear actual evidence, and that no one can be

[103] Ibid, p. 139.
[104] Çayan, G (2016), Tax Cases, p. 461.

considered guilty except proven, is similar to regulation in Ömer's Directive sent to Basra governor. This similarity also wipes to the doctrines of the eastern and the western. Because the common aim of Blackstone and Abu Hanifa is to protect innocents from wrongful conviction. For this reason, I strongly reject the dominant view that starting point of the presumption of innocence is Anglo-Saxon Legal System. According to me, the presumption of innocence is included in the legal field with Hammurabi Laws; it is a principle developed and expanded by Greek City States, Roman and Byzantine Empires, Islamic State, Anglo-Saxon and Continental Europe. To attribute this principle to a civilization alone means to ignore the common struggle of the east and the west for the presumption of innocence. On the other hand, it is an undeniable reality that Anglo-Saxon Legal System makes important contributions to the presumption of innocence and plays a serious role in development of it.

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Those who consider punishment as purpose and Retributivists say that main thing is the protection of the Act, and the State does not have a duty to protect the innocents. Is it really the protection of the Act? Doesn't the state have a duty to protect innocents?

Law schools tried to position the presumption of innocence according to their own opinions. The common starting point of positioning is that wrongful conviction of innocents is unfair. If persecution increases in the State, or if the State and legal system proves persecution, trust in justice is destroyed. Social crisis and turmoil arise where trust in justice is destroyed. When the social crisis can not be overcome with the shadow of justice, it turns into a swamp through the legal system. For this reason, the persecution should be rejected by justice.

Indeed, it is enough to establish a short-term empathy to feel the weight of the wrongful conviction and the extent of the persecution. If you think that you have been executed due to a crime you did not commit or that you have been dismissed from your job, you may understand the extent of the pain that can not be expressed in words.

The state and Law can only be legitimate if they serve the purpose of glorifying human. Because the state and its laws gain meaning with the existence of the society formed by individual people. For this reason, it is not possible to say that the State has no purpose to protect the innocents.

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There is no hesitation in point that the presumption of innocence will become effective with criminal charge. But here there is a contradiction in how crime charge should be interpreted. Is criminal charge limited only to the Criminal Code?

The area of punishment and crime is not limited to the Criminal Code regulations. In countries such Turkey, Germany, France, Britain and Spain punishment area is divided into three parts. These are the classical punishment under criminal law, the simple crimes or misdemeanors punishment, and administration punishment under administrative legislation. Therefore, while evaluating criminal charge, not only the Criminal Code should be limited, but also the presumption should be applied in other punishment areas.

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Will the accusation of crime that will make the presumption of innocence change from day by day or from society to society? Here, let's move on the action of passing (continue driving) in red light. Let me assume that the penalty for the action of passing red light in country A is a fine, there is a three-day imprisonment in country B, and there is no penalty for this action in country C. In country C, there is no doubt that the presumption of innocence will not find application since action is not included in any punishment areas. On the other hand, it is easy to say that for country A, which regulates three-day imprisonment that deprives the human of liberty, this action is an accusation of crime and that the presumption of innocence will come into effect. So, what would be fact in country A, which regulates a fine for action?

Before moving on to country A, we have found that crime charges have changed from country to country. Because in example there is a criminal charge in country B and the presumption of innocence will find application area; in country C, since action is not included in any punishment area, it is not possible to say coming into effect the presumption of innocence. Let's assume that country C has made an amendment and has determined the equivalent of action as two months imprisonment. In this case, according to the severity of crime and punishment, action is now a criminal charge for country C and the presumption of innocence will find application. As can be seen, while the presumption of innocence for the same action previously did not work, it became operational with new regulation in country C. In this case, it is also possible to say that the applicability of the presumption of innocence varies from time to time.

So, will fines in country A be considered as a criminal charge? In the Kangers/Latvia application, the European Court of Human Rights accepted such a case as a criminal charge and decided that the presumption of innocence would be applied. I agree with the same view as the Court of Human Rights and that the presumption of innocence will find application in administrative fines.

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It is possible for an action to create both legal and criminal liability. For example, injury crime may require both criminal and civil liability. Is it possible for perpetrator sentenced to pay compensation by a civil court, despite acquittal from a criminal court for same action?

Criminal and civil proceedings are as different as much as day and night. This difference occurs both in trial proceedings and in the standard of proof. The standard of proof in civil courts is lower than criminal courts. Because the criminal courts aim to reach material truth and to prove action with clear evidence beyond reasonable doubt. In the civil courts, it is also possible to prove with superior document and proof by presumptions. For this reason, it is not inconsistent with presumption of innocence that a person acquitted a criminal court is convicted by civil court using same proof.

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Nowadays, presumption of innocence is applicable in many disputes within administrative jurisdiction. Administrative courts, which aim to establish rule of law, have to prevent administrative acts contrary to the presumption of innocence, while controlling the legality of this acts.

So, does administrative court have to self-examine whether an administrative act is accordance with the presumption of innocence, even if it has not been argued by plaintiff?

As it is known, self-examine procedure is valid in the Turkish Administrative Jurisdiction. In this procedure, a judge examines whether procedure is lawful, regardless of parties' claims and arguments. While conducting a trial, it is necessary to evaluate whether important human rights have been violated by administrative act.

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Thanks to criminal justice, criminals get rid of punishment, a great chaos environment occurs in society, and this situation destroys the society and the State. For this reason, applying broadly the presumption of innocence will increase wrongful acquittals, which will lead criminal justice to an insurmountable condition. Sometimes it can be said that it is better for ten criminals to be acquitted rather than being condemned to an innocent. Sometimes there are thousands of criminals. Numbers are important. A system that allows thousands of criminals to be freed for fear of condemning an innocent may not be able to adequately protect the society. If the society is not sufficiently protected, social chaos becomes inevitable. For this reason, it is impossible to recognize the presumption of innocence as an unlimited right.

If society requires benefit, the presumption of innocence can be limited and under certain circumstances, the burden of proof can be left to defender.

If important situations required by high public interest require of the presumption of innocence's limitation injustice, the question of how to take measures in administrative jurisdiction is raised. In fact, this problem is deep. So, whether the presumption of innocence will be limited is controversial in doctrine. if high public interest requires limiting the presumption of innocence, it is whether this limitation needs to be compensated.

For example, a State may require that no criminal investigation be opened against them while employing intelligence officials, soldiers, polices, judges and prosecutors and may not accept someone who has a criminal investigation into these employment positions. Under normal circumstances, disqualification and stigmatization from certain employment positions without a finalized court decision is against the presumption of innocence. However, a special loyalty bond should be established between soldiers, police, judges, prosecutors and the State and there should not be even the slightest doubt on what will be employed in these professions. Because public officials working in such positions directly use the sovereign power of the state. High public interest can justify the search for condition that a criminal investigation has not been opened when assigning positions on state sovereignty.

In such cases, it can be said that the disqualification of certain positions without a finalized conviction is against the presumption of innocence. High public interest must be balanced with an action against the presumption of innocence. In my opinion, balancing should be done by paying a certain amount of compensation for action that is against the innocence. Because it is a reality that acts against the presumption of innocence even if the society requires benefit, and the State must respect it as much as possible. Accepting otherwise means that the person's right is violated significantly against the common good, and this should not be justified in a modern state of law.

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Although some actions are not regulated as a crime in any punishment area, the suspicion that these actions are committed may result in stigmatization by the society. For our country, adultery is an example that fits this situation. Today in the Turkish Criminal Code "adultery" is not regulated as an actual crime. The influence of Islamic Law in Turkey was considered as a criminal act of adultery like the Ottoman and Seljuk states. In 1996 and 1998, the articles of 440 and continuation of the old Turkish Criminal Code 765, which regulated adultery as a crime, were canceled by the Constitutional Court and repealed[105].

[105] Turkish Constitutional Court, 23/09/1996, 1996/15 Merit, 1996/34 Finalized; 23/06/1998,

Today, the act of adultery is no longer included in the classical punishment area as it is not a crime in criminal law. On the other hand, Turkish society is still defeating adultery and accepts that this act is bad. It may also be the exclusion, oppression and stigmatization of perpetrators by the society. Because, in Turkish law, the act of adultery still has certain results. For example, in Article 161 § 2 of Turkish Civil Code, if one of the spouses is adultery, the other spouse may open a divorce case within six months after learning the adultery act and if the event of adultery is constant, the spouse who performs this action will be flawed in case, and compensate for material and moral damages suffered by the other spouse in this way. As can be seen, the Turkish Civil Code accepted adultery as an inaccurate behavior. Since adultery is not regulated as a crime in Turkish Criminal Code, it can not be said that the divorce case is related to a criminal proceeding. The issue to be discussed here is whether the adulterous spouse can benefit from the presumption of innocence's guarantee in civil proceeding. As I have just mentioned above, adultery is considered a bad behavior by the Turkish society, although it is not regulated as a crime, and it is possible for an adulterer to be excluded, suppressed or stigmatized by the society. In addition to its classic meaning, the presumption of innocence aims to protect a person from the pressure of society or social stigma. In the divorce case opened due to adultery, the adulterer must be protected against social stigma. For these reasons, the civil court should proceed according to the presumption of innocence until it decides on adulteries charge.

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THE DISTINCTION BETWEEN THE EMPLOYEE AND THE SELF-EMPLOYED:THE CASE OF PROFESSIONAL DRIVERS

İşçi ve Bağımsız Çalışan Ayrımı: Profesyonel Sürücüler Örneği

Dr. Hande Bahar Aykaç*

Research Article

Abstract

In many countries, the principal criterion of the distinction between dependent and independent work is subordination, in other words, the control test. This test, however, is difficult to apply in some cases, which is mainly a complicated task of case law, and therefore, its interpretation and application could significantly vary across different jurisdictions. In this study, we have handled and compared two different judicial approaches to implementing this test for the same profession, the case of professional drivers, whether they are employees or just a lessee of the vehicle, namely an self-employed entrepreneur (independent contractor). In the US, the courts scrutinize all the factors of the tests one by one, and clearly present how the legal principles and tests were applied in the case under the rationale of the orders. In Turkish law, on the other hand, there is no complete and detailed explanation of how formulated principles for subordination took place in the present case. As a matter of fact, cases were sometimes based on the extremely secondary elements, which have not been mentioned in its formula rationale. Thus, Turkish jurisprudence seems to be willing to find an employment relationship in such cases, which could also indicate the willingness of Turkish courts to consider the workers, who are in the gray zone due to their economic dependency to be in the employee category. Even if this broad judicial interpretation can be regarded as to be proper as a result, a more satisfactory and coherent justification should be declared, as in American law, in order to provide legal certainty and predictability for subsequent cases.

Keywords Subordination, the right to control test, the distinction between the employee and the self-employed, the independent contractor, taxi drivers

Özet

Pek çok ülkede, bağımlı ve bağımsız çalışmayı birbirinden ayıran temel kriter, bağımlılıktır, diğer bir ifadeyle kontrol testidir. Ancak söz konusu testin uygulanması bazı olaylarda güçlük arz etmektedir ve bu zorlu görev esas itibariyle yargıya ait olmaktadır. Bu nedenle söz konusu testin uygulanması farklı ülkelerin yargı kararlarında önemli farklılıklar gösterebilmektedir. Bu çalışmada, bağımlılık testinin aynı mesleğe –profesyonel sürücülere- uygulanması, bu kişilerin işçi mi yoksa sadece söz konusu aracın kiralayanı yani bağımsız çalışan mı oldukları konusundaki iki farklı yargısal yaklaşım karşılaştırılmalı olarak ele alınmıştır. Amerikan mahkemeleri söz konusu testin içerdiği faktörleri tek tek ayrıntılı şekilde irdelemekte ve yasal testlerin somut olaya nasıl uygulandığını tatmin edici bir karar gerekçesiyle açık şekilde ortaya koymaktadır. Buna karşılık Türk hukukunda incelediğimiz kararlarda bağımlılık unsuruna ilişkin prensiplerin somut olaya nasıl uygulandığına ilişkin tatmin edici ve ayrıntılı bir gerekçe ortaya konulmamaktadır. Gerçekten de, mahkeme hükümlerinin bazen -formül gerekçede yer almayan- son derece tali unsurlara dayalı olarak verildiği görülmektedir. Böylece Türk yargısı, ekonomik bağımlılığından dolayı işçi ve bağımsız çalışan arasındaki gri bölgede kalan çalışanları işçi kategorisinde kabul etmeye daha istekli görülmektedir. Her ne kadar sonucu itibariyle işçi kavramının geniş yorumlanması yerinde kabul edilebilirse de, sonraki davalarda hukuki belirlilik ve öngörülebilirlik sağlanması açısından Amerikan hukukunda olduğu gibi Türk hukukunda da daha tatmin edici ve tutarlı gerekçelerle sonuca ulaşılması gerekir.

Anahtar Kelimeler Bağımlılık, kontrol testi, işçi ve bağımsız çalışan ayrımı, bağımsız çalışan, taksi şoförleri

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INTRODUCTION

Who is an employee? In recent years, jurisdictions and researchers from all over the world have shown the increased interest in this fundamental question of employment and labor law. As a result of dramatic changes and developments in technology, economics, politics, and management techniques, the standard employment relationship, which is "full time, indefinite employment in a subordinate relationship,"[1] has steadily declined while nonstandard working relationships,[2] such as telework, remote work, or temporary agency work, have emerged.[3] However, these new forms of working relationships, sometimes called atypical employment, have led to several challenges and risks, and questions as to the distinction between dependent and independent work.[4] Employers' opportunity and/or motivation to control and supervise workers directly has decreased, and therefore, the authority-based relationship between the worker and the employer has considerably weakened. Thus, some workers face the risk of not falling into the employee category within the framework of traditional tests of employment law, and therefore not being beneficiaries of fundamental social rights legally associated with the employee concept. Furthermore, in order to avoid financial and legal employment responsibilities and achieve better flexibility, employers increasingly demonstrate a strong motivation to classify workers more exactly than simply "employees."[5] Considering

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1 ILO, Non-Standard Forms of Employment, Report For Discussion at the Meeting of Experts, Non-Standard Forms of Employment, Geneva, 1 (2015).

2 Non-standard employment "covers work that falls outside the scope of the standard employment relationship" (ILO, *supra* note 1, at 1)

3 *See* Katherine V. W. Stone, *The Decline of the Standard Employment Contract: Evidence From Ten Advanced Industrial Countries*, Working Paper, UCLA INSTITUTE FOR RESEARCH ON LABOR AND EMPLOYMENT, 2 (2012); Brian A. Langille & Guy Davidov, *Beyond Employees and Independent Contractors: A View From Canada*, 21 Comparative Lab. L. & Pol'Y J. 31 (1999); Nicola Countouris, THE CHANGING LAW OF THE EMPLOYMENT RELATIONSHIP, COMPARATIVE ANALYSES IN THE EUROPEAN CONTEXT, Ashgate, 58, (2007). Also see Alain Supiot, *The Transformation of Work and the Future of Labor Law in Europe: A Multidisciplinary Perspective,* 138 INT. LAB. R. 31, 34 (1999).

4 There are some other challenges such as "increasing income inequalities between the lower level jobs and the top level jobs; spells of unwanted joblessness in the course of one person's career; the obligation of permanent self-education; the disappearing boundaries between work-time and free-time" (Anne Meier, THE NEW EMPLOYMENT RELATIONSHIP, HOW "ATYPICAL" WORK CONTRACTS CHALLENGE EMPLOYMENT LAW, LABOUR LAW AND SOCIAL SECURITY SYSTEMS, A COMPARATIVE LEGAL RESEARCH, Dike Law Books, 4, (2014).

5 Jeffrey M. Hirsch, Paul M. Secunda & Richard A. Bales, UNDERSTANDING EMPLOYMENT LAW, Second Edition, LexisNexis, at 7, 14; Langille & Davidov, *supra* note 3, at 31; Also *see* Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted In Simulated Statutory Purposelessness*, 21

these challenges in the light of the primary purposes of employment law, the questions emerge whether the existing legal methods to determine employee status are adequate and consistent.

The distinction between the employee and the self-employed person is, in practice, essential for two reasons.[6] First, the employee status is the "critical threshold" or the "gateway"[7] to fall into the scope of employment and labor law's protection. In fact, in many countries, in order to be entitled to lots of social rights such as minimum wage, protection against unjust dismissals, overtime pay, discrimination bans or collective bargaining, the individual should be primarily deemed to be an employee by law. Second, there are specific laws implemented only in some workplaces with a certain number of employees. In Turkey, for instance, it is required to be employed in an establishment with thirty or more employees in order to benefit from the job security system of Turkish Employment Code No. 4857. In the US, for example, Title VII and the Americans with Disabilities Act (ADA) covers the number of fifteen or more employers, while the Age Discrimination in Employment Act (ADEA) applies to employers of twenty or more employees.[8]

Although some general statutory definitions regarding concepts of the employee and the employer are given in the related Codes, they are mostly not very detailed and helpful. By this way, lawmakers have intentionally assigned the responsibility of determining the existence of an employment contract mostly to case law.[9] In order to handle this hard task especially within complicated working relationships, jurisdictions determine a list of indicators as to the existence of the employment relationship. In most countries, the traditional criterion of the distinction between dependent and independent work is subordination, in other words, the "right to control." [10] This test is also the justification of the employee's protection by the law as a weaker party of the contract against exploitation, an unsafe workplace or discrimination. However, especially for work not performed in the premise of the employer, the employer

COMP. LAB. L. & POL'Y J. 188 (1999).

6 Hirsch, Secunda & Bales, *supra* note 5, at 7.

7 Langille & Davidov, *supra* note 3, at 7-8.

8 *See* Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 Wm & MARY L. REV. 75, 114, 78 (1984); Frank J. Menetrez, *Employee Status and the Concept of Control in Federal Employment Discrimination Law*, 63 SMU L. REV. 137, 144, (2010).

9 *See* Langille & Davidov, *supra* note 3, at 16; Giuseppe Casale, *The Employment Relationship: A General Introduction,* THE EMPLOYMENT RELATIONSHIP, A Comparative Overview, Edited by Giuseppe Casale, Geneva, ILO, 26, (2011). Also see Ali Guzel, *Fabrika'dan Internet'e İşçi Kavramı ve Özellikle Hizmet Sözleşmesinin Bağımlılık Unsuru Üzerine Bir Deneme*, KAMU-IS JOURNAL, Vol 2, (1997) http://www.kamu-is.org.tr/pdf/426.pdf, 85.

10 Meier, *supra* note 4, at 35.

or his/her representative is mostly not able to control the employees consistently and strictly. Thus, it is a controversial issue whether the traditional tests by themselves or their interpretation or their application can adequately resolve this clearly and easily as it used to be in typical employment relationships.[11]

There are many types of nonstandard employment relationships and atypical workers, which can be found in several economic sectors and professions, and their number is increasing. One of them is transportation workers (taxi drivers, truck drivers, private postal services, etc.)[12] The status of the worker is frequently being questioned in this sector because the labor, as a kind of attenuated work arrangement, is performed outside of the premise of the employer, in a vehicle, and therefore the employer does not have an opportunity to control and supervise the driver directly.[13] Besides, these workers are mostly economically dependent on one or two principles.[14] Thus, determining the status of professional drivers is one of the legal challenges for jurisdictions in different countries.

This article will examine and compare the existing legal tests in Turkey and the United States to distinguish an employee from an self-employed person (independent contractor), and the implementation of these tests to a specific profession: professional drivers. We will begin with a general overview of the employee concept in Turkey and then will examine some case samples regarding the status of professional drivers in this country. Next, we will present the general overview of the employee concept in the United States, and then, the judicial implementation regarding the status of professional drivers in the U.S. Finally, we will compare the American and Turkish employment law in terms of the distinction of dependent and independent work, and the status of professional drivers. It is beyond the scope of this study to examine the professional drivers working using online transportation applications, such as Uber or Lyft because of the fact that even though Uber has been de facto activated in Istanbul, there is no court order regarding this type of relations likely because of its illegality in Turkey.

Although political, economic and legal conditions in the United States and Turkey are quite different, these countries were chosen for the comparison in this study for two basic reasons. First, because Turkey is the author's home country, the author knows its employment law system the best. Second, they have some basic similarities with regard to the subject of this study. The United

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11 *Id,* at 43.

12 Meier, *supra* note 4, at 21.

13 See Mark A. Rothstein, Charles B. Craver, Elinor P. Schroeder, Elaine W. Shoben & L. Camille Hebert, EMPLOYMENT LAW, Fifth Edition, Hornbook Series, West Academic Publishing, 596 (2014).

14 *See* Langille & Davidov, *supra* note 3, at 33.

States and Turkey are among the countries which have both preserved the dual distinction of working relations as either employee or self-employed worker.[15] Besides, subordination is the traditional criterion of the distinction between dependent and independent work in both countries, in other words, the "right to control", and it has been left mainly to case law to determine the existence of an employment contract.[16] In the light of these similarities, the adequacy of the right to control test will be questioned by examining its implementation to a specific profession. In this regard, most of the author's contribution will contain the analysis of the employment law system in Turkey.

I. GENERAL OVERVIEW OF THE EMPLOYEE CONCEPT IN TURKEY

The basic code of Turkey governing employment relations, except for those cited in Article 4, is the Employment Code No. 4857[17] which covers both white collar and blue collar employees.[18] According to this Code, the employee is *"any real person working based on an employment contract."* The employment contract has also a definition as follows: *"an agreement whereby one party (the employee) undertakes to perform work in subordination to the other party (the employer) who undertakes to pay him a wage."* (Art.8)[19]

The Constitutional Court of Turkey stated that the employment contract has three components: 1. Performing service 2. Remuneration 3. Subordination. Subordination is the component which distinguishes the employment contract from the other contracts for services. Employee depends on the employer at a

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15 Some country legislatures, such as Germany, Italy and the United Kingdom, have created intermediary statuses - in between employees and independent contractor. *See* Wolfgang Daubler, *Working People in Germany*, 21 COMP. LAB. L. & POL'Y J. 77 (1999); Matthew W. Finkin, *Introduction*, 21 COMP LAB. L. & POL.'Y J. 4 (1999).

16 Jeffrey Sack, Emma Phillips & Hugo Leal-Neri, *Protecting Workers in a Changing Workworld: The Growth of Precarious Employment in Canada, the United States and Mexico*, THE EMPLOYMENT RELATIONSHIP, A COMPARATIVE OVERVIEW, Edited by Giuseppe Casale, Geneva, ILO, 252 (2011); Guzel, *supra* note 9, at 85. Also see Casale, *supra* note 9, at 26.

17 Official Gazette, 10.06.2003, No. 25134 For the English version of this Act by Toker Dereli see. http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=64083&p_country=TUR&p_count=762&p_classification=01.02&p_classcount=9

18 Levent Akin, *Termination of Labor Contracts and Unfair Dismissal under Turkish Labor Law, 25 Comp. Lab. L. & Pol'y. J.* 561, 592 (2004); Toker Dereli, LABOR LAW AND INDUSTRIAL RELATIONS IN TURKEY, Kluwer Law International, 29, (2006).

19 There is also another similar definition of the employment contract under Code of Obligations No. 6098: *"an employment contract is a contract in which the employee undertakes to perform work for a definite or indefinite period in subordination to the employer, and the employer undertakes to pay him or her remuneration on the basis of time or work amount. Contracts in which the employee undertakes to perform work for an employer as part-time in a regular manner are also the employment contracts."* (Art. 393/1, 2)

high or low degree. That is to say; the employee carries out the work under the employer's supervision and control.[20] Thus, Turkish courts and scholars[21] all agree on the fact that subordination or dependency is the distinctive element of employment contracts. It should be noted that dependency and subordination are alternative terms used as synonyms in the Turkish law as in some other legal systems,[22] and they will be utilized in the same manner in this study.

The feature of the subordination and indicative factor of employment contracts is considered to be *legal and personal subordination* rather than economic dependence.[23] Accordingly, employment contracts have a hierarchical structure and create an authority relationship between the employee and the employer, different from other similar contracts.[24] Within this framework, the

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20 Cons. Court, 26-27.9.1967, 336/29, Official Gazette 19.10.1968, V.13031. Subordination has been considered to be a distinctive element of the employment contacts also by the Court of Cassation (CC, 9th Div, 19.04.2016, 33063/9962, CC 9th Div, 21.3.2016, 35247/6636, CC 9th Div, 5.4.2016, 37442/8465, CC 9th Div, 22.10.2015, 21176/29569; CC 9th Div, 7.6.2016, 14014/13596; CC 9th Div., 26.10.2015, 29398/29976; www.kazanci.com. CC 9th Div. 9.2.1999, 18888/1810, YKD, Nisan 2000, 546-549 and a legal evaluation by Melda Sur, *Ferdi Is Iliskisinin Kurulmasi ve Isin Duzenlenmesi,* YARGITAYIN IS HUKUKUNA ILISKIN 1999 YILI KARARLARININ DEGERLENDIRILMESI, Istanbul, 12-14 (2001).

21 *See* Sarper Suzek, IS HUKUKU*,* Istanbul, 225-229, (2019); Nuri Celik, Nursen Caniklioglu & Talat Canbolat, IS HUKUKU DERSLERI*,* Istanbul, 166 (2018); E. Tuncay Senyen Kaplan, BIREYSEL IS HUKUKU, Gazi Kitabevi, Ankara, 54 (2015); Suleyman Basterzi, *Avukatla Bagitlanan Sozlesmenin Hukuki Niteligi, Is Sozlesmesinin Vekalet ve Diger Isgorme Sozlesmelerinden Ayrilmasi*", SICIL, Vol. 17, March, 178, (2010); Guzel, *supra* note 9, at 96; Orhan Ersun Civan, *Is Hukukunda Uzaktan Calisma (Evde Calisma/ Tele Calisma)*, IS HUKUKU VE SOSYAL GUVENLIK HUKUKU DERGISI, Vol. 26, 545, (2010); Sur, *supra* note 20, at 13; Can Tuncay, *Is Iliskisinin Kurulmasi, Hukumleri ve Isin Duzenlenmesi,* YARGITAYIN IS HUKUKU VE SOSYAL GUVENLIK HUKUKU KARARLARININ DEGERLENDIRILMESI 2011, Ankara, 4 (2013); Mustafa Alp, *Tele Calisma (Uzaktan Calisma),* PROF.DR. SARPER SUZEK'E ARMAGAN, Vol.1, Istanbul, 805 (2011); Sevil Dogan, IS SOZLESMESINDE BAGIMLILIK UNSURU, ATIPIK IS ILISKILERI ACISINDAN DEGERLENDIRILMESI*,* Ankara, 73 (2016).

22 Dereli, *supra* note 18, at 29; Dogan, *supra* note 21, at 99-100; Also *see* Casale, *supra* note 9, at 26; Eduardo J. Ameglio & Humberto Villasmil, *Subordination, Parasubordination and Self Employment: A Comparative Overview in Selected Countries in Latin America and Caribbean,* THE EMPLOYMENT RELATIONSHIP, A COMPARATIVE OVERVIEW, Edited by Giuseppe Casale, Geneva, ILO, 80, (2011).

23 Haluk Hadi Sumer, *Is Sozlesmesinin Bagimlilik Unsuru*, SICIL, September, 69, (2010); Tuncay, *supra* note 22, at 4; Guzel, *supra* note 9, at 105-106; Tankut Centel*, Turk Borclar Kanunu'nda Hizmet Sozlesmelerinin Tanimi ve Kurulmasi,* TISK AKADEMI, VOL. II, 11 (2011); Hamdi Mollamahmutoglu; Muhittin Astarli and Ulas Baysal, IS HUKUKU, Ankara, 311-314, (2014); Alp, *supra* note 21, at 805; Civan, *supra* note 21, at 545. Sur, *supra* note 20, at 13; Dogan, *supra* note 21, at 102-103; CC 7th Div, 14.01.2014, 25282/232, CALISMA VE TOPLUM, 2, 237-240 (2014); CC 9th Div, 3.5.2012, 7939/15559, CALISMA VE TOPLUM*,* 14, 300-304 (2012).

24 Guzel, *supra* note 9, at 105-106; Dogan, *supra* note 21, at 98; Alp, *supra* note 21, at 805;

employer has some special rights and powers arising from the employment contract, such as disciplinary power over the employees, which is not found in any other similar contract. Besides, orders and instructions emerged in other contracts, for instance, in a contract for work, these are just about the results of working in general, whereas the employer organizes the whole process of working with his/her orders and instructions in an employment contract.[25] The employee must follow the employer's orders and instructions based on his/her management right. As a summary, legal subordination means that employees work under the employer's orders and instructions for a definite or an indefinite period, and the employer controls both the working process and its results.[26]

The economic dependence has generally been defined as follows: the employee's livelihood depends only or mostly on his/her wage.[27] Under Turkish law, however, it is considered that economic dependence could not be the distinctive element of employment contracts since it is mostly an ambiguous term, and therefore, an unreliable criterion to distinguish employment contracts from similar relations.[28] According to this idea, this criterion makes it impossible to determine the limits of employment law because it could also exist in other similar contracts. A contractor, for instance, who is legally and personally independent but has only one client, would be economically dependent upon that client; he/she, however, could not deem to be an employee. On the other side, an employee, who is under the control and instructions of the employer, can also have other incomes apart from his/her remuneration, and therefore he/she may not be economically dependent upon the employer. In such a case, even if there is no economic dependence, the relationship would still constitute an employment contract.[29] Besides, it has also been asserted that it would be unlawful to determine the feature of the contract according to the contractual parties' social and economic position since the employee is considered to be

CC10th Div, 24.02.2014, 4466/3445, CALISMA VE TOPLUM, 4, 430-432 (2014). CC 9th Div, 5.3.1981, 725/889, www.kazanci.com.

25 Suzek, *supra* note 21, 225-229; Gulsevil Alpagut, *Is Iliskisinin Kurulmasi, Hukumleri ve Isin Duzenlenmesi,* YARGITAYIN 2010 YILI IS HUKUKU VE SOSYAL GUVENLIK HUKUKU KARARLARININ DEGERLENDIRILMESI SEMINERI, Ankara 11-12, (2010); CC10th Div, 24.02.2014, 4466/3445, CALISMA VE TOPLUM, 4, 430-432 (2014).

26 Sumer *supra* note 23, at 69; Guzel *supra* note 9, at 97; Alp *supra* note 21, at 806; CC10th Div, 24.02.2014, 4466/ 3445, CALISMA VE TOPLUM, 4, 430-432 (2014).

27 Guzel, *supra* note 9, at 102-103; Dogan, *supra* note 21, at 102.

28 Guzel, *supra* note 9, at 102-105; Tuncay *supra* note 21, at 4; Kadriye Bakirci, *The Concept of 'Employee': The Position in Turkey*, RESTATEMENT OF LABOR LAW IN EUROPE, Hart Publishing, 732-733 (2017); Civan, *supra* note 21, at 545-546; Basterzi *supra* note 21, at 179; Also see Countouris, *supra* note 3, at. 62. CC 9th Div, 7.6.2016, 14014/13596, www.kazanci.com.

29 Guzel, *supra* note 9, at 102-105; Tuncay, *supra* note 21, at 4; Civan, *supra* note 21, at 545-546; Basterzi. *supra* note 21, at 179; CC9th Div, 7.6.2016, 14014/13596, www.kazanci.com.

a legal concept rather than a social and economic concept. Moreover, if the employee concept could be clearly determinable by law, this would also serve the interests of the society, and the employees could practically benefit from the protective feature of employment law.[30]

As a result of atypical work arrangements, a flexible auxiliary criterion is adopted along with the legal/personal subordination test, which is *"performing work within the framework of someone else's work organization (for the benefit of other's)"* (organization criterion).[31] This criterion does not remove the test of legal/personal subordination, but only completes/makes it explicit.[32] According to this test, if a worker performs work determined, set in its framework, and organized by the employer and the employee works under the management and instructions of the employer *even if in a general manner within this frame*, the employment relationship could exist.[33] Performing service within a work organization managed and organized by the employer indicates that the employee is still under the authority of the employer regardless of the expertness of the employee and degree of the employee's freedom in performing work.[34] Therefore, even if the employer does not strictly control the worker, the worker may be considered to be an employee within the context of this criterion. Thus, this concept serves the application of employment law to some workers such as teleworkers, commercial travelers, doctors, or professors.

The limit of the organization test's ability to extend the scope of the employment relationship is the relations' having the characteristics of "self-employed entrepreneurship." Accordingly, if an individual has his/her own clients, is free to make his/her own decisions, determines the scope of activity on his/her own, bears the economic risk of his/her enterprise and has the profit and undertake losses, he/she does not work based on an employment contract.[35]

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30 Munir Ekonomi, FERDI IS HUKUKU, Istanbul, 14 (1987); Dogan, *supra* note 21, at 103.

31 Guzel, *supra* note 9, at 109; Sur, *supra* note 20, at 13; Centel, *supra* note 24, at 69; Tuncay *supra* note 21, at 3-4; Suzek, *supra* note 21, at 225-229; CC 10th Div., 24.02.2014, 4466/ 3445, CALISMA VE TOPLUM, 4, 430-432 (2014).

32 Suzek, *supra* note 21, at 225-229; Tuncay *supra* note 21, at 3-4; Celik; Caniklioglu & Canbolat, *supra* note 21, at 166 vd; Guzel, *supra* note 9, at 109; Basterzi *supra* note 21, at 182; Sur *supra* note 20, at 13; Alp *supra* note 22, at 807; Civan *supra* note 21, at 546; CC 10th Div, 24.02.2014, 4466/ 3445, CALISMA VE TOPLUM, 4, 430-432 (2014).

33 Suzek *supra* note 21, at 225-229; Celik; Caniklioglu & Canbolat, *supra* note 21, at 166 vd; Guzel *supra* note 9, at 109; Basterzi *supra* note 21, at 182; Civan *supra* note 21, at 546; Alp, *supra* note 22, at 807.

34 Sumer *supra* note 23, at 70; Guzel *supra* note 9, at 110-111.

35 Sumer, *supra* note 23, at 70; Suzek *supra* note 21, at 225-229; Civan, *supra* note 21, at 547; Also see, Adalberto Perulli *Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of Selected African Countries*, THE EMPLOYMENT RELATIONSHIP, A Comparative Overview, Edited by Giuseppe Casale, Geneva, ILO, 147, (2011).

Self-employed entrepreneurs are not qualified as an employee although they are in a continuous relationship with the employer.

Turkish courts also consider the following subsidiary factual indicators to determine the existence of an employment contract on a case by case basis:[36]

(a) Whether the work is performed inside the employer's premises[37]

(b) Whether the alleged employer provides the materials and production tools

(c) Whether the employee receives instructions regarding the details of the work

(d) Whether the principal or his/her assistant controls the work

(e) Carrying out service without investing capital and having an organization belonging to him/her

(f) The manner of payment

(g) Bearing the profit and loss/financial risk

(h) Whether the worker has the freedom to decide as reserved by the entrepreneur

(i) whether the work is performed on a regular and continuous basis[38]

(j) whether the worker performs work for the benefit of the same principal exclusively

(k) whether the worker hires other helpers whose salary is paid by the worker in the performance of work

(l) Whether the worker has his/her own employees or clients[39]

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36 CC9th Div 11.10.2016, 15883/17663; CC9th Div, 16.03.2016, 32559/6205; CC9th Div, 26.04.2016, 33284/10471; CC 9th Div, 14.03.2016, 34769/5955, CC 9th Div, 19.1.2016, 36465/1110; CC 9th Div, 21.3.2016, 35247/6636; CC 9th Div 5.4.2016, 37442/8465; CC 9th Div, 7.6.2016, 14014/13596; CC 9th Div, 12.1.2016, 36463/469, www.kazanci.com; Y7HD, 14.01.2014, 25282/232, CALISMA VE TOPLUM, 2, 237-240 (2014); CC 9th Div, 2.3.2015, 2903/8612, CALISMA VE TOPLUM, 3, 323 (2015). CC 9th Div, 3.5.2012, 7939/15559, 14, CALISMA VE TOPLUM, 300-304 (2012)

37 Guzel, *supra* note 9, at 120; Tuncay, *supra* note 21, at 3-5; CC 9th Div, 31.5.2010, 21771/15108, Alpagut *supra* note 25, at 11-12.

38 In some cases, the High Court also expressed that "…working time and subordination are determinant features of the employment contract. While the contractor undertakes to yield a result in the contract for work, the undertaking of an employee in the employment contract consists of performing service for a fixed or indefinite period" (CC 9th Div, 9.2.1999, 18888/1810, YKD, April 2000, 546-549 and Sur supra note 20. For the same result see CC 10th Div, 24.02.2014, 4466/3445, CALISMA VE TOPLUM, 4, 428-432 (2014).

39 CC 9th Div, 16.2.2016, 804/2815; CC 9th Div. 11.10.2016, 15883/17663, CC 9th Div. 13.7.2009, 876/20602; CC 9th Div, 26.10.2015, 29398/29976; CC 9th Div, 22.02.2010, 10530/4617, Sumer *supra* note 23, at 70; CC 9th Div, 2.3.2015, 2903/8612, 3, CALISMA VE TOPLUM, 323, (2015). CC 9th Div, 13.07.2009, 876/20602; Basterzi *supra* note 21,

According to the Court of Cassation, none of those above mentioned indicators constitute a criterion on its own. Besides, there are no formalized hierarchies of these indicators, and the judge is free to evaluate them. The High Court, however, also has mentioned that possession of the real management and supervision of the work is the primary significant criterion. Accordingly, the employee gets involved within an organization under the employer's administration and responsibility; the place of the work is generally determined by the employer within fixed or flexible working hours, and the employer provides the working tools and documentation.

II. THE JUDICIAL IMPLEMENTATION REGARDING THE STATUS OF PROFESSIONAL DRIVERS IN TURKEY

The Court of Cassation has a formulated legal rationale, which is repeated in all related cases, as to the principles determining the professional driver's status.[40] Accordingly, if the owner of the taxicab (vehicle) supervises and controls the performance of the driver, the relationship should be qualified as an employment contract. If, however, the owner of the taxicab has the driver use the cab daily in return for a certain cost, he/she only demands a fixed fee whatever the driver's revenue is, and he/she does not deal with anything related to the operation of the cab except for this daily cost, it would be hard to qualify the relationship as an employment contract. In other words, if the vehicle owner assigns the vehicle to the driver within a certain time period of the day and does not deal with how the driver carries out his/her work, even whether he/she uses the cab, and if the driver does not take any order and instruction related to the performing of his/her work and he/she could organize his/her time freely, it should be accepted as no personal subordination. Besides, one of the most important differences between the employees and the self-employed contractors is the question to whom belongs the profit and loss of an enterprise. The employee would not have any financial risk in the venture. Although it is not sufficient all alone, the financial risk appears as a very important indicator, if there is no legal and personal subordination in the case. The driver will be an self-employed person if he/she works as an operator undertaking financial risk and a renter of the car. Being registered for the chamber of the tradesmen is also important. It is generally clear that the one undertaking the financial risk would be the driver in a relationship in which the amount remaining from the driver's fixed payment regularly made to the owner of the car is driver's profit. An

at 175; Guzel *supra* note 9, at 121-123; Suleyman Basterzi, *Is Iliskisinin Kurulmasi, Hukumleri ve Isin Duzenlenmesi,* YARGITAYIN IS HUKUKU VE SOSYAL GUVENLIK HUKUKU KARARLARININ DEGERLENDIRILMESI*,* 2009, Ankara, 16, (2011).

[40] CC9th Div, 25.10.2016, 19997/18472; CC9th Div, 7.6.2016, 14014/13596; CC9th Div, 26.02.2015, 2190/8456; CC9th Div Y9HD, 26.10.2015, 29398/29976, www.kazanci.com

employment contract is based on the relationship of authority-subordination, rather than economic dependence. In the employment contract, the employer has the management right and the authority to give orders and instructions; and the employee has an obligation to follow these orders and instructions.

Considering and repeating this formulated rationale, Turkish jurisdiction concluded in many cases that the driver was an "employee." In one of the cases, for example, while the trial court concluded that there was just a contract of leasing, and therefore, self-employment in the case, the High Court reversed this decision finding that the driver was an employee. One of the notable facts of this case was that the owner of the taxicab and the driver were living in different countries. Every month the driver was paying a certain amount of daily revenue to the cab owner's cousin acting as the representative of the owner. Besides, there was a dateless document declaring that "the driver leased the car belonging to the taxicab owner between the years 2000-2010." Furthermore, there was a proxy statement declaring that the driver was assigned as a proxy by the taxi-owner for some commercial taxi legal procedures such as signing the vehicle insurance costs, financial liability and motor insurance contracts, collecting cash or cheques, making a damage assessment, taking the registration and road certificates of the motor vehicle, and taking and transporting the license plate. Considering this proxy statement, the court concluded that the economic risk belonged to the taxicab owner, and the driver performed work under the instructions of the owner, and therefore there was legal and personal subordination in the case. According to the court, the driver's acting on behalf of the taxicab owner (and therefore, being the employer's representative) according to the proxy statement does not prevent him/her to be an employee legally at the same time. Besides, the dateless document did not indicate the relationship based on the contract of the usufructuary lease because of the lack of yearly leasing contracts. As a result of all these facts, the driver was considered to be an employee of the taxi-owner.[41]

One of the remarkable expressions of the Court's formulated rationale was that even though there is not any personal or legal subordination, the employment contract could still exist considering the criterion of "financial risk." Thus, the court seems to present the financial risk criterion as an alternative to personal or legal subordination. Besides, the Court, in the last-mentioned case, found that the financial risk belonged to the taxi-owner since he/she assigned the driver as a proxy for the commercial taxicab procedures. However, this fact on its own would not have indicate that the financial risk belonged to the taxi owner. In the case, the driver paid a daily-determined and fixed revenue monthly to the owner of the taxi. As suggested in the Court's formulated rationale, this fact

41 CC9th Div, 26.02.2015, 2190/8456, www.kazanci.com

would have shown that the economic risk belonged to the driver, not to the owner.

In another case, two taxi drivers were working in shifts: one of them was working in the day, the other one was working in the evening.[42] The plaintiff driver worked in this taxi in the evening and paid a certain revenue daily to the taxi owner. The High Court held that the economic risk belonged to the owner of the taxi (defendant), and the driver performed work under the instruction of the defendant, so it was clear that there was legal and personal subordination. Thus, legal and personal subordination was determined in the case again especially within the context of economic risk criterion. In this case, however, a certain daily revenue has been paid to the owner of the car. According to the formulated rationale of the High Court, this fact would have shown that the economic risk belonged to the driver.

In another decision, the trial labor court had held with a very satisfying and convincing rationale that the driver was an self-employed person, which was reversed by the High Court.[43] According to the rationale of the trial court, the shared commercial taxi belonging to the defendant was leased to the plaintiff driver in return for a certain monthly lease cost. It was also accepted by the parties that the driver operated the collective taxi subjected to leasing. In return for this, he/she paid a certain monthly leasing cost to the defendant, and all kinds of expenses related to the vehicle were compensated by the driver. Furthermore, it was specified that the driver was free to operate the leased vehicle in the hours he/she desires and in the method he/she determined, and the car owner could not give any instruction to the leaser. Thus, the car owner would not have any intervention even if the driver never operated the vehicle as long as he/she paid for the lease. The risk completely belonged to the leaser on the issue of whether the expected income would be attained. The owner of the vehicle did not have any liability for payment of any remuneration to the driver due to the operation of the vehicle. Besides, according to the statements of witnesses, another driver could also drive the car, and the daily wage was paid by the driver to this person. With all these rationales, the trial labor court concluded that the relationship was not an employment contract, but only a leasing relationship. Despite this satisfying and detailed reasoning reflecting the prominent features of the case, the High Court firstly repeated its formula rationale and concluded that there was no self-employment because the driver was entitled to the insurance for employees by the owner of the car, paid monthly fees, and arranged payrolls. Besides, traffic tickets were issued on

[42] CC9th Div, 07.06.2016, 14014/13596, www.kazanci.com
[43] CC9th Div, 25.10.2016, 19997/18472, www.kazanci.com

behalf of the car owner; the damage occurring in the vehicle was invoiced on behalf of the car owner, and there were no yearly leasing contracts.

The facts on which the High Court based its decision, such as on behalf of whom the traffic tickets were issued and the occurring damage were invoiced, are secondary elements in the case and would not indicate an employment relationship by themselves. Besides, the social security status of a person is not a binding indicator with regards to the status under employment law. Accordingly, the court does not bound up with the insurance status of the parties or whether they have given notice to the insurance institution or not.[44] The lack of yearly leasing contracts is also not determinant by itself because the task of determining the real feature of a legal relationship belongs to the jurisdiction in Turkish law. As a result, while concluding this case; the High Court was not based on the criterion of legal and personal subordination or organization test or even the financial risk factor, and the existence of an employment contract was concluded with some secondary indicators.

In another case, the driver was also the owner of the vehicle.[45] The driver worked with his/her vehicle in the personnel transportation work between the dates 01/09/2007-01/05/2012, and this work had been performed in return for an invoice in the commercial operation of the plaintiff operated on his/her own behalf as of 2010. The plaintiff driver exclusively performed the personnel transportation work of the defendant companies in all the work period with his/her vehicle; he/she followed the orders and instructions of the defendants within this period. Therefore, the driver was found to be an employee since he/she was legally and personally dependent upon the defendant.

To sum up, although the formula rationale of the High Court suggested that the relationship between the driver and the car owner could form self-employment or an employment contract depending on the conditions of the cases, in all decisions mentioned above the Court of Cassation seems more than willing to find an employment relationship different from trial courts.

III. GENERAL OVERVIEW OF THE EMPLOYEE CONCEPT IN THE UNITED STATES

Being an employee in the US implies having fewer recognized statutory social rights than an employee in the Western European countries, inter alia an employee in Turkey. Some commentators have even claimed that under the doctrine of employment-at-will there is no real legal status of the employee in

44 Guzel *supra* note 9, at 116; Basterzi *supra* note 21, at 194; CC 9th Div, 2.3.2015, 2903/8612, 3, CALISMA VE TOPLUM, 323, (2015).

45 CC9th Div, 26.10.2015, 29398/29976, www.kazanci.com

the United States.[46] Aside from this fact, being an employee is still a significant term to be considered in the scope of some social legislation such as Title VII of the Civil Rights Act, Fair Labor Standards Act (FLSA), National Labor Relations Act (NLRA), or Occupational Safety and Health Act (OSHA).[47] Thus, to be entitled to collective bargaining rights, the minimum wage, workers compensation, protection from unsafe workplaces, discrimination bans, and unemployment insurance, one should be deemed to be an employee. Besides, as noted earlier, some laws are covered only at some workplaces with a certain number of employees, for example, Title VII and the ADA covers employers of fifteen or more; the ADEA is applied to employers of twenty or more employees.[48]

In US law, rather than a single definition of the employee and one determinative test, there are multiple definitions of the employee under various Acts and different tests determining the employment status according to the purpose of the statute.[49] Some scholars have stated that the lack of uniformity in the definition of employee and legal tests have both positives and negatives.[50] Positively, it gives a chance to meet and effectuate the purposes of each act optimally.[51] On the other hand, this can also lead to predictability, consistency and clarity problems where the parties do not know exactly the purpose of the statute or where a worker is an employee for the goal of one statute, but he/she could find himself/herself, surprisingly, not an employee for another statute.[52]

There are two prominent tests distinguishing the employee from the self-employed person: the "control" test and the "economic realities" test. [53]

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46 Meier, *supra* note 4, at 40; Stone, *supra* note 3, at 62. As Stone and Meier have emphasized that standard contract of employment law in the US Law does not come from the legal system, but from a social practice, which implies job security and employer-provided health insurance and pension benefits. (Meier, *supra* note 4, at 41; Stone, *supra* note 3, at 59). Even though it comes from the social practice, it became a part of a legal system by courts' recognizing legal consequences to this practice.

47 Ann C. Hodges & Rafael Gely, PRINCIPLES OF EMPLOYMENT LAW, Second Edition, WEST ACADEMIC PUBLISHING, 2, (2018); Dowd, *supra* note 8, at 77; Linder, *supra* note 5, at 187; Langille & Davidov, *supra* note 3, at 16.

48 See Dowd, *supra* note 8, at 78; Menetrez, *supra* note 8, at 137, 144.

49 Kenneth G.Dau-Schmidt and Michael D. Ray, *The Definition of "Employee" in American Labor and Employment Law*, 117, http://www.jil.go.jp/english/events/documents/clls04_dauschmidt2.pdf

50 Dau-Schmidt & Ray, *supra* note 49, at 117.

51 Hirsch, Secunda & Bales, *supra* note 5, at 9; Langille & Davidov, *supra* note 3, at 18.

52 Dau-Schmidt & Ray, *supra* note 49, at 117; Sack, Phillips & Leal-Neri, *supra* note 16, at 253.

53 There are some other tests, for example, the 'entrepreneur test' which is focused on control, ownership of tools, chance of profit, and risk of loss, and 'business organization' test which looks at whether the worker has been integrated into the organization (Sack, Phillips & Leal-Neri, *supra* note 16, at 253.)

A. The Control Test

One of the leading tests to distinguish dependent work from self-employment, the control test, is originally derived from the principles of the general common law of agency.[54] This test is applied within the context of establishing an employer's vicarious liability, liability for employment taxes (federal unemployment insurance, social security, and Medicare),[55] National Labor Relations Act,[56] the Copyright Act,[57] workers compensation,[58] ADA, ADEA, and Equal Opportunity laws.[59] This approach mainly focuses on the capacity of the contractor to regulate the manner and means of the performing work.[60] Accordingly, "*if the contractor of work merely specifies the final product, while the contractee controls the time, place and means of his or her work, and provides his or her own tools and materials, it is likely the contractee will be found to be an independent contractor.*"[61]

In distinguishing the employee and the independent contractor under the control test, the following factors are considered:[62]

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54 Hirsch, Secunda & Bales, *supra* note 5, at 8; Patricia Davidson, *The Definition of Employee Under VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 208 (1984); Rothstein et al., *supra* note 16, at 594; Hodges & Gely, *supra* note 47, at 3.

55 Hirsch, Secunda & Bales, *supra* note 5, at 8. Also see Mary Recor, *Classifying Independent Contractors and Employees,* the JPA Journal, December, 52, (2012).

56 In *NLRB v. Hearst Publications, Inc,* the Supreme Court initially applied the economic realities test within the meaning of NLRA. Congress, however, later amended the NLRA and exempted independent contractors, managerial and confidential employees (supervisors) from the definition of the employee. (Dau-Schmidt & Ray, *supra* note 49, at 121,122; Davidson, *supra* note 54, at 209-210; Dowd, *supra* note 8, at 92; Hirsch, Secunda & Bales, *supra* note 5, at 10) These exemptions and willingness of the court's to exclude increasing number of workers as independent contractor or supervisor for NLRA has significantly criticized by some commentators. (*Id,* at 123)

57 For example *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. (Supreme Court of US, 1989); See also Hirsch, Secunda & Bales, *supra* note 5, at 12.

58 *See* Rothstein et al., *supra* note 13, at 596-597.

59 Sack, Phillips & Leal-Neri, *supra* note 16, at 254.

60 Hodges & Gely, *supra* note 47, at 3; Dau-Schmidt & Ray, *supra* note 49, at 118; Sack, Phillips & Leal-Neri, *supra* note 16, at 253.

61 Dau-Schmidt & Ray, *supra* note 49, at 118; The purpose of being applied the direct and control test under tort law is to ensure that the proper party pays for the wrongs. (*Id,* at 118). The Supreme Court also explained this test as follows: "*…the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words not only what shall be done, but how it shall be done".* (*Singer Mfg. Co. v. Rahn,* 132 U.S. 518, 523, (Supreme Court of US, 1889)

62 See, Section 220 (2) of the RESTATEMENT (SECOND) of AGENCY

(a) The extent of control which, by the agreement, the master may exercise over the details of the work.

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal party is in business (is engaged in a recognized business)

As repeatedly mentioned in numerous cases, each factor of the control test is not determinative[63] by its own and cannot be applied as separate tests; they are intertwined, and their weight often depends on particular combinations.[64] Thus, most courts do not apply these factors on a strictly numerical basis.[65] In most cases, however, courts focused on the degree of control reserved by the employer over the worker as the decisive factor.[66]

The crucial factor of this test is whether the employer *has the right to control*, rather than whether this right actually is actually exercised.[67] That is to say, even the individual has considerable discretion and is under only limited supervision, he/she would still be considered to be the employee if the employer has the authority to direct the performance of the worker.[68] Besides,

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63 Davidson, *supra* note 54, at 208; Sack, Phillips & Leal-Neri, *supra* note 16, at 253; See, *Cmty. for Creative Non-Violence v. Reid,* 490 U.S. 730, 732, (Supreme Court of the US, 1989).

64 *See Alexander v. FedEx Ground Package Sys.*, 765 F.3d 981, 984, (U.S. App. 9th Circuit 2014).

65 *See* Rothstein et al., *supra* note 16, at 596.

66 Davidson, *supra* note 54, at 209; Dowd, *supra* note 8, at 80; Recor, *supra* note 55, at 49. For example see, *Gutierrez v. Aero Mayflower Transit Co.*, (U.S. Dist. 1979) *Cristler v. Express Messenger Systems, Inc*, 171 Cal. App. 4th 72 (2009).

67 Recor, *supra* note 55, at 49; Dowd, *supra* note 8, at 81; Hodges & Gely, *supra* note 47, at 3.

68 Dowd, *supra* note 8, at 81; Recor, *supra* note 55, at 49

the parties' label as to their relationship is non-binding for the judgement if their real interaction leads a different relationship.[69]

The commentators have criticized the control test on several grounds. First, because the factors of the test are unweighted and dispositive, and not every factor applies to every case, it is claimed that it yields indeterminate results.[70] Accordingly, the test provides no decisional criteria for weighing the various factors when some of them would indicate an employee status while others would indicate an independent contractor (self-employed) status.[71] Second, this test has been criticized for being "rigid and formalistic."[72] Accordingly, while applying this test, courts focus on a limited set of factors in the formal nature of the employment relationship rather than the real relationship between the employee and the employer.[73] Besides, applying this test (especially within the meaning of Title VII) could lead to injustice because it "fails to consider the employer's ability to manipulate access to employment opportunities and to control the terms and conditions of employment."[74]

B. The Economic Realities Test

The second prominent test determining the type of the relationship is the "economic realities test," which is applied specifically within the meaning of FLSA, Family and Medical Leave Act (FMLA) and OSHA.[75] This test is also used by some Circuit Courts in the context of Title VII of the Civil Rights Act, ADA, and ADEA.[76]

This test is an attempt to correct the formalism and indeterminacy of the control test, based on the purposes of FLSA and its definition of "employ."[77]

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69 For example see *Estrada v. FedEx Ground Package System, Inc.,* 154 Cal. App. 4th 1, 11, 64 Cal. Rptr. 3d 327, 335, (2007).

70 Hirsch, Secunda & Bales, *supra* note 5, at 9; Also *see* Hodges & Gely, *supra* note 47, at 12.

71 *Id,* at 9.

72 Hirsch, Secunda & Bales, *supra* note 5, at 9; Also *see* Dowd, *supra* note 8, at 112-113.

73 Dowd, *supra* note 8, at 85.

74 *Id,* at 86.

75 Meier, *supra* note 4, at 41; David Weil, *The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who are Misclassified as Independent Contractors*, Administrator's Interpretation No. 2015-1, U.S. Department of Labor Wage and Hour Division Washington, D.C. 20210, 1, 2 https://www.blr.com/html_email/AI2015-1.pdf (2015); Dau-Schmidt & Ray, *supra* note 56, at 119; Hirsch, Secunda & Bales, *supra* note 5, at 10, 13; Hodges & Gely, *supra* note 47, at 9.

76 See Dowd, *supra* note 8, at 102-105; Linder, *supra* note 5, at 195; Hodges & Gely, *supra* note 47, at 9.

77 Hirsch, Secunda & Bales, *supra* note 5, at 9; Also see, Dowd, *supra* note 8, at 112-113; This attempt also explains as "shift(ing) attention away from direct control mechanisms toward "bureaucratic or administrative control mechanisms, such as the power to promote, discipline, or fire the worker." (*Id,* at 10; Langille & Davidov, *supra* note 3, at 19)

FLSA stipulates that "*employ includes to suffer and permit to work.*"[78] This broad and vague definition is not considered to be a random choice of the legislator, it is purposely designed to ensure a broad scope of statutory coverage since the Act aims to cover many persons and relationships which previously were not deemed to fall within an employee category.[79] The Fifth Circuit also stated that the FLSA's purpose is "to protect those whose livelihood is dependent upon finding employment in the business of others."[80] Hence, it is considered that the proper test which accomplishes these purposes best is the economic realities test.

This test focuses on the "whole activity" surrounding the employment relationship considering whether the workers are economically dependent on the business for which they perform work and requires an analysis of the whole employment relationship or totality of the circumstances.[81] Accordingly, even if the employer's direct control could not be determined (if, for example, the worker uses considerable discretion, or performs his/her work outside the employer's premises, or is a specialized professional), the worker can be still deemed as an employee in certain other conditions.[82] It is considered that the economic realities test indicates whether the employee is economically dependent on the employer.[83]

The factual indicators of the economic realities test:

1.The investment in facilities and equipment

While independent contractors typically make investments, making some investment is not always necessarily indicative of independent work.[84] Regarding professional drivers, the investment could be the capital investment in their vehicles and equipment or expenses for operating the vehicles. Since owning a car could be also essential for personal purposes, some courts also consider whether workers purchased their vehicles for the primary goal of their work.[85]

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78 FLSA, 29 U.S.C. § 203 (g)

79 Weil, supra note 75, at 4; Dau-Schmidt & Ray, *supra* note 54, at 119; Hirsch, Secunda & Bales, *supra* note 5, at 13; Dowd, *supra* note 8, at 112.

80 *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, 298, (U.S. App. 1975); Davidson, *supra* note 54, at 212.

81 Dau-Schmidt & Ray, *supra* note 54, at 119; Rothstein et al. *supra* note 16, at 338; Hodges & Gely, *supra* note 47, at 5.

82 Hirsch, Secunda & Bales, *supra* note 5, at 10.

83 Sack, Phillips & Leal-Neri, *supra* note 16, at 254.

84 Weil, supra note 75, at 9.

85 *See Molina v. S. Fla Express Bankserv, Inc* 420 F. Supp. 2d at 1276 (U.S. Dist. 2006).

2.The nature and degree of control retained or exercised by the alleged employer

The economic realities test also includes the control factor, but only as a part of many other factors.[86] In other words, the control factor does not have an oversized role in this test. Considering the totality of the circumstances and all possibly relevant factors, an employment relationship could still be determined even if the employer is not strictly and directly controlling the employee. Besides, the reason for control is also insignificant even if it comes from the regulatory requirement or the nature of the business, or satisfaction of the customers.[87]

Regarding professional drivers status, factual indicators such as assigning to particular routes, which drivers were unable to choose, negotiate, or reject, receiving detailed instructions concerning the routes, including what roads to take and what times to be at specific locations, being frequently monitored via radio or appropriate devices, being unable to request or decline additional work, and hiring drivers to work for them would be found to be offering sufficient evidence to show an employment relationship.[88]

3. The worker's opportunities for profit or loss

Within the context of this factor, it is considered whether worker's managerial skills affect the worker's opportunity for profit or loss of him/her.[89] The decisive point of this indicator is whether the worker can change his/her profit or loss with his/her managerial skills such as hiring others, purchasing materials and equipment, advertising, renting space, or managing timetables.[90] Working more hours or performing more amount of work is not considered to be kind of managerial skills even if they could affect the profit or loss.[91]

In *Molina,* for example, the court held that since any employee also can claim for more work or compensation from his/her employer, this fact would not indicate an independent worker status by itself.[92] It is also pointed out that

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86 Dowd, *supra* note 8, at 108. Thus, being subject to little or no direct control or supervision and being able to control the hours during which they work is mostly insignificant (Weil. *supra* note 82, at 13). United States Court of Appeals for the Fifth Circuit held that "… Control is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity…" (*Usery v. Pilgrim Equipment Co*., 527 F.2d at 1308, 1312-1313, U.S. App. 1976).

87 Weil, supra note 75, at 14.

88 *Molina,* at 1276.

89 Weil, *supra* note 75, at 7; Dau-Schmidt & Ray, *supra* note 54, at 119.

90 Weil, *supra* note 75, at 7.

91 *Id,* at 7.

92 Molina, at 1276.

even if workers are able to reduce their costs theoretically, the indicative factor is whether they are actually able to (or in fact did) do so.[93]

4. The degree of the worker's independent initiative, judgment, and foresight in open market competition with others required for the success of the operation

The critical point of this factor is whether the work performed requires worker's business skills, judgment, and initiative, not his/her technical skills.[94] So, while having or using special technical skills is not determinative by itself, whether those skills are used independently is decisive.[95]

For example, in *Bonnets v. Arctic Express Inc,*[96] the court held that even though driving a truck containing large loads of cargo requires a significant degree of skill, if the company significantly control over the driver's route selection and other manners of his/her work, this fact would indicate that the driver does not use his/her skills independently. Thus, if drivers are told what roads to use, unable to claim for more work or to choose more profitable work, these facts would indicate that they are employees.[97]

5. Permanency of the working relationship

The permanency or indefiniteness of the relationship would indicate an employment relationship.[98] If drivers work for a short time, they could work for other courier services; their contract does not contain a non-compete clause, these facts would indicate an independent relationship.[99] In *Molina,*[100] for example, the court held that this factor favored an independent relationship because the agreement was terminable upon twenty-four hours' notice, and drivers were free to work for other courier companies.

6.The extent to which the services rendered is an integral part of the alleged employer's business (whether the work is an integral part of the business).

If the performance of the worker is an integral part of the alleged employer's business, this fact would indicate that the worker is economically dependent on the employer.[101] Thus, even though the work is performed away from the employer's premises, if the company would not have been able to perform its

93 *Id* at 1286.
94 Weil, *supra* note 75, at 10.
95 See *Molina,* at 1276
96 *Bonnetts v. Arctic Express,* 7 F. Supp. 2d at 977, 982, (U.S. Dist. 1998).
97 *Molina,* at 1276.
98 See Weil, *supra* note 75, at 12-13
99 *Molina, at* 1276
100 *Id,* at 29
101 Weil, supra note 75, at 6.

primary business operations without these workers, they are more likely to be considered as employees under FLSA.[102]

In *Molina,*[103] the principal was a courier business, and workers were their couriers, and it was a given that without workers services the company would not have been able to perform its business operations. So, this factor was found to favor an employment relationship.

IV. THE EMPLOYEE CONCEPT WITHIN THE MEANING OF TITLE VII OF THE CIVIL RIGHTS ACT

Title VII, which prohibits engaging in certain employment discrimination practices toward employees, defines the "employer" as *"a person engaged in an industry affecting commerce who has fifteen or more employees"*[104] and the "employee" as *"an individual employed by an employer."*[105] Each definition depends on the other, that is to say, those definitions are "completely circular and explain nothing."[106] According to some commentators, Congress deliberately did not define the term of "employee" to encourage flexible and broad definition that would encompass the broadest number of individuals subject to the regulation of employment discrimination.[107] Due to the lack of statutory definition, however, some courts have applied the control test in the context of Title VII, which has been criticized by some commentators.[108]

Some other courts have applied the economic realities test to define employee status under Title VII.[109] In these cases, courts mainly focused on

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102 *Id,* at 6.

103 *Molina,* at 1286.

104 42 U.S.C, § 2000 (b)

105 42. U.S.C § 2000 (f); For the similar definitions for ADEA *see* 29 U.S.C. § 630 (B); for ADA *see* 42 U.S.C, § 12111 (4)

106 Dowd, *supra* note 8, at 78; Menetrez, *supra* note 8, at 4; Sack, Phillips & Leal-Neri, *supra* note 16, at 253.

107 Dowd, *supra* note 8, at 89.

108 *Id,* at 114. Dowd has criticized the court's approach regarding the application of the control test, to focus solely on a few easily measured factors, at the expense of excluding other potentially significant factors (*Id* at 83). In *Gutierrez*, for instance, the court focused on the written agreement between the parties designing the driver as an independent contractor. The court held that "The provision in the Agreement that the truckman shall have absolute discretion with respect to the manner and method of performing hauling services is itself sufficient to support a finding that the truckmen who contract with defendant are independent contractors under the right to control test." (*Gutierrez v. Aero Mayflower Transit* Co., 6, U.S. Dist. 1979).

109 Dowd, *supra* note 8, at 103. In the first case with this approach, in *Sibley Memorial Hospital v. Wilson*, the United States Court of Appeals for the District of Columbia Circuit focused on the economic realities of the relationship, particularly the dependency of the plaintiff on the hospital in obtaining employment opportunities (Dowd, *supra* note 8, at 104). "In prohibiting discrimination in employment on the basis of sex, "one of Congress' main goals

the economic relationship and the control of employment opportunities or the terms and conditions of employment.[110] In *Mathis v. Standard Brands Chemical Industries,*[111] for example, the plaintiff was a truck driver performing industrial waste removal services for the defendant. In the contract between the parties, the driver was defined as an independent contractor. The Court, however, held that this classification was not binding.[112] The facts of this case were as follows: the driver owned the trucks and other equipment using for hauling wastes, the work was performed by employees of the driver rather than by the driver personally, and the driver was paid at a contractually set rate based on the volume of material removed and that he bore all operating expenses and therefore could increase his profit by reducing costs. Although these facts suggested that the driver was an independent contractor, the driver emphasized that he personally performed other work for the defendant under the supervision of the defendant's officials with the help of others, and he was paid an hourly rate for this extra work. Considering the economic realities of the relationship, the court held that the payment of wages and control by the employer suggested an employment relationship.[113] The court, thus, handled the control factor as one of many factors in determining employee status.[114]

There has also been a different approach for some Title VII cases by the US Courts of Appeals for the Third, Seventh, Ninth, Eleventh, and District of Columbia Circuits, which was called "hybrid approach" or "hybrid economic realities test."[115] Accordingly, the control test and some elements of the economic realities test were considered together while the control factor is considered to be the most prominent factor in determining the employee status. In *Spirides v. Reinhardt,*[116] for example, the court applied the hybrid test and concluded that the right to control is the most important factor.[117] In *Armbruster*

was to provide equal access to the job market for both men and women…Congress has determined to prohibit each of these from exerting any power it may have to foreclose, on invidious grounds, access by any individual to employment opportunities otherwise available to him". *Sibley Memorial Hospital v. Wilson,* 488 F.2d at 1338, 1341, (U.S. App. 1973).

110 See Dowd, *supra* note 8, at 104-106.

111 *Mathis v. Standard Brands Chem. Industries,* LEXIS 13731 (U.S. Dist 1975).

112 *Id,* at 6.

113 *Id,* at 7.

114 Dowd, *supra* note 8, at 108.

115 Davidson, *supra* note 54, at 214; Dowd, *supra* note 8, at 109; Hirsch, Secunda & Bales, *supra* note 5, at 13.

116 *Spirides v. Reinhardt*, 613 F.2d at 826 (U.S. App.1979).

117 See Davidson, supra note 54, at 216.

v. Quinn,[118] however, the Sixth Circuit rejected the application of the hybrid test for Title VII cases and held that this approach was narrow and inappropriate for the purposes of the Act.[119] According to the Court, unless specifically excluded by Law, Title VII must cover all those who are in a position to suffer the harm the statute was designed to prevent.[120] The court concluded that because of the broad remedial purposes of the Act, the "employee" concept should also be interpreted broadly, so the economic realities of the relationship must be considered under Title VII.[121]

V. THE STATUS OF PROFESSIONAL DRIVERS IN THE U.S.

In this section US, the examined cases will be presented in a table since there has been a large number of cases in the US regarding the status of professional drivers such as taxi drivers or truck drivers.

The Case	The Test	Indicators favoring the self-employed status	Neutral	Indicators favoring the employee status	Conclusion
Air Couriers Internat v. Employment Development Dep. (April 12, 2007, *(The Court of Appeal of California)*	The Right to Control	-	-	-Retaining control over the delivery operation -working in a regular schedule -Often regular daily routes -infrequently turning down jobs -not engaging in a separate profession or operating an independent business -no major investments in equipment or materials	The drivers were employees.

[118] *Armbruster v. Quinn*, 711 F.2d at 1332, 1336, (U.S. App. 1983) For the detailed analysis of *Spirides* and *Armbruster* see Davidson, *supra* note 54, at 222-228.

[119] *Armbruster,* at 1336.

[120] *Id,* at 1341.

[121] *Id,* at 1341-1342; Davidson, *supra* note 54, at 221; Dowd, *supra* note 8, at 111.

Alexander v. Fedex Ground Package Sys, (765 F.3d 981, US Court of Appeals for the Ninth Circuit)	The Right to Control	-entrepreneurial opportunities -providing their own vehicles The parties' beliefs	-method of payment	-Exercising a great deal of control over the manner of the job -the skill not required in the occupation -distinct occupation or business -The work is part of the principal's regular business -length of time for performance of services	The drivers were employees.
Yellow Cab Co. v. Industrial Com. of Illinois (464 N.E.2d at 1079, 1080, (Ill. App. (1984)	The Right to Control	The driver was not required to drive a certain number of hours, or to fill out trip sheets, to report fares or tips, or to generate a certain amount of income during the lease period, or to answer radio calls.		The cab company exercised control over driver's operation. (e.g. the cabs were uniform in appearance, had the company's name and telephone number on them, and the company had the right to discharge the driver.) -The driver was not permitted to sublease a cab, was instructed to purchase gas at the company garage and was required to report its mileage. -The cab company maintained and repaired on the cabs. if the driver accepted one of the radio calls, he/she was expected to follow through with it.	The driver was an employee

Robenson v. Indus. Comm'n (P. I. & I. Motor Express, Inc) (866 N.E. 2d 191. Supreme Court of Illinois 2007)	The Right to Control	The driver was responsible for all costs and expenses as to operating his truck, allowing the driver to have employees, The employer did not dictate the driver's routes. The contract also provided that it was not intended to create an employment relationship, that the company shall have no direction or control over the contractor "except in the results to be obtained.		the right to control the manner of the work (the driver was required to operate his truck in compliance with applicable laws and regulations, to perform pre-trip inspections and to post the employer's name and logos on his truck, to report any accidents to the employer.[122] The employer provided the driver with a camera to photograph any damage) while the contract allowed the drivers to work for other companies, the alleged employee did not make it in fact because it was too much trouble procedurally.	The driver was an employee

[122] The court stated that even if this control arose from the requirement of compliance with some regulations of the Department of Transportation (DOT), the result would not change. In other words, the motivation for exercising the control over employees was "irrelevant" because this fact did not diminish the degree of control over the work.

Wis Dep't of Workforce Dev. v. Wis. Labor & Indus Review Comm'n, 2010 WI App 123, 329 Wis. 2d 67	Wisconsin Admin. Code § DWD 105	-The drivers owned his or her own vehicle or leased the vehicle from another entity other than the company. -The drivers were responsible from the costs of the vehicle -The drivers could hire another employees to operate their vehicles. -The drivers could terminate their contract on reasonable notice to the company		The drivers were not free from the company's direction and control (e.g. required the drivers' vehicle to be white and to the display the company's logo, and required the drivers wear the company's uniforms)	The drivers were employees.

Nichols v. All Points Transp. Corp. of Mich, Inc (364 F. Supp 2d, 621, U.S. Dist. Court for the Eastern District of Michigan, 2005)	The economic realities test	-The permanency of the relationship, (the agreement was terminable at any time by either party) - The degree of skill required (the drivers must also exercise entrepreneurial skills) - Capital investment, (the drivers were responsible for the capital investment in the trucks and were responsible for their own expenses, including taxes, ferries, and permits) The opportunity for profit or loss -Right to control. (The drivers were free to refuse a load assigned to them		The drivers' performance constituted an integral part of the business.	The drivers were independent contractors.

Bell Taxi & Transp., Inc. v. Taylor 766 P.2d 1297, (Kan. App. 1989)	The right to control			The drivers were penalized monetarily because of arriving late for a shift, and they were required by the company to keep trip sheets. Under a lease agreement between the parties, the business was required to obtain all registration, tags, licenses, and legal permits to operate the taxicabs. The drivers had to pay a rental fee to the taxicab business according to a schedule in the lease agreement.	The drivers were employees.
C & H Taxi Co. v. Richardson (461 S.E. 2d 442 W. Va. 1995)	The right to Control			The taxi company had a right to control and supervise the drivers, provided the equipment, and could terminate the relationship for certain violations.[123] The drivers were supposed to provide gasoline, keep the cabs clean, carefully operate the vehicles, and file a report with the taxi company stating every passenger trip completed and the charges therefor[124]	The drivers were employees.

[123] That was a remarkable case, between a taxi driver and the taxi company regarding working compensation, since it suggested an interpretation rule in favor of the worker. Accordingly, if there is any doubt regarding whether the worker is an employee or independent contractor, it should be resolved in favor of worker so he/she should be considered to be an employee rather than an independent contractor. (461 S.E. 2d at 448, W. Va. 1995)

[124] According to the court, unless a company is in the business of merely leasing vehicles with

City Cab Co. v. NLRB, 628 F.2d at 261, U.S. App.1980	The right to control			control over the manner in which the drivers performed their duties (e.g.the cab drivers were required to maintain a trip sheet that chronicled each driver's movements and the fares they received, the cab company significantly regulated the hours that the drivers worked, and the cab company significantly controlled passenger selection,	The drivers were employees
Molina v. S. Fla Express Bankserv, Inc 420 F. Supp. 2d at 1276 (U.S. Dist. 2006)	The Economic Realities Test	Permanency of the relationship	-Degree of Control -Relative InvestmentsW	Skill and initiative (not) required Whether plaintiffs services were integral to the business	Because of the disputed issues of fact, summary judgment denied
NLRB v. H&H Pretzel Co, 831 F2d 650	The right to control			Extensive control over the drivers Broad authority to terminate the contract unilaterally The lack of evidence of any proprietary in the business on the drivers part	The drivers were employees

no more interest in the operation of taxicabs, an employment relationship would likely be found in that case since this fact would indicate that drivers' providing taxi service is an integral part of the business (461 S.E. 2d at 446, W. Va. 1995)

Craig v. FedEx Ground Package, 300 Kan.788, 355 P. 3d 66, Supreme Court of Kansas 2014	Hybrid Test	-The requirement that the services be provided personally by the worker -The worker hires, supervises and pays assistants -Undertaking Expenses -Source of Tools, Equipment, -Drivers must make a significant investment -whether FedEx has the right to discharge drivers	-The worker's establishment of set work hours A requirement that devoting full time to business The degree to which work is performed on Fedex's premises	-The degree of control (most important) -The extent of any training provided by the employer -The degree of integration of the workers' services -Permanency of working relationship -The degree to which FedEx Sets the order and Sequence of the Work -Required Written or Oral Reports -The Manner of Payment -Ability to make a profit or suffer a loss -whether drivers can work for more than one company at a time. -whether drivers services are regularly and consistently made available to the public -Whether drivers have the right to Terminate the Relationship	The drivers were employers

VI. A COMPARATIVE ANALYSIS OF AMERICAN AND TURKISH EMPLOYMENT LAW AS TO THE DISTINCTION OF DEPENDENT AND INDEPENDENT WORK, AND THE STATUS OF PROFESSIONAL DRIVERS

A. The Classification of Workers

Both Turkey and the US preserve the binary classification of workers as dependent employees and independent workers, in other words, there is not an

intermediate category of workers.[125] So, being an "employee" is the essential key to enter through the gate of employment and labor law. This "all or nothing" distinction, however, appears to be sharper in the United States since there are some laws in Turkey which have a broader coverage such as discrimination, health insurance, founding and joining labor unions.

B. The Tests Distinguishing the Employee From Independent Workers

In the US, there are numerous different tests which distinguish the employee from the independent contractor and are determined according to the purpose of the related code. Accordingly, the right to control test is applied with regard to the employer's vicarious liability, liability for employment taxes,[126] NLRA, the Copyright Act, workers compensation, ADA, and ADEA, while the economic realities test is applied within the meaning of FLSA and FMLA. There are also some other tests, such as "entrepreneur test" and "business organization test."[127]

In contrast, in Turkey, there is only one fundamental test which determines the employee concept: legal and personal subordination. It is applied within the meaning of all laws of employment, including minimum wages, restriction on the dismissal rights of employers, holiday pay, occupational health and safety, unemployment compensation, or discrimination bans. Likewise, Trade Unions, and Collective Labor Agreements Act. No.6356[128] has referred to the provision of the Employment Code regarding the definitions of employee and employer to ensure the unity of basic definitions under different Codes.[129] Thus, the decisive factor of employment contracts is the "legal/personal subordination," which is also within the meaning of collective labor law.

Even though the common basic legal test of subordination in Turkey remains, Turkish courts have interpreted this test in a flexible manner and enlarged it by the help of auxiliary criteria and factual indicators.

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125 Kadriye Bakirci, however, has claimed that under the Obligations Act of Turkey, an intermediate category between employees and self-employed persons exists for home workers and travelling salespersons (Bakirci, *supra* note 30, at 733).

126 Hirsch, Secunda & Bales, *supra* note 5, at 8. Recor, *supra* note 55, at 52.

127 *See* Sack, Phillips & Leal-Neri, *supra* note 16, at 253.

128 Official Gazette, 7.11.2012, Vol. 28460 According to this provision, "*The concepts of the employee, employer, and workplace for the implementation of this Law are as defined in the Employment Code, No 4857…"* (Art. 2/3).

129 See, http://www2.tbmm.gov.tr/d24/1/1-0567.pdf

The US's Economic Realities Test	**Turkey's Subordination Test**	**The US's Control test**
The nature and degree of control retained or exercised by the alleged employer	Most prominent factor: The extent of control over the details of the work.	Most Prominent Factor: The extent of control over the details of the work.
-	The manner of payment (by the time or by the job)	The manner of payment (by the time or by the job)
The investment in facilities and equipment	The source of the instrumentalities and tools	The source of the instrumentalities and tools
-	The location of the work	The location of the work
-	whether the worker performs work for the benefit of the same principal exclusively	whether or not the one employed is engaged in a distinct occupation or business
	Carrying out service without investing capital and having an organization belonging to her	Whether or not the work is a part of the regular business of the employer
Permanency of the working relationship	whether the work is performed on a regular and continuous basis	The length of time for which the person is employed
The degree of the worker's independent initiative, judgment, and foresight in open market competition with others required for the success of the operation	Whether the worker has the freedom to decide as reserved by the entrepreneur	The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction the employer or by a specialist without supervision
	whether the worker has the right to reject the task assigned without risk of job loss	The skill required in the particular occupation
	whether the worker hires other helpers whose salary is paid by the worker in the performance of work; whether the worker has her own employees or client	whether or not the parties believe they are creating the relation of master and servant
The worker's opportunities for profit or loss	Bearing the profit and loss/ financial risk	whether the principal party is in business

The essence of the USA's control test and Turkey's legal/personal subordination test is the same.[130] Legal subordination means that employees work under the employer's orders and instructions for a definite or an indefinite period, and the employer controls both the working process and its results. Similarly, the right to control test mainly focuses on the capacity of the contractor to regulate and control *the means and manner of the performing work*.[131] Under the right to control test, if merely the final product is determined while the worker controls the time, place and means of his/her work, and provides his/her own tools and materials, it is likely the worker will be determine to be an self-employed person.

The factual indicators of each test are also very similar. The common indicators of each test are: "the manner of payment," "the source of the instrumentalities and tools," "the location of the work," "whether the worker must perform the work personally or may hire others," and "the length of time for which the person is employed." However, Turkey's subordination test has different factual indicators, such as carrying out service without investing capital and having an organization belonging to him/her, bearing the profit and loss/ financial risk, which seem mostly to coincide with the factors of the economic realities test. On the other hand, the control test has another indicator such as the skill required in the particular occupation, and whether or not the work is a part of the regular business of the employer.

While the core meaning of the legal subordination test and the right to control test is similar, their factual indicators are not entirely the same. Turkey's subordination test seems to be a combination of the right to control test and the economic realities test and is much closer to the hybrid economic realities test since the control factor is considered to be the most prominent factor in determining the employee status.

C. The Meaning and the Function of Economic Dependency

In the US, the economic realities test is considered to be the indication of economic dependency, and is an attempt to correct the deficiencies of the control test, and therefore, is a way of ensuring a broader meaning of the employment relationship.[132] On the other hand, in Turkey, the auxiliary test to correct the deficiencies in the legal subordination test and to provide a more

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130 See, Meier, *supra* note 4, at 35; Supiot, 1999, (cited in Meier *supra* note 4, at 16), at 25

131 Dau-Schmidt & Ray, *supra* note 54, at 118; Sack, Phillips & Leal-Neri, *supra* note 16, at 253.

132 Hirsch, Secunda & Bales, *supra* note 5, at 9; Also see, Dowd, *supra* note 8, at 112-113. This attempt also explains as "shift(ing) attention away from direct control mechanisms toward "bureaucratic or administrative control mechanisms, such as the power to promote, discipline, or fire the worker." (*Id,* at 10; Langille & Davidov, *supra* note 3, at 19)

comprehensive scope of the employment relationship is considered to be the "organization test," which includes *performing work within the framework of someone else's work organization (for the benefit of others).* Even though the content of these two tests is different, their common point is that the control/subordination factor is not excluded entirely, and they mainly pave the way for jurisdictions' application of the control factor in a more flexible manner. Thus, not being constantly under the direct control or authority of the employer does not necessarily prevent an individual from being deemed as an employee.

Furthermore, the meaning of economic dependence seems to be different in each country. In Turkey, economic dependence is considered an ambiguous and unreliable test given its meaning that a worker's remuneration constitutes his/her sole or principal source of income. In the United States, on the other hand, economic dependency is considered to have a broader meaning and defined as "a dependence on that job for that income to be continued and not necessarily for complete sustenance," and this fact has been indicated by the "circumstances of the whole activity." [133] In other words, "the proper test of economic dependence mandates consideration of all the factors, and in light of such consideration, examines whether the workers are dependent on a particular business or organization for their continued employment in that line of business."[134]Accordingly, courts consider following factors within the meaning of this test: 1.The investment in facilities and equipment 2.The nature and degree of control 3. opportunities for profit and loss 4. The degree of the worker's independent initiative, judgment, and foresight 5.Permanency of the relationship 6.The extent to which the services rendered is an integral part of the business

The factors of the economic realities test do not include economic dependence as it has been understood under the Turkish law, and its factors are actually very similar to the factual indicators of subordination test. In fact, some commentators have claimed that all the factors of both the economic realities test and control test are remarkably similar to each other.[135] Some courts also held that the substantive differences between the two tests are minimal. Aside from their contextual similarity, the two tests are also similar in their application to an instant case. Accordingly, like the control test, the factors of the economic realities test are unweighted and nondispositive, and thus, they would be considered on a case-by-case basis.[136]

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133 *Molina,* at. 1276 Halferty, 821 F. 2d at 267

134 *Id,* at 267-68

135 Hirsch, Secunda & Bales, *supra* note 5, at 11. Hodges & Gely, *supra* note 47, at 6.

136 Hirsch, Secunda & Bales, *supra* note 5, at 11.

D. The Scope of Laws

In the US, some laws are implemented only in some workplaces which have a certain number of employees. Regarding discrimination bans, Title VII and the ADA, for example, covers employers with fifteen or more employees, while the ADEA is applied to employers having twenty or more employees. The parallel state statutes often have a lower employee number requirement.[137] The FLSA, which contains four significant regulations: a minimum wage, an overtime standard, the restriction on child labor, and equal pay, has some exemptions in both minimum wage and maximum hour requirements.[138] Taxicab drivers, for instance, are exempt from its overtime provisions but are subject to the minimum wage provisions.[139] There are some other exemptions as well; for instance, FMLA requires fifty employees within seventy-five miles, and FLSA "enterprise" coverage applies only to employers with $500,000 or more annual sales.

On the other hand, in Turkey, coverage exemptions to the employment law seem to be more limited than in the US laws. The Employment Code No. 4857,[140] which is the primary code governing employee and employer relationships and the employee rights such as job security, overtime pay, or annual paid leave, apply to all employees and their employers, irrespective of the field in which their activities fall, only except for those cited in Article 4.[141] There are some

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137 Dowd, *supra* note 8, at 78. Menetrez, *supra* note 8, at 144, Hirsch, Secunda & Bales, *supra* note 5, at 19.

138 Rothstein et. al. *supra* note 16, at 338. Hirsch, Secunda & Bales, *supra* note 5, at 137-138.

139 Hirsch, Secunda & Bales, *supra* note 5, at 14.

140 Official Gazette, 10.06.2003, No. 25134.

141 The exceptions of this Code have been regulated in Article 4. Accordingly, *"The provisions of this Act shall not apply to the activities and employment relationships mentioned below. a. Sea and air transport activities, b. In establishments and enterprises employing a minimum of 50 employees (50 included) where agricultural and forestry work is carried out. c. Any construction work related to agriculture which falls within the scope of family economy, d. In works and handicrafts performed in the home without any outside help by members of the family or close relatives upto 3 rd degree (3 rd degree included) e. Domestic services, f. Apprentices, without prejudice to the provisions on occupational health and safety, g. Sportsmen, Those undergoing rehabilitation, i. Establishments employing three or fewer employees and falling within the definition given in Article 2 of the Tradesmen and Small Handicrafts Act, However, the following shall be subject to this Act; a. Loading and unloading operations to and from ships at ports and landing stages, b. All ground activities related to air transport, c. Agricultural crafts and activities in workshops and factories manufacturing implements, machinery and spare parts for use in agricultural operations, d. Construction work in agricultural establishments, e. Work performed in parks and gardens open to the public or subsidiary to any establishment, f. Work by seafood producers whose activities are not covered by the Maritime Labor Act and not deemed to be agricultural work".* There is a special section under Turkish Code of Obligations for the employees working under employment contracts who are not within the scope of Labor Code (Act No.

exemptions with regard to job security protection for employees working in an establishment with thirty or more workers, and some managerial employees.

Besides, the regulation regarding discrimination bans in an employment relation based on language, race, sex, political thought, philosophical belief, religion, and similar grounds, is also applied to all employee and employer relations in principle, since it has also been regulated under Code No 4857.[142] Moreover, under the Code of Human Rights and Equality Institution of Turkey No. 6701,[143] which entered into force in 2016, discrimination based on sex, race, color, language, religion, belief, sect, philosophical belief, political opinion, ethnic origin, wealth, birth, marital status, medical condition, disability, and age has been forbidden (Art. 3/2). This Code has also set forth that this prohibition exists for all types of contracts for works and services, even if they are not covered by Code No. 4857 (Art 6/5). In other words, all types of working relations, including independent work, are covered under the protection against discrimination.

In addition, all employees shall benefit from the regulation of minimum wage, with no exceptions. Furthermore, there is a broader definition of an employee under some laws. According to the Occupational Safety and Health Code No. 6331,[144] *"This Law shall apply to all works and workplaces in both public and private sector, employers of these workplaces and their representatives, all workers including apprentices and interns regardless of their field of activity."* (Art. 2/1)[145] The worker is defined as *"any natural person employed in public*

6098 dated 11.01.2011, Art.393-Art.447). Besides, Maritime Labor Act (No. 854) is applied to the seamen who work under contract in the ships carrying the Turkish flag and sailing on the seas, lakes and rivers and weighing 100 gross tons and over and to the employers of the seamen (Art.1, Official Gazette, 29.4.1967, 12586). (For the English version of this Act see, http://denizmevzuatudhb.gov.tr/English/um.aspx?Baslik=30). There is also the Act No. 5953 on the relations of press employees with their employers. (Official Gazette, 20.06.1952, 8140).

142 According to this regulation: "*No discrimination based on language, race, sex, political opinion, philosophical belief, religion and sect or similar reasons is permissible in the employment relationship…" (Art.5).*

143 Official Gazette, 20.04.2016, Vol. 29690

144 Official Gazette, 30.6.2012, Vol.28339. For the English version of this Code see, http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=92011&p_country=TUR&p_count=762&p_classification=14&p_classcount=101

145 However, according to the article 2 and paragraph 2, "*this law shall not be applicable to the following activities and persons: a) Activities of the Turkish Armed Forces the police and the Undersecretary of National Intelligence Organization except for those employed in workplaces such as factories, maintenance centers, sewing workshops, and the like. b) Intervention activities of disaster and emergency units c)Domestic services c) Persons producing goods and services in their own name and on their own account without employing workers d) Prison workshop, training, security and vocational course activities within the framework of improvements carried out throughout the enforcement services for*

or private sector workplaces, irrespective of their status in their relevant laws." (Art.3, b) Thus, this law is applied to all workers, including those employed within the scope of the Employment Code, Code of Obligations, Maritime Labor Code, Press Labor Code, and all public servants.[146] Besides, this law also includes apprentices and interns although they are not employees within the meaning of Code No. 4857. In Trade Unions and Collective Labor Agreements Code No. 6356, there is a broader definition of worker in order to extend the scope of the rights to be the founder and member of a trade union.[147] Accordingly, *"A natural person who carries out his/her professional activities independently for a fee, apart from an employment contract and in accordance with a transport contract, work contract, contract of mandate, commission contract, and contract of unincorporated company shall also be considered as workers within the meaning of from the second to the sixth part of this Law. (Art. 2 (4))"* These individuals may form and join labor unions but do not have access to collective bargaining and strike rights since they do not work under an employment contract.[148] One of the other catch-all laws enacted irrespective of the employment status is *"general health insurance,"* which has been regulated under the same Act No. 5510, dated 31 May 2006. Individuals who are holders of universal health insurance have been considered under a very broad scope irrespective of their employment status (Art.60).[149]

E. The Burden of Proof

Under Turkish law, when certain indicators exist in case of disputes, an employment relationship is presumed.[150] Accordingly, if the work is performed for a continuous/particular period; is performed in exchange for a wage, and the work is accepted by the beneficiary, the employment relation presumption is considered (Obligations Act, Art 394). Thus, when these indicators are presented by the worker, the beneficiary of the work then bears the burden of proving that no employment relationship existed.[151]

In the US, it seems that there is no general presumption rule regarding the

convicts and inmates".

146 Suzek, *supra* note 21, at 861.

147 For the legal rationale of this Law in Turkish see. http://www2.tbmm.gov.tr/d24/1/1-0567.pdf

148 Bakirci, *supra* note 30, at 726; Dereli, *supra* note 18, at 67.

149 For instance, citizens whose domestic income per capita is less than one-thirds of the minimum wage, to be determined using the testing methods and data to be laid down by the Institution, considering their expenses, movable and immovable properties and their rights arising from such and, heimatlos and refugees, shall be deemed to be holders of universal health insurance.

150 Bakirci, *supra* note 30, at 739.

151 *Id,* at 740.

existence of the employment relationship. Therefore, courts would determine the existence of the employment relationship on a case-by-case basis.[152] Under some state statutes, however, there are different regulations in this regard. In California, for example, "once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee."[153]

In the US, the label the parties put on their relationship is not determinative as to the conclusion of cases.[154] In other words, for both, right to control and the economic realities tests, an employer's designing or labelling the relationship to be independent work is not determinative even if the employee permits this status.[155] In Turkey, likewise, the judge is not bound to the parties' legal qualification, and thus interprets the contractual relationship between them and determines the type and content of contract ex officio, regardless of the words that the parties have used mistakenly or with the aim of hiding their real goals.

F. Employee Concept to be the Beneficiary of Certain Laws and to be Counted to Establish the Statutory Minimum

In the US, to be a counted employee to establish the statutory minimum under Title VII or the ADEA, and to be a beneficiary employee of these regulations could be two different things.[156] In other words, it is not necessary to be a "counted" employee in order to be under the statutory coverage. For instance, "part-time workers do not count toward the minimum fifteen employees necessary for coverage, but once the employer reaches the minimum for coverage, all employees are protected by the substantive provisions of Act."[157] In Turkey, however, these two facts could also be differentiated, but just in the opposite manner. That is to say; courts are willing to count in every employee to determine the statutory minimum even though they would not cover individually by related law. Thus, in order to be a "counted" employee, it is not always necessary to be under the coverage of the related law. For example, in order to determine whether the employer is subject to the job security regulation according to the statutory minimum number of employees, all employees of the employer in the sector are included, regardless of whether they work under the definite or indefinite termed contracts, or part time or full time, although

152 See, Sack, Phillips and Leal-Neri, *supra* note 16, at 253.

153 *Taylor v. Shippers Transp. Express, Inc* 2014 U.S. Dist. LEXIS 180061, at 26

154 For example see, *Molina v. S. Fla Express Bankserv*, Inc 420 F. Supp. 2d 1276; 2006 U.S. Dist. LEXIS 12417 Some commentators have criticized that both right to control test and the economic realities test have a potential for being manipulated by employers. (Hirsch, Secunda & Bales, *supra* note 5, at 12)

155 Weil, supra note 75, at 5.

156 Rothstein et al., *supra* note 16, at 97.

157 *Id,* at 97.

the employees working under the definite termed contracts are not covered by the regulation. Besides, although some persons in managerial positions are not covered by this protection, they are taken into account in the number of employees.[158] Besides, in some collective agreements, some employees are determined as *"non-covered,"* although they work based on an employment contract.[159] Accordingly, the parties could agree on excluding certain categories of employees, such as the managers, chief executives, and sometimes even the whole office staff, lawyers, legal advisors, and part-time workers from the agreement protection. However, in determining the authorized trade union,[160] all employees working in that workplace shall be taken into consideration while calculating the number of employees, including part-time workers, employees working based on work on-call, and non-covered employees[161].

G. The Judicial Implementation Regarding the Status of Professional Drivers

In both countries, one of the prominent factors for distinguishing an employee from an independent contractor in the case of professional drivers is the manner of the payment, that is to say, whether the driver pays a flat rental to the principal. Considering this fact, the US jurisdiction has inferred whether the cab company would have a financial incentive to exert control over the "means and manner" in which the driver performs. This idea has been explained as follows: "*If a driver* pays a fixed rental, the cab company has little interest in the way in which the *driver* performs since the cab company receives the same amount of money regardless of the *driver's performance. When a driver* must submit a percentage of fares earned during a shift to the cab company, however, the company has a financial incentive to exert control over the *'means and manner' in the driver* performs*."*[162] In Turkey, however, considering the manner of payment, it is inferred whether the financial risk belongs to the driver. Accordingly, the one undertaking the financial risk would be the driver in a relationship in which the amount remaining from the

158 Suzek, *supra* note 21, at 549; Also see Akin, *supra* note 18, at 566-567.

159 Celik, Caniklioglu & Canbolat, *supra* note 21, at 952; Dereli, *supra* note 18, at 75. Besides, "*employer's representatives within the meaning of this Law and those who participate in the collective labor agreement negotiations in the name of the employer shall not benefit from the collective labor agreement"* (Art. 39/7).

160 Trade Unions and Collective Labor Agreements Act. No.6356 provides that "*The workers' trade union representing at least three percent of the workers engaged in a given branch of activity and more than half of the workers employed in the workplace and forty percent of the workers in the enterprise to be covered by the collective labor agreement shall be authorised to conclude a collective labor agreement covering the workplace or enterprise in question"* (Art.41/1).

161 Celik, Caniklioglu & Canbolat, *supra* note 21, at 952.

162 *Bell Taxi & Transp., Inc. v. Taylor*, 1989 Kan. App. LEXIS 9, *1, 766 P.2d 1297.

driver's fixed payment made to the car's owner regularly is the driver's profit. It appears that Turkish courts have attributed importance to the factor of a *chance of profit and risk of loss* as a decisive criterion in most cases regarding professional drivers.[163] In the US, on the other hand, financial risk is an element in the economic realities test only, and not in the right to control test.

Another prominent factor in determining the driver's status, in both countries, is whether the alleged employer deals with anything related to the operation of the taxicab or vehicle; he/she deals with whether the driver uses the vehicle. Turkish jurisdiction, however, presumed the existence of this factor, namely subordination, under the presence of certain conditions even if the driver and the vehicle owner live in different countries in some cases. The Court of Cassation, for example, pointed out that "The existence of subordination between the parties would be presumed because of the alleged employer's having a power of shift-working arrangement and the absence of a written lease agreement, and this presumption can be rebutted with sufficient evidence."[164] On the other hand, in the US, rather than abiding by a presumption, it is determined in which matters the driver had the initiative and in which matters the alleged employer had the right to control the operation of the vehicle. Thus, it explicitly appears in the legal justification of the US courts' order in terms of which extent the alleged employer had or exercised control over the employees.

Likewise, justifications of the US court orders also clearly show how the legal principles and tests were applied in the case. In Turkish law, on the other hand, there has not always been a satiable and detailed explanation of how formulated principles took place in the present case. As a matter of fact, cases were sometimes concluded with a very secondary element, which has not been mentioned in its formula rationale. Turkish jurisprudence seems to be willing to find an employment relationship in such cases, which could also indicate the willingness of Turkish courts to consider the workers, who are in the gray zone due to their economic dependency, in the employee category. Even if this broad judicial interpretation can be regarded as to be proper as a result, a more satisfactory and coherent justification should be declared in order to provide legal certainty and predictability for subsequent cases.

CONCLUDING REMARKS

In this study, rather than providing conclusive solutions, we have merely tried to show that distinguishing dependent work from independent work is sometimes complicated and problematic. This legal challenge has been

[163] Also see Langille & Davidov, *supra* note 3, at 19.
[164] See CC 10th, 30.01.2015, 26435/1649; CC10th, 05.02.2013, 327/1329.

analogically described by District Court of the US as "(being) handed a square peg and (being) asked to choose between two round holes."[165] In order to handling this hard task, jurisdictions collect a long list of indicators, and suggest that none of these indicators constitute a criterion on its own; that there are no formalized hierarchies of these indicators, and the judge is free to evaluate them. This fact inevitably leads to predictability, consistency and clarity issues which have rightfully been criticized by Harris and Krueger as follows: "in too many cases conclusions are driven by a predetermined desired outcome rather than by objective analysis. As a result, similarly situated workers, such as truck drivers, could be employees under a statute in one jurisdiction, but self-employed persons under the same statute in a different jurisdiction."[166] In fact, in addressing the issue, one of the most crucial goals should be reducing the legal uncertainty as much as possible by declaring more satisfactory and coherent justification for the legal conclusions. On the other hand, we also agree with the opinion that some degree of indeterminacy is necessary in order to leave a broad margin of discretion for labor courts considering the challenges of the new types of working relations and the great motivations of employers to define their working relations other than an employment relationship.[167]

In theory, the tests of the right to control or subordination maintain its function and importance to distinguish dependent work from independent work. However, its interpretation and application could significantly vary across different jurisdictions. The basic reason for this divergence is that the tests themselves leave broad room for judicial discretion.[168] Turkish courts exercise this discretion in favor of the employee and construe the employee category widely.

Attributing overweight to the factor of being under the direct control or supervision, or a narrow analysis of the relationship does not adjust finely with the features of some complicated working relations. Indeed, flexibly performing work does not necessarily create an independent relationship.

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165 *Cotter v. Lyft, Inc*, 60 F Supp 3d 1067, 1081 (N.D. Cal. 2015). Also see Valerio De. Stefano, The Rise of the Just-in-Time Workforce: On-demand Work, Crowd Work and Labor Protection in the "Gig Economy", *37 Comp. Lab. L. & Pol'y J.*471, 494 *(2016).*

166 Harris, Seth D. & Krueger, Alan B. A Proposal for Modernizing Labor Laws For Twenty-First-Century Work: "The Independent Worker", The Hamilton Project, Discussion Paper, 10, at 5-6, (2015). Also see, Means, Benjamin; Seiner, Joseph A. 2016. "Navigating the Uber Economy", *49.U.C.D.L. Rev* 1531-1532, 1543 (2016).

167 Davidov, Guy. Guest Post: The Status of Uber Drivers- Part 1: Some Preliminary Questions, https://onlabor.org/guest-post-the-status-of-uber-drivers-part-1-some-preliminary-questions/. May 17 (2016)

168 Guy Davidov, Mark Freedland & Nicola Kountouris, The Subjects of Labor Law: "Employees" and Other Workers, Research Handbook in Comparative Labor Law, Editors: Matthew Finkin & Guy Mundlok, Edward Elgar, 5, (2015). http://www.labourlawresearch.net/sites/default/files/papers/The%20Subjects%20of%20Labor%20law%20.pdf

Benjamin Sachs noted that "workplaces can be *highly* flexible and yet staffed by 'employees.'"[169] In order to ensure this coexistence in harmony, more flexible tests are essential. In Turkey, the proper auxiliary criterion supporting this coexistence is considered to be the organization test, which is performing work within the framework of someone else's work organization (for the benefit of other's) while the economic realities test is considered to serve the same purpose in the US.[170] The common feature of both tests, however, is that they do not exclude right-to-control test, but do enable the control factor to be handled more flexible manner.

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169 Benjamin Sachs, Uber: *Employee Status and "Flexibility",* September 25, 2015, https://onlabor.org/uber-employee-status-and-flexibility/

170 Also *see* Benjamin Sachs, *New DOL Guidance on Employee Status: News for Uber or Lyft?,* July 15, 2015, https://onlabor.org/new-dol-guidance-on-employee-status-news-for-uber-or-lyft/; Benjamin Sachs, *"Do We Need an "Independent Worker" Category?* December 8, 2015, https://onlabor.org/do-we-need-an-independent-worker-category/

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DIE HOCH GERICHTLICHEN URTEILE ÜBER EIN KRIMINALPOLITISCHES INSTRUMENT: VORRATSDATENSPEICHERUNG - MIT DEN URTEILEN DES EGMR VOM 24.04.2018 19.06.2018 und 13.09.2018 *

Bir Suç Politikası Aracı Olan Verilerin İlerde Kullanılmak Üzere Saklanması Tedbiri Hakkındaki Yüksek Yargı Kararları – AİHM'in 24.04.2018 19.06.2018 ve 13.09.2018 Tarihli Kararlari İle

Asst.Prof. Çiler Damla BAYRAKTAR**

Research Article

Zusammenfassung

Die Vorratsdatenspeicherung ist ein kriminalpolitisches Instrument, wodruch gesichert wird, dass die Anbieter öffentlich zugänglicher elektronischer Kommunikationsdienste oder Betreiber eines öffentlichen Kommunikationsnetzes bestimmte Verkehrsdaten – Rufnummer, Zeitpunkt, Dauer der Verbindung die Teilnehmer- und Geräterkennung (IMSI, IMEI) sowie die Standortdaten bei Beginn der Verbindung sowie die Internetprotokolladressen – zum Zwecke der Ermittlung, Feststellung und Verfolgung von Straftaten eine bestimmte Zeit lang aufbewahren.

In der Türkei ist die Vorratsdatenspeicherungsmassnahme im Gesetz Nr. 5809 über die elektronische Kommunikation (§ 51 Abs. 10) und im Gesetzes Nr. 5651 über dieInternetverkehrsdaten (§ 6 Abs. 1 lit. b) vorgesehen.

Die Vorratsdatenspeicherungsmassnahme hat europaweit rechtspolitische und verfassungsrechtliche Diskussionen ausgelöst. Es geht um strategische Abwägungen zwischen Strafverfolgungseffizienz, Sicherheit und dem Schutz des Privat leben und der Daten. Schliesslich stellt eine Vorratsdatenspeicherung als anlassunabhängige und verdachtslose Überwachung des Telekommunikations- und Internetverkehrs einen intensiven Eingriff in Art. 8 der EMRK bzw. in das Recht auf Achtung des Privatlebens und der Korrespondenz dar.

Bei dieser Arbeit wird die Rechtliche Anforderungen des EuGH, BVerfG und EGMR an die Vorratsdatenspeicherung, Bzw. an die Zulassigkeit einer gesetzlichen Grundlage zur Vorratsdatenspeicherungsmassnahme detailliert dargelegt.

Schlüsselwörter Vorratsdatenspeicherung, Schutz des Privat leben und der Daten, Telekommunikationsverkehrsdaten, Internetverkehrsdaten

Özet

Verilerin ilerde kullanılmak üzere saklanması tedbiri, elektronik iletişim hizmetleri sağlayıcılarının ve kamu iletişim ağı operatörlerinin, belirli trafik verilerini - telefon numarasını, bağlantının süresini ve zamanını, abone ve cihaz tanımlamasını (IMSI, IMEI), bağlantının başlangıcındaki konum verilerini ve internet protokolü adreslerini - suçların araştırılması, soruşturulması ve kovuşturulması amacıyla belirli bir süre saklamalarını sağlayan bir suç politikası aracıdır. Türkiye'de verilerin ilerde kullanılmak üzere saklanması tedbiri 5809 sayılı Elektronik Haberleşme Kanununda (51 madde 10. fıkra) ve 5651 sayılı İnternet Ortamında Yapılan Yayınların Düzenlenmesi ve Bu Yayınlar Yoluyla İşlenen Suçlarla Mücadele Edilmesi Hakkında Kanunda (6. Madde 1. fıkra b bendi) öngörülmüştür. Verilerin ilerde kullanılmak üzere saklanması tedbiri (iletişim verilerinin rezervi tedbiri), Avrupada hukuk politikası ve anayasal açılardan çok büyük tartışmalara sebep olmuştur. Bu tartışmanın ana eksenini 'cezai takibin etkililiği ve güvenliğin sağlanması' hukuki faydası karşısında 'özel hayatın korunması ve veri koruması' noktasında verilecek tavizlere ilişkin stratejik ikilem oluşturmaktadır. Nitekim herhangi bir kriminal olaydan bağımsız olarak ve bünyesinde herhangi bir şüphe barındırmayan kişilerin telekomünikasyon ve internet trafiğinin denetlenmesi anlamına gelen verilerin ilerde kullanılmak üzere saklanması tedbiri, AİHS'nin 8. Maddesinde düzenlenmiş olan özel hayata ve yazışmalara saygı gösterilmesi hakkına yoğun bir müdahale içermektedir. Bu çalışmada, Avrupa Adalet Divanı, Alman Anayasa Mahkemesi ve Avrupa İnsan Hakları Mahkemesi'nin verilerin ilerde kullanılmak üzere saklanması tedbirine ilişkin, özellikle bu tedbirin uygulanmasını düzenleyen yasal hükümlerin hukuka uygun kabul edilebilmesi için belirledikleri kriterler detaylı şekilde ele alınmıştır.

Anahtar Kelimeler Veri saklama tedbiri, özel hayatın korunması ve veri koruması, iletişim trafik bilgisi, İnternet trafik bilgisi

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EİNLEİTUNG

Die Vorratsdatenspeicherung[1] ist ein kriminalpolitisches Instrument, wodruch gesichert wird, dass die Anbieter öffentlich zugänglicher elektronischer Kommunikationsdienste oder Betreiber eines öffentlichen Kommunikationsnetzes bestimmte Verkehrsdaten – Rufnummer, Zeitpunkt, Dauer der Verbindung die Teilnehmer- und Geräterkennung (IMSI, IMEI) sowie die Standortdaten bei Beginn der Verbindung sowie die Internetprotokolladressen – zum Zwecke der Ermittlung, Feststellung und Verfolgung von Straftaten eine bestimmte Zeit lang aufbewahren.[2]

Diese Massnahme ist im Hinblick auf die Voraussetzungen der Ermächtigungsgrundlage in EU-Mitgliedstaaten alle unterschiedlich von einander vorgesehen.[3] Zur Vereintlichung der nationalen Vorschriften der EU-Mitgliedstaaten zur Speicherung von Telekommunikationsdaten auf Vorrat wurde die *Richtlinie 2006/24/EG*[4] *des Europäischen Parlaments und des Rates vom 15.3.2006 über die Vorratsspeicherung von Daten, die bei der Bereitstellung öffentlich zugänglicher elektronischer Kommunikationsdienste oder öffentlicher Kommunikationsnetze erzeugt oder verarbeitet werden,* erlassen.

Diese Massnahme ist in der Türkei im Gesetz Nr. 5809 über die elektronische Kommunikation (§ 51 Abs. 10) und im Gesetzes Nr. 5651 über die Internetverkehrsdaten (§ 6 Abs. 1 lit. b) vorgesehen. Schliesslich können

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1 Für die Untersuchung, ob durch den Wegfall der Vorratsdatenspeicherung Schutzlücken für Strafverfolgung und Gefahrenabwehr entstanden sind. Vgl. ALBRECHT, Hans-Jörg/BRUNST,Phillip/DE BUSSER,Els/GRUNDIES,Volker/KILCHLING,Michael/RİNCEANU, Johanna/KENZEL, Brigitte/NİKOLOVA,Nina/ROTİNO,Sophie/TAUSCHWİTZ,Moritz: „Schutzlücken durch Wegfall der Vorratsdatenspeicherung?“, Gutachten der kriminologischen Abteilung des Max-Planck-Instituts für ausländisches und internationales Strafrecht, 2. erweiterte Fassung, Juli 2011, https://www.mpg.de/5000721/vorratsdatenspeicherung.pdf, (Abgerufen am: 26.03.2020).

2 Vgl. z. B. § 113a ff. TKG in Deutschland. Allerdings stellt die Vorratsdatenspeicherun gsmassnahme keine Ermächtigung zur Speicherung des Inhalts der Kommunikation und der Daten über die aufgerufenen Internetseiten dar.

3 Vgl. hier ALBRECHT, Hans-Jörg/BRUNST,Phillip/DE BUSSER,Els/GRUNDIES,Volker/KILCHLING,Michael/RİNCEANU, Johanna/KENZEL, Brigitte/NİKOLOVA,Nina/ROTİNO,Sophie/TAUSCHWİTZ,Moritz: „Schutzlücken durch Wegfall der Vorratsdatenspeicherung?“, Gutachten der kriminologischen Abteilung des Max-Planck-Instituts für ausländisches und internationales Strafrecht, 2. erweiterte Fassung, Juli 2011, https://www.mpg.de/5000721/vorratsdatenspeicherung.pdf, (Abgerufen am: 26.03.2020).

4 Die Richtlinie wurde vom Gerichtshof der Europäischen Union am 08.04.2014 für ungültig erklärt vgl. hierzu EuGH, Urteil vom 08.04.2014, A.z. Nr. ECLI:EU:C:2014:238, http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130de700df-713de9743a38043cbd35a29330c.e34KaxiLc3eQc40LaxqMbN4Obx0Pe0?text=&-docid=150642&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1&cid=256574, (abgerufen am 31.03.2020)-

nach § 51 Abs. 10 des Gesetzes Nr. 5809 die Verkehrs- und Standortdaten der Kommunikation sowie die persönlichen Daten des Anwenders im Rahmen der Überprüfung der Beschwerden und der Überwachungstätigkeiten verarbeitet werden. Die Datenkategorien und die Zeitdauer der Speicherung der Daten, die nicht weniger als ein Jahr und nicht mehr als 2 Jahre von der Kommunikation an beträgt, werden durch eine Verordnung bestimmt (§ 51 Abs.9 i.V.m. Abs. 10 lit. c). Zudem ist die Speicherungsverpflichtung des Internetanbieters in § 6 Abs. 1 lit. b des Gesetzes Nr. 5651 vorgesehen. Danach muss der Internetanbieter die Internetverkehrsdaten bezüglich seines Dienstes für eine bestimmte Zeitdauer, die nicht weniger als 6 Monate und nicht mehr als zwei Jahre beträgt und die durch eine Verordnung festgelegt wird, speichern und die Geheimhaltung und die Sicherheit dieser gespeicherten Daten gewährleisten.

Die Vorratsdatenspeicherungsmassnahme hat europaweit rechtspolitische und verfassungsrechtliche Diskussionen ausgelöst.[5] Es geht um strategische Abwägungen zwischen Strafverfolgungseffizienz, Sicherheit und dem Schutz des Privat leben und der Daten. Schliesslich stellt eine Vorratsdatenspeicherung als anlassunabhängige und verdachtslose Überwachung des Telekommunikations- und Internetverkehrs einen intensiven Eingriff in Art. 8 der EMRK bzw. in das Recht auf Achtung des Privatlebens und der Korrespondenz dar.[6]

Insofern wurden in vielen europäischen Staaten die durch die Umsetzung der Richtlinie 2006/24 eingeführten gesetzlichen Grundlagen der Vorratsdatenspeicherungsmassnahmen wegen Verstoßes gegen jeweilige Verfassungen teilweise vor Verfassungs- oder Obersten Gerichten ausgetragen. Zum Beispiel das bulgarische Oberste Verwaltungsgericht hat in einer Entscheidung vom 11.12.2008[7] einen wesentlichen Teil der bulgarischen

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5 Für die detaillierten Informationen darüber vgl. ALBRECHT, Hans-Jörg/BRUNST,Phillip/DE BUSSER,Els/GRUNDIES,Volker/KILCHLING,Michael/RİNCEANU, Johanna/KENZEL, Brigitte/NİKOLOVA,Nina/ROTİNO,Sophie/TAUSCHWİTZ,Moritz: „Schutzlücken durch Wegfall der Vorratsdatenspeicherung?“, Gutachten der kriminologischen Abteilung des Max-Planck-Instituts für ausländisches und internationales Strafrecht, 2. erweiterte Fassung, Juli 2011, S. 3 ff., https://www.mpg.de/5000721/vorratsdatenspeicherung.pdf, (Abgerufen am: 26.03.2020).

6 ALBRECHT, Hans-Jörg/BRUNST,Phillip/DE BUSSER,Els/GRUNDIES,Volker/KILCHLING,Michael/RİNCEANU, Johanna/KENZEL, Brigitte/NİKOLOVA,Nina/ROTİNO,Sophie/TAUSCHWİTZ,Moritz: „Schutzlücken durch Wegfall der Vorratsdatenspeicherung?“, Gutachten der kriminologischen Abteilung des Max-Planck-Instituts für ausländisches und internationales Strafrecht, 2. erweiterte Fassung, Juli 2011, S. 1 f., https://www.mpg.de/5000721/vorratsdatenspeicherung.pdf, (Abgerufen am: 26.03.2020).

7 *Albrecht* u.a., Gutachten der kriminologischen Abteilung des Max-Planck-Instituts für ausländisches und internationales Strafrecht, „Schutzlücken durch Wegfall der Vorratsdatenspeicherung?“, Teil G, S. 195 ff. , 2. erweiterte Fassung, Juli 2011, abrufbar unter https://www.mpg.de/5000721/vorratsdatenspeicherung.pdf (Stand vom 24.02.2020).

Transformationsgesetzgebung für verfassungswidrig erklärt.[8] Zudem hat sich das rumänische Verfassungsgericht nach Inkrafttreten der rumänischen Vorratsdatenspeicherung mit dem die Speicherung von Telekommunikations- und Internetverbindungsdaten anordnenden Gesetz befasst und in einer Entscheidung vom 8. Oktober 2009 ausgeführt, dass das Gesetz in Gänze verfassungswidrig und deshalb nichtig sei.[9]Dazu entschied das BVerfG[10] am 03.02.2010, dass die Vorratsdatenspeicherung in ihrer gegenwärtigen Form gegen die Verfassung verstößt. Wieder am 22. März 2011 erklärte das tschechische Verfassungsgericht das Gesetz Nr. 127/2005sowie die Verordnung Nr. 485/2005, mit denen die Richtlinie 2006/24/EG in der tschechischen Republik umgesetzt worden war, für verfassungswidrig.[11]

Insbesondere ist das Beschwerdeverfahren im Irische Oberste Gericht insoweit bedeutungsvoll: Das Irische Oberste Gericht hat am 5. Mai 2010 in einem Beschwerdeverfahren der Digital Rights Ireland Limited gegen das im Juli 2009 eingebrachte Reformgesetz (Communications (Retention of Data) Bill 2009), das die Speicherung von Telefonverkehrsdaten auf 2 Jahre und die von Internetverbindungen auf 1 Jahr festsetzt, eine Vorlage zum Europäischen Gerichtshof (EuGH) zugelassen.Die Vorlage zielt auf die Aufhebung des Reformgesetzes wegen Verstoßes der EU-Richtlinie 2006/24/EG gegen Art. 7, 8, 11 und 41 der Grundrechtecharta, gegen den Grundsatz der Verhältismäßigkeit (Art. 5 EUV) sowie gegen die Europäische Menschenrechtskonvention (Art. 8).[12]Auf Ersuchen des irischen Obersten

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8 *Albrecht* u.a., Gutachten der kriminologischen Abteilung des Max-Planck-Instituts für ausländisches und internationales Strafrecht, „Schutzlücken durch Wegfall der Vorratsdatenspeicherung?“, S. 5, 2. erweiterte Fassung, Juli 2011, abrufbar unter https://www.mpg.de/5000721/vorratsdatenspeicherung.pdf (Stand vom 24.02.2020).

9 Rumänische Verfassungsgericht, Entscheidung vom 8.10.2009, Entscheidung Nr.1258, vgl. hierzu *Albrecht* u.a., Gutachten der kriminologischen Abteilung des Max-Planck-Instituts für ausländisches und internationales Strafrecht, „Schutzlücken durch Wegfall der Vorratsdatenspeicherung?“, S. 5, 2. erweiterte Fassung, Juli 2011, abrufbar unter https://www.mpg.de/5000721/vorratsdatenspeicherung.pdf (Stand vom 24.02.2020).

10 BVerfG, Urteil vom 2.3.2010, A.z. Nr. 1 BvR 256/08, vgl hierzu *Albrecht* u.a., Gutachten der kriminologischen Abteilung des Max-Planck-Instituts für ausländisches und internationales Strafrecht, „Schutzlücken durch Wegfall der Vorratsdatenspeicherung?“, S. 3 ff., 2. erweiterte Fassung, Juli 2011, abrufbar unter https://www.mpg.de/5000721/vorratsdatenspeicherung.pdf (Stand vom 24.02.2020).

11 *Albrecht* u.a., Gutachten der kriminologischen Abteilung des Max-Planck-Instituts für ausländisches und internationales Strafrecht, „Schutzlücken durch Wegfall der Vorratsdatenspeicherung?“, S. 5, 2. erweiterte Fassung, Juli 2011, abrufbar unter https://www.mpg.de/5000721/vorratsdatenspeicherung.pdf (Stand vom 24.02.2020).

12 *Albrecht* u.a., Gutachten der kriminologischen Abteilung des Max-Planck-Instituts für ausländisches und internationales Strafrecht, „Schutzlücken durch Wegfall der Vorratsdatenspeicherung?“, S. 5 f., 2. erweiterte Fassung, Juli 2011, abrufbar unter https://www.mpg.de/5000721/vorratsdatenspeicherung.pdf (Stand vom 24.02.2020).

Gerichts hatte der EuGH die Gültigkeit der Richtlinie 2006/24/EG[13]überprüft und mit dem Urteil vom 08.04.2014 hat er diese Richtlinie insbesondere im Hinblick aufdie Grundrechte des auf Achtung des Privatlebens sowie des Grundrechts auf Schutz personenbezogener Datenfür ungültig erklärt.[14]

Auf der anderen Seite beschäftigt sich der der Europäische Gerichtshof für Menschenrechte (EGMR) in seinen aktuellen Urteilen[15] auch spezifisch mit den Beschwerden über die Zulassigkeit der jeweiligen gesetzlichen Ermächtigungsgrundlagen, die die staatlichen Maßnahmen über Massenabfangen von Kommunikation und Erfassung dynamischer IP-Adressen (Internet Protocol) anordnen.

Angesichts der Tatsache, dass die Feststellungen des EuGH, BVerfG und EGMR bei den jeweiligen Urteilen bei der Überprüfung der Zulassigkeit einer gesetzlichen Grundlage zur Vorratsdatenspeicherungsmassnahme berücksichtigt werden[16], werden bei dieser Arbeit die Rechtliche Anforderungen

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13 EuGH, Urteil vom 08.04.2014, A.z. Nr. ECLI:EU:C:2014:238, abrufbar unter http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130de700df713de9743a38043cbd35a29330c.e34KaxiLc3eQc40LaxqMbN4Obx0Pe0?text=&docid=150642&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1&cid=256574 (Stand vom 19.02.2020); für die Frage, ob die Richtlinie mit dem Recht auf Achtung des Privatlebens aus Art. 8 EMRK vereinbar ist, siehe *Gola/Klug/Reif*, NJW 2007, S. 2599, 2600; *Westphal*, EuZW 2010, S. 494, 495 f.;Simitis, NJW 2009, S.1782, 1782 ff.; *Westphal*, EuR 5/2006, S. 706, 707 ff.;*Roßnagel*, NJW 2010, S. 1238, 1243;*Roßnagel*, MMR 2011, S. 493,495.

14 „EuGH: Richtlinie zur Vorratsdatenspeicherung ungültig“ in Datenschutzbeauftragter Info, 8.04.2014, abrufbar unter https://www.datenschutzbeauftragter-info.de/eugh-richtlinie-zur-vorratsdatenspeicherung-ungueltig/ (Stand vom 21.02.2020).

15 *EGMR*, Urteil vom 24.4.2018 – Individualbeschwerde Nr. 62357/14 – Benedik gegen Slovenien, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22benedik%20v.%20slovenia%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-182455%22]} (abgerufen am 25.04.2019); *EGMR*, Urteil vom 13.09.2018 – Individualbeschwerde Nr. 58170/13, 62322/14 und 24960/15 – Big Brother Watch und die Andere gegen Vereinigtes Königsreich, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Big%20Brother%20Watch%20and%20Others%20v.%20United%20Kingdom%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-186048%22]} (abgerufen am 26.04.2019); *EGMR*, Urteil vom 19.06.2018 – Individualbeschwerde Nr. 35252/08 – Centrum För Rättvisa Gegen Schweden, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22centrum%20f%C3%B6r%20r%C3%A4ttvisa%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%2200-1-183863%22]} (abgerufen am 29.4.2019).

16 Die Überprüfung der Zulassigkeit des Gesetzes Nr. 5651 und Nr. 5809 als Ermachtigungsgrundlage zur Vorratsdatenspeicherungsmassnahme und die Überprüfung der Zulassigkeit des §135 der Türkischen Strafprozessordnung als Abrufsregelung ist kein Thema dieser Arbeit. Für diesen Überprüfungen vgl. BAYRAKTAR, Çiler Damla: “Die Vorratsdatenspeicherung in der türkischen Rechtsordnung gemessen an den Anforderungen

des EuGH, BVerfG und EGMR an die Vorratsdatenspeicherung detailliert dargelegt.

I. RECHTLICHE ANFORDERUNGEN AN DIE VORRATSDATENSPEICHERUNG

A. Die Anforderungen des EGMR

Der EGMR findet die Datenbanken in einer demokratischen Gesellschaft notwendig, soweit die gesetzliche Grundlage die Anforderungen an das Merkmal „in einer demokratischen Gesellschaft“ erfüllt[17] und beanstandet die Datenbanken nicht.

Die Feststellungen der EGMR über die Vereinbarkeit der jeweiligen gesetzlichen Ermächtigungsgrundlagen mit Artikel 8 EMRK, die die staatlichen Maßnahmen über Massenabfangen von Kommunikation und Erfassung dynamischer IP-Adressen (Internet Protocol) anordnen, sind folgendermaßen:

1. Benedik gegen Slowenien

In diesem Urteil hat der Beschwerdeführer geltend gemacht, dass sein Recht aus Artikel 8 der Konvention verletzt worden sei, weil die Polizei rechtswidrig Informationen von seinem Internet-Dienstanbieter erhalten habe, die zu seiner Identifizierung geführt hätten: Im Jahr 2006 führten die Schweizer Strafverfolgungsbehörden des Kantons Wallis eine Überwachung der Benutzer des sogenannten "Razorback" -Netzes durch. Die Schweizer Polizei stellte fest, dass einige Nutzer Kinderpornografie in Form von Bildern oder Videos besaßen und austauschten.Zu den von der Schweizer Polizei erfassten dynamischen IP-Adressen (Internet Protocol) gehörte auch eine bestimmte dynamische IP-Adresse, die später mit dem Beschwerdeführer verknüpft wurde.[18]

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des EGMR und der EMRK - Darstellung der Praxis im Rahmen der Abrufsregelung des § 135 der türkischen Strafprozessordnung”, KriPoZ, 3/2020, S. 173 ff und BAYRAKTAR, Çiler Damla: “Telekommunikationsüberwachungsmaßnahme in der türkischen Strafprozessordnung - Anhand Art. 8 EMRK”, Bilişim Hukuku Dergisi, 1/2019, S. 3 ff.

17 EGMR, Urteil vom 26.03.1987 – Leander gegen Schweden, Rn. 54 f., http://www.eugrz.info/PDF/EGMR3/EGMR03-35, (Abgerufen am: 25.11.2018); EGMR, Urteil vom 21.06.2011 – Shimovolos gegen Russland, Rn. 65 ff., http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105217#{"itemid":["001-105217"]}, (Abgerufen am: 07.07.2018); EGMR, Urteil vom 04.12.2008 – S und Marper gegen Vereinigtes Königsreich, Rn. 95 ff., http://hudoc.echr.coe.int/eng?i=001-90051#{„itemid“:[„001-90051“]}, (Abgerufen am: 30.11.2018).

18 EGMR, Urteil vom 24.04.2018 - Benedik gegen Slovenien, Rn. 6, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22benedik%20v.%20slovenia%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-182455%22]}, (Abgerufen am: 25.04.2019).

Auf der Grundlage der von der Schweizer Polizei erhobenen Daten hat die slowenische Polizei auf §149b Absatz 3 des Strafprozessgesetzes Bezug genommen und forderte am 7. August 2006 ohne gerichtlichen Beschluss die Firma S., einen slowenischen Internetdienstanbieter auf, Daten über den Nutzer offenzulegen, dem am 20. Februar 2006 um 1.28 Uhr die von der Polizei festgestellte IP-Adresse zugewiesen wurde. Schließlich ist der Betreiber elektronischer Kommunikationsnetze nach dem §149b Absatz 3 des Strafprozessgesetzes verpflichtet, der Polizei Informationen über die Eigentümer oder Benutzer bestimmter elektronischer Kommunikationsmittel zu geben.[19]

Der Beschwerdeführer beschwerte sich, dass sein Recht auf Privatsphäre verletzt worden sei, weil die Polizei die mit seiner dynamischen IP-Adresse verknüpften Abonnentendaten erhalten habe und folglich seine Identität willkürlich ohne gerichtlichen Beschluss unter Verstoß gegen Artikel 8 der Konvention erhalten habe.[20]

Bei der Feststellung, ob der Eingriff in das Recht des Beschwerdeführers auf Schutz der Privatsphäre den Erfordernissen des Artikels 8 Absatz 2 entsprach, hat der EGMR geprüft ob §149b Absatz 3 des Strafprozessgesetzes zugänglich und vorhersehbar und mit dem Rechtsstaat vereinbar war.[21]

Insofern hat der Gerichtshof festgestellt, dass der vorliegende Fall keine Probleme hinsichtlich der Zugänglichkeit des Gesetzes aufwirft. In Bezug auf die verbleibenden Anforderungen weist der Gerichtshof erneut darauf hin, dass eine Vorschrift „vorhersehbar“ ist, wenn sie so präzise formuliert ist, dass jeder Einzelne - falls erforderlich - mit geeigneten Ratschlägen sein Verhalten regeln kann. Darüber hinaus erfordert die Vereinbarkeit mit der Rechtsstaatlichkeit, dass das innerstaatliche Recht einen angemessenen Schutz gegen willkürliche Eingriffe in die Rechte des Artikels 8 bietet. Der Gerichtshof muss daher auch davon überzeugt sein, dass angemessene und wirksame Garantien gegen Missbrauch bestehen. Laut dem Gerichtshof hängt diese Beurteilung von allen Umständen des Einzelfalls ab, z. B. Art, Umfang und Dauer der möglichen

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19 EGMR, Urteil vom 24.04.2018 - Benedik gegen Slovenien, Rn. 7, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22benedik%20v.%20slovenia%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-182455%22]}, (Abgerufen am: 25.04.2019).

20 EGMR, Urteil vom 24.04.2018 - Benedik gegen Slovenien, Rn. 73, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22benedik%20v.%20slovenia%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-182455%22]}, (Abgerufen am: 25.04.2019).

21 EGMR, Urteil vom 24.04.2018 - Benedik gegen Slovenien, Rn. 124 ff., https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22benedik%20v.%20slovenia%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-182455%22]}, (Abgerufen am: 25.04.2019).

Maßnahmen, die für ihre Anordnung erforderlichen Gründe, die für die Genehmigung, Durchführung und Überwachung zuständigen Behörden sowie die Art der Rechtsmittel.[22]

In diesem Zusammenhang stellt der Gerichtshof fest, dass es zum fraglichen Zeitpunkt offenbar keine Regelung gab, in der die Bedingungen für die Aufbewahrung von Daten, die gemäß § 149b (3) des Strafprozessgesetzes gewonnen wurden, gelistet waren. Schutzmaßnahmen gegen Missbrauch durch Staatsbedienstete im Zugangsverfahren und Übermittlung solcher Daten waren auch nicht festgelegt. Außerdem wurde zum maßgeblichen Zeitpunkt keine unabhängige Beaufsichtigung des Einsatzes dieser Polizeibefugnisse nachgewiesen, obwohl diese Befugnisse den slowenischen Internetdienstanbieter dazu gezwungen hatten, die gespeicherten Verbindungsdaten abzurufen, und die Informationen zu Online-Aktivitäten einer bestimmten Person ohne dessen Zustimmung der Polizei abzugeben.[23]

In Anbetracht der vorstehenden Ausführungen vertritt der Gerichtshof die Auffassung, dass das Gesetz keine ausreichenden Schutzmechanismen gegen willkürliche Eingriffe in die Rechte nach Artikel 8 bot[24] und kommt daher zu dem Schluss, dass Artikel 8 der Konvention verletzt wurde.[25]

2. Big Brother Watch und Andere gegen Vereinigtes Königsreich

In diesem Urteil wurden die Anträge nach Offenbarungen von Edward Snowden in Bezug auf die elektronischen Überwachungsprogramme der Nachrichtendienste der Vereinigten Staaten von Amerika und des Vereinigten Königreichs eingereicht.[26] Die Beschwerdeführer waren alle der

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22 EGMR, Urteil vom 24.04.2018 - Benedik gegen Slovenien, Rn. 125, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22benedik%20v.%20slovenia%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-182455%22]}, (Abgerufen am: 25.04.2019).

23 EGMR, Urteil vom 24.04.2018 - Benedik gegen Slovenien, Rn. 130, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22benedik%20v.%20slovenia%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-182455%22]}, (Abgerufen am: 25.04.2019).

24 EGMR, Urteil vom 24.04.2018 - Benedik gegen Slovenien, Rn. 132, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22benedik%20v.%20slovenia%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-182455%22]}, (Abgerufen am: 25.04.2019).

25 EGMR, Urteil vom 24.04.2018 - Benedik gegen Slovenien, Rn. 134, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22benedik%20v.%20slovenia%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-182455%22]}, (Abgerufen am: 25.04.2019).

26 EGMR, Urteil vom 13.09.2018 - Big Brother Watch und die Andere gegen Vereinigtes Königsreich, Rn. 7, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Big%20Brother%20Watch%20and%20Others%20v.%20United%20Kingdom%22],%22docu-

Auffassung, dass ihre elektronische Kommunikation aufgrund der Art ihrer Tätigkeiten wahrscheinlich von den britischen Geheimdiensten abgefangen worden sei oder erhalten worden sei, nachdem sie von ausländischen Regierungen abgefangen wurden; und / oder von den britischen Behörden von Kommunikationsdienstanbietern ("CSPs") bezogen worden sei.[27] Insofern haben sie sich über die Vereinbarkeit von drei Regelungen nach Artikel 8 beschwert: der Regelung für das Massenabfangen von Kommunikation gemäß § 8 Absatz 4 RIPA; das Geheimdienstregime; und die Regelung für den Erwerb von Kommunikationsdaten gemäß Kapitel II des RIPA.[28]

Im Rahmen dieses Urteils hat der Gerichtshof ausdrücklich anerkannt, dass die nationalen Behörden bei der Auswahl, wie das legitime Ziel des Schutzes der nationalen Sicherheit am besten erreicht werden kann, einen großen Ermessensspielraum genießen und festgestellt, dass die Einleitung eines Massenabfangsystems nicht per se gegen das EMRK verstieß. Schließlich hat der EGMR hervorgehoben, aufgrund der aktuellen Bedrohungen, denen die Vertragsstaaten ausgesetzt sind, einschließlich der Plage des globalen Terrorismus und anderer schwerer Kriminalität, wie Drogenhandel, Menschenhandel, sexuelle Ausbeutung von Kindern und Cyberkriminalität, sowie die Fortschritte in der Technologie, die es für Terroristen und Kriminellen erleichtern im Internet unentdeckt zu bleiben und die Unvorhersehbarkeit der Routen, über welche die elektronischen Kommunikationen übertragen werden, fällt das Massenabfangsystem, welches unbekannte Bedrohungen für die nationale Sicherheit ermittelt, weiterhin in den Ermessensspielraum der Staaten.[29]

Im Rahmen seiner Prüfungen über die Regelung für das Massenabfangen von Kommunikation gemäß § 8 Absatz 4 RIPA hat EGMR zwar auf die

mentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-186048%22]}, (Abgerufen am: 26.04.2019).

27 EGMR, Urteil vom 13.09.2018 - Big Brother Watch und die Andere gegen Vereinigtes Königsreich, Rn. 8, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Big%20Brother%20Watch%20and%20Others%20v.%20United%20Kingdom%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-186048%22]}, (Abgerufen am: 26.04.2019).

28 EGMR, Urteil vom 13.09.2018 - Big Brother Watch und die Andere gegen Vereinigtes Königsreich, Rn. 269, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Big%20Brother%20Watch%20and%20Others%20v.%20United%20Kingdom%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-186048%22]}, (Abgerufen am: 26.04.2019).

29 EGMR, Urteil vom 13.09.2018 - Big Brother Watch und die Andere gegen Vereinigtes Königsreich, Rn. 314, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Big%20Brother%20Watch%20and%20Others%20v.%20United%20Kingdom%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-186048%22]}, (Abgerufen am: 26.04.2019).

unabhängige Aufsicht durch das *Interception of Communications Commissioner* und das *Investigatory Powers Tribunal* sowie die umfangreichen unabhängigen Ermittlungen hingewiesen, die den Edward Snowden-Enthüllungen folgten und insofern positiv behandelt, dass die Geheimdienste des Vereinigten Königreichs ihre Verpflichtungen der Konvention ernst nehmen und ihre Befugnisse gemäß Abschnitt 8 (4) der RIPA nicht missbrauchen, aber er hat bei der Prüfung dieser Befugnisse zwei Hauptproblembereiche ermittelt: Erstens das Fehlen einer Aufsicht über den gesamten Auswahlprozess, einschließlich der Auswahl von Trägern für das Abfangen, von der Selektoren und von Suchkriterien zum Filtern abgefangener Kommunikationen sowie der Auswahl von Material zur Prüfung durch einen Analytiker; und zweitens das Fehlen wirklicher Garantien für die Auswahl betroffener Kommunikationsdaten zur Prüfung[30]. In Anbetracht dieser Unzulänglichkeiten hat der Gerichtshof festgestellt, dass die Regelung des § 8 Absatz 4 die Anforderung der „Rechtsqualität" nicht erfüllt und nicht in der Lage ist, den „Eingriff" auf die Maßgabe „Notwendigkeit in einer demokratischen Gesellschaft" einzuschränken. Insofern ist der EGMR zu dem Schluss gekommen, dass Artikel 8 der Konvention verletzt worden ist[31].

Außerdem hat der EGMR im Rahmen seiner Prüfungen über die Regelung für den Erwerb von Kommunikationsdaten gemäß Kapitel II des RIPA darauf hingewiesen, dass das innerstaatliche Recht, wie es von den inländischen Behörden angesichts der jüngsten Urteile des EuGH ausgelegt wird, erfordert, dass ein Regime, das den Behörden den Zugriff auf die von dem Kommunikationsdienstanbieter (Communications Service Providers) gespeicherten Daten erlaubt, den Zugang zum Zweck der Bekämpfung der „schweren Kriminalität" einschränkt, und dieser Zugang zuvor von einem Gericht oder einer unabhängigen Verwaltungsstelle überprüft wird. Insofern hat der EGMR festgestellt, dass die Regelung des Kapitels II nicht im Einklang mit dem Gesetz im Sinne von Artikel 8 der Konvention stehen kann,da diese Regelung den Zugang zu gespeicherten Daten zum Zweck der Kriminalitätsbekämpfung (und nicht als „schwere Kriminalität") erlaubt und dieser Zugang nicht der vorherigen Prüfung durch Gericht oder einer

30 EGMR, Urteil vom 13.09.2018 - Big Brother Watch und die Andere gegen Vereinigtes Königsreich, Rn. 387, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Big%20Brother%20Watch%20and%20Others%20v.%20United%20Kingdom%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-186048%22]}, (Abgerufen am: 26.04.2019).

31 EGMR, Urteil vom 13.09.2018 - Big Brother Watch und die Andere gegen Vereinigtes Königsreich, Rn. 388, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Big%20Brother%20Watch%20and%20Others%20v.%20United%20Kingdom%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-186048%22]}, (Abgerufen am: 26.04.2019).

unabhängigen Verwaltungsbehörde unterliegt, sofern der Zugang zum Zwecke der Ermittlung der Quelle eines Journalisten angestrebt wird.[32]

Zudem hat der EGMR in diesem Urteil festgestellt, dass bei einem Fall in dem es sich um das Produkt des Abfangens handelt, die Mindestanforderungen vorliegen müssen, die sich auf Speicherung, Prüfung, Verwendung, Weiterverbreitung, Löschung und Zerstörung beziehen[33].

3. Centrum För Rättvisa gegen Schweden

Die Beschwerdeführerin, Centrum för rättvisa, ist eine schwedische Stiftung, die 2002 gegründet wurde und ihren Sitz in Stockholm hat. Sie ist eine gemeinnützige Organisation, deren erklärtes Ziel ist, Klienten, die behaupten, dass ihre Rechte und Freiheiten gemäß der Konvention und nach schwedischem Recht verletzt worden sind, in Rechtsstreitigkeiten gegen den Staat und auf andere Weise zu vertreten. Sie führt auch Bildung und Forschung durch und nimmt an der allgemeinen Debatte über Fragen der Rechte und Freiheiten des Einzelnen teil. Die Beschwerdeführerin kommuniziert täglich per E-Mail, Telefon und Fax mit Einzelpersonen, Organisationen und Unternehmen in Schweden und im Ausland und macht geltend, dass ein großer Teil dieser Kommunikation aus Datenschutzsicht besonders sensibel ist. Aufgrund seiner Funktion als Nichtregierungsorganisation, die die Aktivitäten staatlicher Akteure unter die Lupe nimmt, ist die Beschwerdeführerin der Auffassung, dass ihre Kommunikation über Mobiltelefone und mobiles Breitband durch Signal-Nachrichten abgefangen und geprüft wird oder abgefangen und geprüft werden wird.[34]

Bei seiner Prüfung hat der EGMR erstens die Bedeutung des Begriffs der Signal-Nachrichten folgendermaßen festgelegt:[35] Signal-Nachrichten

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32 EGMR, Urteil vom 13.09.2018 - Big Brother Watch und die Andere gegen Vereinigtes Königsreich, Rn. 467, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Big%20Brother%20Watch%20and%20Others%20v.%20United%20Kingdom%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-186048%22]}, (Abgerufen am: 26.04.2019).

33 EGMR, Urteil vom 13.09.2018 - Big Brother Watch und die Andere gegen Vereinigtes Königsreich, Rn. 423, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Big%20Brother%20Watch%20and%20Others%20v.%20United%20Kingdom%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-186048%22]}, (Abgerufen am: 26.04.2019).

34 EGMR, Urteil vom 19.06.2018 - Centrum För Rättvisa Gegen Schweden, Rn. 6, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22centrum%20f%C3%B6r%20r%C3%A4ttvisa%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-183863%22]}, (abgerufen am: 01.04.2019).

35 EGMR, Urteil vom 19.06.2018 - Centrum För Rättvisa Gegen Schweden , Rn. 7, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22centrum%20f%C3%B6r%20r%C3%A4ttvisa%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAM-

kann als Abfangen, Verarbeiten, Analysieren und Berichten von Intelligenz aus elektronischen Signalen definiert werden. Diese Signale können zu Text, Bild und Ton verarbeitet werden. Die durch diese Verfahren gesammelten Informationen können sowohl den Inhalt einer Kommunikation als auch die zugehörigen Kommunikationsdaten betreffen (Daten, die beispielsweise beschreiben, wie, wann und zwischen welchen Adressen die elektronische Kommunikation durchgeführt wird).‘

Danach hat der Gerichtshof in seinem Urteil auf die möglichen schädlichen Auswirkungen hingewiesen, die die Anwendung eines Signals-Nachrichtensystems auf den Schutz der Privatsphäre haben kann und herausgestellt, dass ein solches System für die nationalen Sicherheitsmaßnahmen von Bedeutung ist. Insofern hat der Gerichtshof festgestellt, dass angesichts der heutigen Bedrohungen durch den weltweiten Terrorismus und der schweren grenzüberschreitenden Kriminalität sowie der zunehmenden Komplexität der Kommunikationstechnologie die Entscheidung, ein Massenabfangsystem einzurichten, um solche Bedrohungen zu ermitteln, unter den Ermessensspielraum des Staates fiel.[36]

Allerdings hat der EGMR bei seiner Prüfung auch angemerkt, dass der Ermessensspielraum des Staates bei der Anwendung des Abfangsystems enger ist und insofern bei der Prüfung des schwedischen Signals-Nachrichtensystems die einschlägigen Rechtsvorschriften und die anderen verfügbaren Informationen berücksichtigt, um zu beurteilen, ob insgesamt ausreichende Mindestgarantien vorhanden sind, um die Öffentlichkeit vor Missbrauch zu schützen. Nach seiner Beurteilung sind zwar einige Bereiche vorhanden, in denen Verbesserungsbedarf besteht - insbesondere die Regulierung der Übermittlung personenbezogener Daten an andere Staaten und internationale Organisationen sowie die Praxis, nach Prüfung einzelner Beschwerden keine öffentlichen Gründe zu nennen – jedoch weist das System keine erheblichen Mängel in seiner Struktur und Arbeitsweise auf. Bei dieser Feststellung hat der Gerichtshof darauf beruht, dass der Regulierungsrahmen mehrmals überprüft wurde, um die Verwendung von Signals-Nachrichten ausbauen zu können, vor allem aber mit dem Ziel, den Schutz der Privatsphäre zu verbessern. Es hat sich so entwickelt, dass es das Risiko von Eingriffen in die Privatsphäre minimiert und den Mangel an Vorhersehbarkeit kompensiert. Insbesondere sind der Geltungsbereich der Signals-Nachrichtenmaßnahmen und die Behandlung der

BER%22],%22itemid%22:[%22001-183863%22]}, (abgerufen am: 29.04.2019).

36 EGMR, Urteil vom 19.06.2018 - Centrum För Rättvisa Gegen Schweden ,Rn. 179, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22centrum%20f%C3%B6r%20r%C3%A4ttvisa%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-183863%22]} (Abgerufen am: 29.04.2019).

abgefangenen Daten im Gesetz klar festgelegt, das Genehmigungsverfahren ist detailliert und einer Justizbehörde anvertraut, und es gibt mehrere unabhängige Stellen, die mit der Überwachung und Überprüfung des Systems beauftragt sind.[37] Insofern stellt der Gerichtshof fest, dass das schwedische Signals-Nachrichtensystem angemessene und ausreichende Garantien gegen Willkür und Missbrauch bietet. Die einschlägigen Rechtsvorschriften erfüllen die Anforderung der „Rechtsqualität" und der festgelegte „Eingriff" kann als „in einer demokratischen Gesellschaft notwendig" angesehen werden. Darüber hinaus sind die Struktur und der Betrieb des Systems in einem angemessenen Verhältnis zu dem angestrebten Ziel.[38]

B. Anforderungen des Gerichtshofs der Europäischen Union

Nach der Vorratsdatenspeicherungsrichtlinie sollten die Mitgliedsstaaten, die in Art. 5 I der Richtlinie im Einzelnen bestimmten Arten von Daten ohne einzelfallbezogenen Anlass „auf Vorrat" speichern, soweit sie von Telekommunikationsdienstleistungsanbietern bei der Bereitstellung ihrer Dienste erzeugt oder verarbeitet werden (Art. 3 I). Die Speicherungsdauer ist von mindestens sechs und höchstens 24 Monaten (Art.6). Jedoch dürfen nach dieser RL Art. 5 II die Daten, die Aufschluss über den Inhalt der Kommunikation geben, nicht gespeichert werden.[39]

Der Gerichtshof der Europäischen Union hat bei seiner Rechtsprechung auf die folgenden Kriterien beruht[40] und diese Richtlinie für ungültig erklärt:[41]

1- Der Teilnehmer oder der registrierte Benutzer soll über die Vorratsspeicherung der Daten und ihre spätere Nutzung informiert werden, damit bei den

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37 EGMR, Urteil vom 19.06.2018 - Centrum För Rättvisa Gegen Schweden , Rn. 180, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22centrum%20f%C3%B6r%20r%C3%A4t-tvisa%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-183863%22]} (Abgerufen am: 29.04.2019).

38 EGMR, Urteil vom 19.06.2018 - Centrum För Rättvisa Gegen Schweden, Rn. 181, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22centrum%20f%C3%B6r%20r%C3%A4t-tvisa%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-183863%22]}, (Abgerufen am: 29.04.2019).

39 GRAULICH, Kurt: "Telekommunikationsgesetz und Vorratsdatenspeicherung", NVwZ, 2008, S. 486.

40 Diese Kriterien hat der EuGH bei dem Urteil vom 21.12.16 wieder bestätigt und verlangt, dass sich die Ausnahmen vom Schutz personenbezogener Daten- sowohl die Regeln über die Vorratsdatenspeicherung als auch die Regeln über den Zugang zu den gespeicherten Daten- auf das absolut Notwendige beschränken. Vgl. hierzu EuGH, Urteil vom 21.12.16, http://curia.europa.eu/juris/document/document.jsf?text=&docid=186492&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1, (Abgerufen am: 08.04.2019).

41 EuGH, Urteil vom 08.04.2014, http://curia.europa.eu/juris/document/document.jsf?-text=&docid=150642&pageIndex=0&doclang=de&mode=req&dir=&occ=first&part=1&-cid=415485, (Abgerufen am: 21.01.2018).

Betroffenen nicht das Gefühl erzeugt wird, dass ihr Privatleben Gegenstand einer ständigen Überwachung ist.[42]

2- Es sind Bestimmungen erforderlich, die zu gewährleisten vermögen, dass sich der Eingriff tatsächlich auf das absolut Notwendige beschränkt:[43] Insofern hat der Gerichtshof der Europäischen Union den Fall beanstandet, dass die Richtlinie sich generell auf sämtliche Personen, elektronische Kommunikationsmittel und Verkehrsdaten erstreckt, ohne irgendeine Differenzierung, Einschränkung oder Ausnahme anhand des Ziels der Bekämpfung schwerer Straftaten vorzusehen.[44]

Zudem hat der Gerichtshof darauf hingewiesen, dass die Richtlinie lediglich allgemein auf die von jedem Mitgliedstaat in seinem nationalen Recht bestimmten „schweren Straftaten" Bezug nimmt, und beanstandet in diesem Zusammenhang, dass die Richtlinie kein objektives Kriterium vorsieht, das es ermöglicht, den Zugang der zuständigen nationalen Behörden zu den Daten und deren Nutzung zwecks Verhütung, Feststellung oder strafrechtlicher Verfolgung auf Straftaten zu beschränken, die im Hinblick auf das Ausmaß und die Schwere des Eingriffs in die fraglichen Grundrechte als so schwerwiegend angesehen werden können, dass sie einen solchen Eingriff rechtfertigen.[45]

Ferner hat er beanstandet, dass die Richtlinie keine materiell- und verfahrensrechtlichen Voraussetzungen für den Zugang der zuständigen nationalen Behörden zu den Daten und deren spätere Nutzung enthält.[46]

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42 EuGH, Urteil vom 08.04.2014, Rn. 37, http://curia.europa.eu/juris/document/document.jsf?text=&docid=150642&pageIndex=0&doclang=de&mode=req&dir=&occ=first&part=1&cid=415485, (Abgerufen am: 21.01.2018).

43 Für das gleiche Kriterium bei der Rechtfertigung eines Eingriffs auf der EGMR-Ebene, dass der Eingriff tatsächlich auf das absolut Notwendige beschränkt sein soll, vgl. EGMR, Urteil vom 26.03.1987 – Leander gegen Schweden, Rn. 64 (Der EGMR hat bei der Verhältnismäßigkeitsabwägung des Eingriffs darauf hingewiesen, dass die Verordnung über Personalüberprüfungen einige Bestimmungen enthält, die die Auswirkungen der Durchführung der Personalüberprüfung auf ein unvermeidliches Minimum reduzieren sollen.), http://www.eugrz.info/PDF/EGMR3/EGMR03-35, (Abgerufen am: 25.11.2018).

44 EuGH, Urteil vom 08.04.2014, Rn. 56 ff., http://curia.europa.eu/juris/document/document.jsf?text=&docid=150642&pageIndex=0&doclang=de&mode=req&dir=&occ=first&part=1&cid=415485, (Abgerufen am: 21.01.2018).

45 EuGH, Urteil vom 08.04.2014, Rn. 60, http://curia.europa.eu/juris/document/document.jsf?text=&docid=150642&pageIndex=0&doclang=de&mode=req&dir=&occ=first&part=1&cid=415485, (Abgerufen am: 21.01.2018).

46 EuGH, Urteil vom 08.04.2014, Rn. 61, http://curia.europa.eu/juris/document/document.jsf?text=&docid=150642&pageIndex=0&doclang=de&mode=req&dir=&occ=first&part=1&cid=415485, (Abgerufen am: 21.01.2018). Diese Anforderung, dass für die Rechtfertigung eines Eingriffs bei der gesetzlichen Grundlage die materiell- und verfahrensrechtlichen Voraussetzungen vorgesehen sein sollen, entspricht den Anforderungen des EGMR, vgl. EGMR, Urteil vom 10.02.2009 – Iordachi u. a. gegen Moldawien, Rn. 48, (Der EGMR hat ausdrückliche Bestimmungen über das Verfahren bei Auswertung, Verwendung

In diesem Zusammenhang hat er besonders darauf hingewiesen, dass der Zugang zu den Daten einer vorherigen Kontrolle durch ein Gericht oder eine unabhängige Verwaltungsstelle unterliegen soll.[47]

Außerdem hat er beanstandet, dass die Richtlinie ohne eine Unterscheidung zwischen den Datenkategorien anhand der betroffenen Personen oder nach Maßgabe des etwaigen Nutzens der Daten für das verfolgte Ziel und ohne objektive Kriterien, die gewährleisten, dass die Speicherung auf das absolut Notwendige beschränkt wird, die Dauer der Vorratsspeicherung der Daten zwischen mindestens sechs und höchstens 24 Monaten bestimmt hat.[48]

3- Die Daten sollen wirksam vor Missbrauchsrisiken sowie vor jedem unberechtigten Zugang und jeder unberechtigten Nutzung geschützt werden. In diesem Zusammenhang ist eine Vernichtungsregelung nach dem Ablauf der Speicherungsfrist und eine unabhängige Kontrollstelle, die die Einhaltung der Erfordernisse des Datenschutzes und der Datensicherheit überwacht, erforderlich.[49]

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und Speicherung der Daten vorausgesetzt, damit die gesetzliche Grundlage des Eingriffs die Mindestanforderungen des EGMR an Rechtsschutz und an Schutz gegen Willkür erfüllt.), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i= 001-91245#{"itemid":["001-91245"]}, (Abgerufen am: 17.05.2018).

47 EuGH, Urteil vom 08.04.2014, Rn. 62, http://curia.europa.eu/juris/document/document.jsf?text=&docid=150642&pageIndex=0&doclang=de&mode=req&dir=&occ=first&part=1&cid=415485, (Abgerufen am: 21.01.2018). Dies entspricht den Anforderungen des EGMR; schließlich hat der EGMR, schon mehrfach betont, dass die die Maßnahme zulassende Stelle unabhängig sein muss, vgl. EGMR, Urteil vom 15.01.2015 – Dragojević gegen Kroatien, Rn. 94, http://hudoc.echr.coe.int/eng?i=001-150298#{"itemid":["001-150298"]}, (Abgerufen am: 17.11.2018); EGMR, Urteil vom 18.05.2010 – Kennedy gegen Vereinigtes Königsreich, Rn. 153, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98473#{"itemid":["001-98473"]}, (Abgerufen am: 7.7.2018).

48 EuGH, Urteil vom 08.04.2014, Rn. 63 f., http://curia.europa.eu/juris/document/document.jsf?text=&docid=150642&pageIndex=0&doclang=de&mode=req&dir=&occ=first&part=1&cid=415485, (Abgerufen am: 21.01.2018).

49 EuGH, Urteil vom 08.04.2014, Rn. 66 ff., http://curia.europa.eu/juris/document/document.jsf?text=&docid=150642&pageIndex=0&doclang=de&mode=req&dir=&occ=first&part=1&cid=415485, (Abgerufen am: 21.01.2018). Die Löschungspflicht und die Erfordernis einer Kontrollstelle entsprechen auch den Anforderungen des EGMR (vgl. EGMR, Urteil vom 24.04.1990 – Huvig gegen Frankreich, Rn. 34, http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"fulltext":["huvig v. france"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-57627"]}, (Abgerufen am: 07.07.2018); EGMR, Urteil vom 04.12.2008 – S und Marper gegen Vereinigtes Königsreich, Rn. 99, http://hudoc.echr.coe.int/eng?i=001-90051#{"itemid":["001-90051"]}, (Abgerufen am: 30.11.2018); EGMR, Urteil vom 18.05.2010 – Kennedy gegen Vereinigtes Königsreich, Rn. 153, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98473#{"itemid":["001-98473"]}, (Abgerufen am: 07.07.2018).

C. Anforderungen des Bundesverfasungsgericht

Am 01.01.2008 ist in Deutschland das „Gesetz zur Neuregelung der Telekommunikationsüberwachung und anderer Ermittlungsmaßnahmen sowie zur Umsetzung der Richtlinie 2006/24/EG[50] vom 21.12.2008“ , das meistens als Telekommunikationsüberwachungsgesetz (TKÜ) bezeichnet wird, in Kraft getreten und hat dadurch die neue Regelung des § 113a TKG über die Vorratsdatenspeicherung eingeführt.[51]Danach sind die Anbieter nach der Kernnorm der Vorratsdatenspeicherung § 113a TKG verpflichtet, bestimmte Verkehrsdaten – Rufnummer, Zeitpunkt, Dauer der Verbindung sowie die Internetprotokolladressen – bei der Inanspruchnahme von Internet- und Telefondiensten eines jeden Kommunikationsaktes für sechs Monate aufzubewahren[52] (§ 113a II TKG). Vergleichbare Daten sind bei der Nutzung von E-Mail- und Internetzugangsdiensten und bei Mobiltelefonen zusätzlich zu speichern (§ 113a III, IV TKG), insbesondere die Teilnehmer- und Geräterkennung (IMSI, IMEI) sowie die Standortdaten bei Beginn der Verbindung[53] (§ 113a II Nr. 4 TKG). Allerdings stellt dieses Gesetz keine Ermächtigungsgrundlage zur Speicherung des Inhalts der Kommunikation und der Daten über die aufgerufenen Internetseiten dar.[54]

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50 GRAULİCH, Kurt: “Telekommunikationsgesetz und Vorratsdatenspeicherung”, NVwZ, 2008, S. 486; für die Umsetzung dieser RL in Österreich und Schweden vgl. GERHARTİNGER, Hartwig: „Österreich: Durchführungsverordnungen zur Vorratsdatenspeicherung erlassen“, ZD-Aktuell, 2012, 02729, http://beck-online.beck.de/?vpath=bibdata\zeits\zdaktuell\2012\cont\zdaktuell.2012.02729.htm&pos=7&hlwords=vorratsdatenspeicherung%C3%90+vorrat+%C3%90+daten+%C3%90+speichern+#xhlhit, (Abgerufen am: 03.03.2013); SCHWEDA, Sebastian: “Schweden: Gesetz zur Vorratsdatenspeicherung verabschiedet”, ZD-Aktuell, 2012, 02882, http://beck-online.beck.de/?vpath=bibdata\zeits\zdaktuell\2012\cont\zdaktuell.2012.02882.htm&pos=6&hlwords=vorratsdatenspeicherung%C3%90+vorrat+%C3%90+daten+%C3%90+speichern+#xhlhit, (Abgerufen am: 03.03.2013), sowie MİTTELBERGER, Philipp: “Verfassungsmäßigkeit der Vorratsdatenspeicherung in Liechtenstein”, LJZ, 2012 März, S. 8, 11 f.

51 GRAULİCH, Kurt: “Telekommunikationsgesetz und Vorratsdatenspeicherung”, NVwZ, 2008, S. 486.

52 PUSCHKE, Jens: “Telekommunikationsüberwachung Vorratsdatenspeicherung und sonstige heimliche Ermittlungsmaßnahmen der StPO nach der Neuregelung zum 1.1. 2008”, NJW, 2008, S. 118. Außerdem sollen nach der sonderbaren Ansicht von *Fischer* die gespeicherten Daten in jedem Fall eine längere Zeit aufbewahrt werden, weil sich die Vorratsdatenspeicherung auch entlastend auswirken könne (vgl. FISCHER, Rn. 303). Für die Ansicht von Antonie Knierim und Wolfgang Bär über die Speicherfrist siehe SCHULDT, Michaela: “Abschlusstagung des Forschungsprojekts InVoDaS (Interessenausgleich im Rahmen der VorratsDatenSpeicherung) am 07.09.2011 in Berlin”, ZD-Aktuell, 2011, 112, https://www.beck.de/cms/main?docid=323207, (Abgerufen am: 03.03.2013.

53 PUSCHKE, Jens: “Telekommunikationsüberwachung Vorratsdatenspeicherung und sonstige heimliche Ermittlungsmaßnahmen der StPO nach der Neuregelung zum 1.1. 2008”, NJW, 2008, S. 118.

54 FISCHER, Rn. 302.

Nach § 113b TKG dürfen die Daten sowohl zur Strafverfolgung als auch zur Abwehr von erheblichen Gefahren für die öffentliche Sicherheit und zur Erfüllung der Aufgaben der Geheimdienste genutzt werden.[55]

Das Verfassungsgericht hat am 02.03.2010 die Vorschriften zur Vorratsdatenspeicherung für verfassungswidrig und die entsprechenden Vorschriften für nichtig erklärt,[56] weil das Gesetz in seiner jetzigen Fassung gegen Artikel 10 Abs. 1 des Grundgesetzes verstößt;[57] dies insofern, als dass zunächst im Hinblick auf das Telekommunikationsgeheimnis die Daten nur dezentral[58] gespeichert und mit besonderen Maßnahmen gesichert werden müssen und zweitens die Nutzung der Daten durch Behörden auf genau spezifizierte Fälle schwerster Kriminalität und schwerer Gefahren beschränkt bleiben muss und das angegriffene Gesetz diesen Anforderungen nicht gerecht wird.[59] Allerdings ist nach dem BVerfG eine Vorratsdatenspeicherung nicht grundsätzlich mit dem Grundgesetz unvereinbar;[60]*der automatisierte*

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55 PUSCHKE, Jens: "Telekommunikationsüberwachung Vorratsdatenspeicherung und sonstige heimliche Ermittlungsmaßnahmen der StPO nach der Neuregelung zum 1.1. 2008", NJW, 2008, S. 119; vgl. hierzu auch ROßNAGEL, Alexander: "Die „Überwachungs-Gesamtrechnung" – Das BVerfG und die Vorratsdatenspeicherung", NJW, 2010, S. 1240. Für die detaillierten Informationen über den 113a TKG und 113b TKG siehe KÜHLING, Jürgen/ELBRACHT, Alexander: "Teil 6. Telekommunikationsrecht", in: Leupold, Andreas/ Glossner, Silke (ed.), Münchener Anwaltshandbuch IT-Recht, 2. A., München 2011, Rn. 346 ff.

56 In diesem Zusammenhang trat im Dezember 2015 in Deutschland ein neues Gesetz zur Vorratsdatenspeicherung in Kraft, vgl. hierzu Gesetz zur Einführung einer Speicherpflicht und einer Höchstspeicherfrist für Verkehrsdaten, Bundesgesetzblatt Teil I Nr. 51 vom 17.12.2015, http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl115s2218.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl115s2218.pdf%27%5D__1453131272810, (Abgerufen am: 17.01.2016). Für die Überprüfung der neuen Vorschriften, die die neue Vorratsdatenspeicherungsmaßnahme anordnen, im Hinblick auf die Anforderungen des EGMR, EuGH und BVerfG vgl. Bayraktar, Çiler Damla, Eingriffe in die Privatsphäre durch technische Überwachung Ein deutsch-türkischer Vergleich anhand Art. 8 EMRK, 2017, S. 269 ff.

57 KÜHLING, Jürgen/ELBRACHT,Alexander: "Teil 6. Telekommunikationsrecht", Münchener Anwaltshandbuch IT-Recht, 2. A., München 2011, Rn. 358.

58 *Für die Ansicht von Sebastian Schweda hierzu vgl.* siehe SCHULDT, Michaela: "Abschlusstagung des Forschungsprojekts InVoDaS (Interessenausgleich im Rahmen der VorratsDatenSpeicherung) am 07.09.2011 in Berlin", ZD-Aktuell, 2011, 112, https://www.beck.de/cms/main?docid=323207, (Abgerufen am: 03.03.2013.

59 Für die Ansicht von Sebastian Schweda, Antonie Knierim, Alexander Dix, Wolfgang Bär, Cecilia J.M. Verkleij und Roßnagel dazu vgl. siehe SCHULDT, Michaela: "Abschlusstagung des Forschungsprojekts InVoDaS (Interessenausgleich im Rahmen der VorratsDatenSpeicherung) am 07.09.2011 in Berlin", ZD-Aktuell, 2011, 112, https://www.beck.de/cms/main?docid=323207, (Abgerufen am: 03.03.2013

60 Zum Inhalt des Urteils und zur Feststellung „BVerfG als Ersatzgesetzgeber" siehe WOLFF, Heinrich Amadeus: "Vorratsdatenspeicherung – Der Gesetzgeber gefangen zwischen Europarecht und Verfassung?",NVwZ, 2010, S. 751 ff.

Bestandsdatenzugriff (112 TKG) wurde vom BVerfG nämlich überhaupt nicht beanstandet.[61]

Hier wird erstens die Feststelungen des BVerfG hinsichtlich der Qualität des im Rahmen der Vorratsspeicherung erfolgenden Eingriffs in die Rechte Dritte und zweitens wird seine rechtliche Anforderungen an diese Maßnahme dargelegt.

a. Die Feststelungen des BVerfG hinsichtlich der Qualität des im Rahmen der Vorratsspeicherung erfolgenden Eingriffs in die Rechte Dritte

Bei seiner Urteil vom 02.03.2010 hat das BVerfG festgestellt, dass diese Maßnahme dem Schutzbereich des Telekommunikationsgeheimnisses nach Art. 10 Abs. 1 GG angehört und über die Stärke der Eingriffsschwere hervorgehoben, dass die anlasslose Speicherung von Telekommunikationsverkehrsdaten geeignet ist, ein diffus bedrohliches Gefühl des Beobachtetseins hervorzurufen, das eine unbefangene Wahrnehmung der Grundrechte beeinträchtigt und eventuell dazu führt, dass Nutzer die Telekommunikation unterbleiben lassen.[62] Außerdem sollte damit gerechnet werden, dass schon durch die Speicherung die Möglichkeit des Missbrauchs und damit eine Gefährdung der Geheimhaltung der Daten geschaffen wird;[63] ebenso könnte durchaus ein Interesse nicht nur an der Geheimhaltung des Gesprächsinhalts, sondern bereits an der Existenz des Gespräches überhaupt bestehen.[64]

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61 Für eine detaillierte Prüfung der Vorschriften der **§§** 112, 113 a, 113 b TKG und §100 g StPO siehe BRİNKEL, Guido/LAMMERS, Judith: „InnereSicherheitaufVorrat?-Ein erster kritischer Blick auf die Vorratsdatenspeicherung in Deutschland“, ZUM, 2008, S. 14 ff.; auch GRAULİCH, Kurt: “Telekommunikationsgesetz und Vorratsdatenspeicherung”, NVwZ, 2008, S. 487 ff.

62 Für die Ansicht von *Mittelberger* siehe MİTTELBERGER, Philipp: “Verfassungsmäßigkeit der Vorratsdatenspeicherung in Liechtenstein”, LJZ, 2012 März, S. 9; BVerfG NJW 2003, 1787 (1793); für die Ansicht von Patrick Breyer siehe siehe SCHULDT, Michaela: “Abschlusstagung des Forschungsprojekts InVoDaS (Interessenausgleich im Rahmen der VorratsDatenSpeicherung) am 07.09.2011 in Berlin”, ZD-Aktuell, 2011, 112, https://www.beck.de/cms/main?docid=323207, (Abgerufen am: 03.03.2013).

63 BVerfG, Urteil vom 02.03.2010, Rn. 212, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/03/rs20100302_1bvr025608.html, (Abgerufen am:10.09.2013); PUSCHKE, Jens: “Telekommunikationsüberwachung Vorratsdatenspeicherung und sonstige heimliche Ermittlungsmaßnahmen der StPO nach der Neuregelung zum 1.1. 2008”, NJW, 2008, S. 119; vgl. Hierzu GOLA, Peter/KLUG, Christoph/REİF, Yvette: “Datenschutz- undpresserechtlicheBewertung der „Vorratsdatenspeicherung””, NJW, 2007, S. 2599.

64 FISCHER, Rn. 303; vgl. hierzu: KÜHLING, Jürgen/ELBRACHT,Alexander: “Teil 6. Telekommunikationsrecht”, in: Leupold, Andreas/Glossner, Silke (ed.), Münchener Anwaltshandbuch IT-Recht, 2. A., München, 2011, Rn. 353.

Zudem ist hier anzumerken, dass es sich bei einem solchen Speicherungseingriff wie bei der Vorratsdatenspeicherungsmaßnahme um einen besonders schweren Eingriff mit einer Streubreite handelt,[65]wie sie die Rechtsordnung bisher nicht kennt.[66]Aus diesen gespeicherten Daten ohne Kommunikationsinhalte lassen sich bis in die Intimsphäre hineinreichende inhaltliche Rückschlüsse ziehen, weil Adressaten, Daten, Uhrzeit und Ort von Telefongesprächen, wenn sie über einen längeren Zeitraum beobachtet werden, in ihrer Kombination detaillierte Aussagen zu gesellschaftlichen oder politischen Zugehörigkeiten sowie persönliche Vorlieben, Neigungen und Schwächen erlauben; und je nach Nutzung der Telekommunikation kann eine solche Speicherung die Erstellung aussagekräftiger Persönlichkeits-, Verhaltens- und Bewegungsprofile von praktisch jedem Bürger ermöglichen.[67] Auch steigt das Risiko für Bürger, weiteren Ermittlungen ausgesetzt zu werden, ohne selbst hierzu Anlass gegeben haben. Auch die Missbrauchsmöglichkeiten, die mit einer solchen Datensammlung verbunden sind, verschärfen deren belastende Wirkung.[68]

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65 ROßNAGEL, Alexander: "Die „Überwachungs-Gesamtrechnung" – Das BVerfG und die Vorratsdatenspeicherung", NJW, 2010, S. 1240; BREYER, Patrick: „Keine europarechtliche Pflicht zur Wiedereinführung einer Vorratsdatenspeicherung", Redaktion MMR-AktuellKurzbeiträge/Kommentare, MMR-Aktuell, 2011, 321241, http://beck-online.beck.de/?vpath=bibdata\zeits\mmraktuell\2011\321241.htm&pos=16&hlwords=vorratsdatenspeicherung%C3%90+vorrat+%C3%90+daten+%C3%90+speichern+#xhlhi, (Abgerufen am: 15.07.2013); vgl. auch die Ansicht von Antonie Knierim [SCHULDT, Michaela: "Abschlusstagung des Forschungsprojekts InVoDaS (Interessenausgleich im Rahmen der VorratsDatenSpeicherung) am 07.09.2011 in Berlin", ZD-Aktuell, 2011, 112, https://www.beck.de/cms/main?docid=323207, (Abgerufen am: 03.03.2013)]

66 Vgl. BVerfG, Urteil vom 02.03.2010, Rn. 210, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/03/rs20100302_1bvr025608.html, (Abgerufen am: 10.09.2013); WEGENER, Christoph/SCHRAMM, Marc: "Neue Anforderungen an eine anlasslose Speicherung von Vorratsdaten Umsetzungsmöglichkeiten der Vorgaben des Bundesverfassungsgerichts, MMR, 2011, S. 10.

67 Vgl. das Gutachten von Felix Freiling, http://www.heise.de/newsticker/meldung/Gutachter-Vorratsdatenspeicherung-bringt-nahezu-lueckenlose-raeumliche-ueberwachung-186947.html, (Abgerufen am: 09.05.2013); vgl. auch KÜHLING, Jürgen/ELBRACHT,Alexander: "Teil 6. Telekommunikationsrecht", in: Leupold, Andreas/Glossner, Silke (ed.), Münchener Anwaltshandbuch IT-Recht, 2. A., München 2011, Rn. 355.

68 BVerfG, Urteil vom 02.03.2010, Rn. 165, 169, 211 ff., http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/03/rs20100302_1bvr025608.html, (Abgerufen am: 10.09.2013); vgl. hierzu ROßNAGEL, Alexander: "Die „Überwachungs-Gesamtrechnung" – Das BVerfG und die Vorratsdatenspeicherung", NJW, 2010, S. 1240 f.; KINDT, Anne: "Diegrundrechtliche Überprüfung der Vorratsdatenspeicherung: EuGHoderBVerfG – wertrautsich", MMR, 2009, S. 662 f.; KÜHLING, Jürgen/ELBRACHT,Alexander: "Teil 6. Telekommunikationsrecht", in: Leupold, Andreas/Glossner, Silke (ed.),Münchener Anwaltshandbuch IT-Recht, 2. A., München 2011, Rn. 353; MİTTELBERGER, Philipp: "Verfassungsmäßigkeit der Vorratsdatenspeicherung in Liechtenstein", LJZ, 2012 März, S. 8.

Zudem liegt der Kritikschwerpunkt bei dem Gewicht dieser Maßnahme in dem Umstand, dass bei der Vorratsdatenspeicherung die Datenspeicherung vollständig unabhängig von einem Tatverdacht erfolgt; sämtliche TK-Verkehrsdaten aller Einwohner werden also ohne Anknüpfung an ein vorwerfbares Verhalten oder sonst eine qualifizierte Situation erfasst.[69]

b. Rechtliche Anforderungen des BVerfG an diese Maßnahme

§ 113b (Alte Fassung) TKG regelt die möglichen Zwecke, für die diese Daten verwendet werden dürfen. In Satz 1 Halbsatz 1 werden dabei die möglichen Zwecke der unmittelbaren Nutzung der Daten aufgelistet: die Verfolgung von Straftaten, die Abwehr von erheblichen Gefahren für die öffentliche Sicherheit und die Erfüllung von nachrichtdienstlichen Aufgaben.[70]

Neben § 113b TKG, der selbst keine Ermächtigung zur Datenabfrage enthält, sondern nur allgemein mögliche Nutzungszwecke bezeichnet, die durch fachrechtliche Regelungen des Bundes und der Länder konkretisiert werden sollen, regelt § 100g StPO – in Konkretisierung des § 113b Satz 1 Halbsatz 1 NR. 1 TKG – die unmittelbare Verwendung der vorsorglich gespeicherten Daten für die Strafverfolgung.Danach erlaubt er die Nutzung auch der Vorratsdaten unabhängig von einem abschließenden Straftatenkatalog für die Verfolgung von Straftaten mit erheblicher Bedeutung sowie darüber hinaus nach Maßgabe einer einzelfallbezogenen Verhältnismäßigkeitsprüfung auch allgemein zur Verfolgung von Straftaten, die mittels Telekommunikation begangen wurden.[71]

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69 BVerfG, Urteil vom 02.03.2010, Rn. 141 und 210, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/03/rs20100302_1bvr025608.html, (Abgerufen am: 10.09.2013); KÜHLING, Jürgen/ELBRACHT,Alexander: "Teil 6. Telekommunikationsrecht", in: Leupold, Andreas/Glossner, Silke (ed.), Münchener Anwaltshandbuch IT-Recht, 2. A., München 2011, Rn. 353; ROßNAGEL, Alexander: "Die „Überwachungs-Gesamtrechnung" – Das BVerfG und die Vorratsdatenspeicherung", NJW, 2010, S. 1240; MİTTELBERGER, Philipp: "Verfassungsmäßigkeit der Vorratsdatenspeicherung in Liechtenstein", LJZ, 2012 März, S. 8; vgl. auch die kritische Ansicht von Patrick Breyer [SCHULDT, Michaela: "Abschlusstagung des Forschungsprojekts InVoDaS (Interessenausgleich im Rahmen der VorratsDatenSpeicherung) am 07.09.2011 in Berlin", ZD-Aktuell, 2011, 112, https://www.beck.de/cms/main?docid=323207, (Abgerufen am: 03.03.2013)]; und siehe auch KINDT, Anne: "Diegrundrechtliche Überprüfung der Vorratsdatenspeicherung: EuGHoderBVerfG – wertrautsich", MMR, 2009, S. 663: „jeder steht unter Generalverdacht".

70 BVerfG, Urteil vom 02.03.2010, Rn. 193 f., http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/03/rs20100302_1bvr025608.html, (Abgerufen am: 10.09.2013).

71 BVerfG, Urteil vom 02.03.2010, Rn. 193 ff., http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/03/rs20100302_1bvr025608.html, (Abgerufen am: 10.09.2013).

Zwar hat das BVerfG die Vorschriften zur Vorratsdatenspeicherung und die entsprechenden Vorschriften für nichtig erklärt,[72] allerdings hat es dabei entschieden, dass eine Speicherungspflicht in dem vorgesehenen Umfang nicht von vornherein schlechthin verfassungswidrig ist.[73]

Nach der Entscheidung des BVerfG ist eine sechsmonatige anlasslose Speicherung von Telekommunikationsverkehrsdaten für qualifizierte Verwendungen im Rahmen der Strafverfolgung, der Gefahrenabwehr und der Aufgaben der Nachrichtendienste, wie sie die § 113a, 113b TKG anordnen, mit Art. 10 GG nicht schlechthin unvereinbar. Bei einer Ausgestaltung[74], die dem besonderen Gewicht des hierin liegenden Eingriffs hinreichend Rechnung trägt, unterfällt eine anlasslose Speicherung der Telekommunikationsverkehrsdaten nicht schon als solche dem strikten Verbot einer Speicherung von Daten auf Vorrat[75] im Sinne der Rechtsprechung des Bundesverfassungsgerichts.[76] Eingebunden in eine eingriffsadäquate gesetzliche Ausgestaltung kann sie den Verhältnismäßigkeitsanforderungen genügen.[77]

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72 BVerfG, Urteil vom 02.03.2010, Rn. 205 ff., http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/03/rs20100302_1bvr025608.html, (Abgerufen am: 10.09.2013); vgl. KÜHLING, Jürgen/ELBRACHT,Alexander: "Teil 6. Telekommunikationsrecht", in: Leupold, Andreas/Glossner, Silke (ed.), Münchener Anwaltshandbuch IT-Recht, 2. A., München 2011, Rn. 358.

73 Für die Bestimmungen von *Westphal* über diesen Beschluss siehe WESTPHAL,Dietrich: "Leitplanken für die Vorratsdatenspeicherung – Abrücken von „Solange" Das Urteil des BVerfG vom 2. 3. 2010", EuZW, 2010, S. 497 ff.

74 Zur Vertiefung siehe WESTPHAL, Dietrich: "Leitplanken für die Vorratsdatenspeicherung – Abrücken von „Solange" Das Urteil des BVerfG vom 2. 3. 2010", EuZW, 2010, S. 496 ff.; vgl. auch ROßNAGEL, Alexander: "Die „Überwachungs-Gesamtrechnung" – Das BVerfG und die Vorratsdatenspeicherung", NJW, 2010, S. 1243 (Die Verhältnismäßigkeit einer Maßnahme könne durch die Gestaltung der Verhältnisse hergestellt werden.); WOLFF, Heinrich Amadeus: "Vorratsdatenspeicherung – Der Gesetzgeber gefangen zwischen Europarecht und Verfassung?",NVwZ, 2010, S. 753 f.

75 Vgl. hier BRİNKEL, Guido/LAMMERS, Judith: „InnereSicherheitaufVorrat?-Ein erster kritischer Blick auf die Vorratsdatenspeicherung in Deutschland", ZUM, 2008, S. 13; WESTPHAL,Dietrich: "Leitplanken für die Vorratsdatenspeicherung – Abrücken von „Solange" Das Urteil des BVerfG vom 2. 3. 2010", EuZW, 2010, S. 497 f., und PUSCHKE, Jens: "Telekommunikationsüberwachung Vorratsdatenspeicherung und sonstige heimliche Ermittlungsmaßnahmen der StPO nach der Neuregelung zum 1.1. 2008", NJW, 2008, S. 119.

76 WEGENER, Christoph/SCHRAMM, Marc: "Neue Anforderungen an eine anlasslose Speicherung von Vorratsdaten Umsetzungsmöglichkeiten der Vorgaben des Bundesverfassungsgerichts, MMR, 2011, S. 10.

77 BVerfG, Urteil vom 02.03.2010, Rn. 205, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/03/rs20100302_1bvr025608.html, (Abgerufen am: 10.09.2013).

In seiner Rechtsprechung hat das BVerfG beanstandet, dass bei den angegriffenen Vorschriften keine hinreichende Datensicherheit[78] und keine hinreichende Begrenzung der Verwendungszwecke der Daten gewährleistet wird.[79]

i. Bestimmungen über die Begrenzung der Verwendung der Daten

Die Urteilsbegründung[80] ergibt, dass die Effektivierung der Strafverfolgung, der Gefahrenabwehr und der Erfüllung der Aufgaben der Nachrichtendienste grundsätzlich legitime Zwecke sind und Art. 10 I GG nicht jede vorsorgliche Erhebung und Speicherung von Daten verbietet, sondern vor einer unverhältnismäßigen Gestaltung solcher Datensammlungen schützt.[81]

Nach dem BVerfG:

„angesichts des Gewichts der Datenspeicherung […] eine Verwendung der Daten nur für überragend wichtige Aufgaben des Rechtsgüterschutzes in Betracht kommt […] Für die Strafverfolgung folgt hieraus, dass ein Abruf der Daten zumindest den durch bestimmte Tatsachen begründeten Verdacht[82] *einer auch im Einzelfall schwerwiegenden Straftat voraussetzt […] Für die Gefahrenabwehr ergibt sich aus*

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78 BVerfG, Urteil vom 02.03.2010, Rn. 271 ff., http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/03/rs20100302_1bvr025608.html, (Abgerufen am: 10.09.2013); vgl. KÜHLING, Jürgen/ELBRACHT,Alexander: "Teil 6. Telekommunikationsrecht", in: Leupold, Andreas/Glossner, Silke (ed.), Münchener Anwaltshandbuch IT-Recht, 2. A., München 2011, Rn. 358.

79 BVerfG, Urteil vom 02.03.2010, Rn. 278 f., http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/03/rs20100302_1bvr025608.html, (Abgerufen am: 10.09.2013); vgl. KÜHLING, Jürgen/ELBRACHT,Alexander: "Teil 6. Telekommunikationsrecht", in: Leupold, Andreas/Glossner, Silke (ed.), Münchener Anwaltshandbuch IT-Recht, 2. A., München 2011, Rn. 358; für eine detaillierte Erörterung dieser Entscheidung siehe: ROßNAGEL, Alexander: "Die „Überwachungs-Gesamtrechnung" – Das BVerfG und die Vorratsdatenspeicherung", NJW, 2010, S. 1241 ff.; WEGENER, Christoph/SCHRAMM, Marc: "Neue Anforderungen an eine anlasslose Speicherung von Vorratsdaten Umsetzungsmöglichkeiten der Vorgaben des Bundesverfassungsgerichts, MMR, 2011, S. 10 ff.; MİTTELBERGER, Philipp: "Verfassungsmäßigkeit der Vorratsdatenspeicherung in Liechtenstein", LJZ, 2012 März, S. 9 ff.

80 BVerfG, Urteil vom 02.03.2010, Rn. 206, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/03/rs20100302_1bvr025608.html, (Abgerufen am:10.09.2013).

81 WESTPHAL,Dietrich: "Leitplanken für die Vorratsdatenspeicherung – Abrücken von „Solange" Das Urteil des BVerfG vom 2. 3. 2010", EuZW, 2010, S. 496.

82 Über die Verdachtsstufe, die das BverfG bei der Verwendung der Vorratsdaten gestern und heute voraussetzt vgl. WEGENER, Christoph/SCHRAMM, Marc: "Neue Anforderungen an eine anlasslose Speicherung von Vorratsdaten Umsetzungsmöglichkeiten der Vorgaben des Bundesverfassungsgerichts, MMR, 2011, S. 12.

dem Verhältnismäßigkeitsgrundsatz, dass ein Abruf der vorsorglich gespeicherten Telekommunikationsverkehrsdaten nur bei Vorliegen einer durch bestimmte Tatsachen hinreichend belegten, konkreten Gefahr[83] für Leib, Leben oder Freiheit einer Person, für den Bestand oder die Sicherheit des Bundes oder eines Landes oder zur Abwehr einer gemeinen Gefahr zugelassen werden darf.[84] *Diese Anforderungen gelten, da es auch insoweit um eine Form der Gefahrenprävention geht, gleichermaßen für die Verwendung der Daten durch die Nachrichtendienste*."[85]

Hier hat das Gericht bei der Verwendung der gespeicherten Daten schwerwiegende qualifizierte Fälle vorausgesetzt, um bei dem Eingriff der Speicherung die Verhältnismäßigkeit zu gewährleisten, da bei der Speicherung der Eingriff so intensiv ist;[86] deshalb ist das Gewicht des Eingriffs bei der Speicherung durch Verschärfung der Voraussetzungen der Verwendung auszugleichen.[87]

Die Anforderung des BVerfG an die hinreichend anspruchsvollen und normenklaren Regelungen zur Begrenzung der Datenverwendung entspricht den Bestimmungen des EGMR, weil dadurch die öffentliche Gewalt in einem vernünftigen Maß beschränkt und den Anforderungen des EGMR im Hinblick auf den Missbrauchsschutz und die Verhältnismäßigkeit Rechnung getragen wurde. Schließlich hat der EGMR im Fall Leander bei der Verhältnismäßigkeitsabwägung berücksichtigt, dass die Verwendung von Daten auf Fälle der Strafverfolgung und Fälle, in denen es um die Erlangung der schwedischen Staatsangehörigkeit geht, begrenzt ist.[88]

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83 Für die Feststellungen über die Gefährdungsintensität vgl.WEGENER, Christoph/ SCHRAMM, Marc: "Neue Anforderungen an eine anlasslose Speicherung von Vorratsdaten Umsetzungsmöglichkeiten der Vorgaben des Bundesverfassungsgerichts, MMR, 2011, S. 13).

84 Zur Vertiefung siehe KÜHLING, Jürgen/ELBRACHT,Alexander: "Teil 6. Telekommunikationsrecht", in: Leupold, Andreas/Glossner, Silke (ed.), Münchener Anwaltshandbuch IT-Recht, 2. A., München 2011, Rn. 356.

85 BVerfG, Urteil vom 02.03.2010, Rn. 227 ff., http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/03/rs20100302_1bvr025608.html, (Abgerufen am:10.09.2013); Beukelmann, NJW-Spezial 2010, S. 184,184.

86 Vgl. auch WESTPHAL,Dietrich: "Leitplanken für die Vorratsdatenspeicherung – Abrücken von „Solange" Das Urteil des BVerfG vom 2. 3. 2010", EuZW, 2010, S. 496 f.

87 BVerfG, Urteil vom 02.03.2010, Rn. 226, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/03/rs20100302_1bvr025608.html, (Abgerufen am: 10.09.2013).

88 EGMR, Urteil vom 26.03.1987 – Leander gegen Schweden, Rn. 64 f., http://www.eugrz.info/PDF/EGMR3/EGMR03-35, (Abgerufen am: 25.11.2015); EKMR, Urteil vom 08.12.1979 – McVeigh u. a. gegen Vereinigtes Königsreich, Rn. 230, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95663#{„itemid":[„001-95663"]}, (Abgerufen

Ferner hat der EGMR im Fall McVeigh auch bei der Verhältnismäßigkeitsabwägung damit gerechnet, dass die gespeicherten Daten nur im Rahmen der Feststellung der Identität des Straftäters eines Terrordelikts für einen Abgleich verwendet werden.[89]

Ferner entspricht es auch den Anforderung des EGMR, dass das BVerfG bei *„Abruf der Daten im Rahmen der Strafverfolgung zumindest den durch bestimmte Tatsachen begründeten Verdachteiner auch im Einzelfall schwerwiegenden Straftat"* voraussetzt.

Schließlich hat der EGMR im Fall S und Marper[90] beanstandet, dass dabei ohne Rücksicht auf die Schwere der Straftat die Daten von jedem erlangt und gespeichert werden sowie dabei für die Speicherung und Erhaltung der Daten keine Bestimmung über die Relation der Betroffenen mit der Tatbegehung vorgesehen wurde.[91]

Dass das BVerfG in seiner Rechtsprechung für die Verwendung der Daten bei Gefahrenabwehrfällen das „*Vorliegen einer durch bestimmte Tatsachen hinreichend belegten, konkreten Gefahr"* vorausgesetzt hat, trägt auch den Anforderungen des EGMR Rechnung, schließlich hat der EGMR im Fall Klass das Merkmal der „drohenden Gefahr" berücksichtigt, als er die Verhältnismäßigkeit der Maßnahme, bzw. der gesetzlichen Ermächtigungsgrundlage überprüft hat.

Dass jedoch das BVerfG im Hinblick auf Gefahrenabwehrfälle keine Personenkategorien bestimmt hat, deren Daten abgerufen werden dürfen, ist kritisch zu behandeln. Schließlich hat der EGMR in vielen Rechtsprechungen[92] beanstandet, dass bei den nationalen gesetzlichen Grundlagen die Kategorien von Personen nicht bestimmt sind, gegen die der Eingriff durchgeführt wird.

Im Fall Kennedy §160, wo nach den „Ripa"-Vorschriften die Telekommunikation von jeder Person in England überwacht werden kann, hat

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am: 31.05.2015).

89 EKMR, Urteil vom 08.12.1979 – McVeigh u. a. gegen Vereinigtes Königsreich, Rn. 230, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95663#{„itemid":[„001-95663"]}, (Abgerufen am: 31.05.2015).

90 EGMR, Urteil vom 04.12.2008 – S und Marper gegen Vereinigtes Königsreich, Rn. 119, http://hudoc.echr.coe.int/eng?i=001-90051#{„itemid":[„001-90051"]}, (Abgerufen am: 30.11.2015).

91 EGMR, Urteil vom 04.12.2008 – S und Marper gegen Vereinigtes Königsreich, Rn. 119, http://hudoc.echr.coe.int/eng?i=001-90051#{„itemid":[„001-90051"]}, (Abgerufen am: 30.11.2015).

92 Vgl. EGMR, Urteil vom 04.05.2000 – Rotaru gegen Rumänien, Rn. 57, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58586#{"itemid":["001-58586"]}, (Abgerufen am: 07.07.2015); EGMR, Urteil vom 10.02.2009 – Iordachi u. a. gegen Moldawien, Rn. 44, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91245#{„itemid":[„001-91245"]}, (Abgerufen am: 17.05.2015).

der EGMR hervorgehoben, dass die gesetzliche Grundlage Kategorien von Personen bestimmen muss, deren Telekommunikation überwacht werden darf.

ii. Bestimmungen über Datensicherheit,Transparenz und Rechtsschutz

Bei der Rechtsprechung hat das BVerfG darauf hingewiesen, dass es insoweit „*hinreichend anspruchsvoller und normenklarer*" Regelungen zur Datensicherheit – sowohl Regelungen zur Sicherheit der gespeicherten Daten als auch Regelungen zur Sicherheit der Übermittlung der Daten –, zur Begrenzung der Datenverwendung, zur Transparenz und zum Rechtsschutz bedarf.[93]

Die Anforderung an eine normenklare Regelung[94] entspricht den Anforderungen des EGMR, der die Normenklarheit als „Vorhersehbarkeitsmerkmal[95] der gesetzlichen Grundlage" im Rahmen der Art. 8 EMRK voraussetzt.

Im Rahmen der Anforderung an die Regelung zur Transparenz hat das BVerfG hervorgehoben, dass im Rahmen der Strafverfolgung eine offene Erhebung und Nutzung der Daten in Betracht kommt. Danach ist eine Verwendung der Daten ohne das Wissen des Betroffenen – außer in Fällen zur Gefahrenabwehr und der Wahrnehmung der Aufgaben der Nachrichtendienste – nur dann zulässig, wenn andernfalls der Zweck der Untersuchung, dem der Datenabruf dient, vereitelt wird. Zudem hat das Gericht vorgesehen, dass eine heimliche Verwendung der Daten hier nur vorgesehen werden darf, wenn sie im Einzelfall erforderlich und richterlich angeordnet ist, und in einem solchen Fall kommt eine nachträgliche Benachrichtigungspflicht in Betracht.

Zudem ist, sofern ein Betroffener vor Durchführung der Maßnahme keine Gelegenheit hatte, sich vor Gericht gegen die Verwendung seiner Telekommunikationsverkehrsdaten zur Wehr zu setzen, diesem nach dem BVerfG eine gerichtliche Kontrolle nachträglich zu eröffnen.

Der EGMR hat im Fall Klass[96] darauf hingewiesen, dass den Betroffenen bei der Geheimhaltung der Eingriffe wegen ihrer Unkenntnis während der

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93 BVerfG, Urteil vom 02.03.2010, Rn. 220 ff., http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/03/rs20100302_1bvr025608.html, (Abgerufen am: 10.09.2013).

94 Vgl. hier auch , Mario: " Das allgemeine Persönlichkeitsrecht im Spiegel der jüngeren Rechtsprechung des Bundesverfassungsgerichts", JA, 2009, S. 846.

95 EGMR, Urteil vom 26.04.1979 – Sunday Times gegen Vereinigtes Königreich, Rn. 49, http://www.eugrz.info/pdf/EGMR34.pdf, (Abgerufen am: 26.11.2015); EGMR, Urteil vom 16.02.2000 – Amann gegen Schweiz, Rn. 65 ff., http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58497#{"itemid":["001-58497"]}, (Abgerufen am: 07.07.2015).

96 EGMR, Urteil vom 06.09.1978 – Klass u. a. gegen Deutschland, Rn. 36 ff., http://www.eugrz.info/pdf/EGMR31.pdf, (Abgerufen am: 26.11.2015).

Phasen der Anordnung und der Durchführung der Überwachungsmaßnahmen die Möglichkeit auf Rechtsschutz versagt bleibt, und hervorgehoben, dass, damit die gesetzliche Grundlage insofern eine wirksame Garantie gegen Missbrauch gewährleisten und als verhältnismäßig angesehen werden kann, sie Kontrollmechanismen vorsehen sollte.

Angesichts der Tatsache, dass das BVerfG die Erhebung und Nutzung der Daten grundsätzlich offen vorgesehen hat, können die Betroffenen ihre Rechtsschutzmöglichkeiten genießen. Die Bestimmung über die Benachrichtigungspflicht gehört auch dazu.
Jedoch ist in bestimmten Fällen eine Verwendung der Daten auch ohne Wissen des Betroffenen möglich, wie z. B., wenn der Zweck der Untersuchung, dem der Datenabruf dient, vereitelt wird, in dieser Fallkonstellationen die Rechtsschutzmöglichkeit versagt, weil der Betroffene nicht von dem Eingriff weiß. Das heißt, insofern sollte das BVerfG einen Kontrollmechanismus vorsehen.

Die Bestimmung des BVerfG, wonach bei der heimlichen Verwendung der Daten die nachträgliche Benachrichtigung der Betroffenen verpflichtend sein und dem Betroffenen in diesem Zusammenhang eine gerichtliche Kontrolle nachträglich eröffnet werden soll, wenn er vor Durchführung der Maßnahme keine Gelegenheit hatte, sich vor Gericht gegen die Verwendung seiner Telekommunikationsverkehrsdaten zur Wehr zu setzen, kompensiert dieses Defizit laut EGMR nicht. Schließlich hat der Gerichtshof im Fall Prezhdavori[97] festgestellt, dass eine juristische Kontrolle, die nur am Ende des Prozesses einen Rechtsschutz sicherstellt, keinen effektiven Schutz für die Rechtsgüter gewährleistet, die im Art. 8 EMRK sichergestellt werden.

Insofern erfüllen diese Bestimmungen die Anforderungen des EGMR an ausreichende Sicherheiten gegen Missbrauch nicht.

Allerdings sollte es trotzdem begrüßt werden, dass dem Betroffenen nachträglich eine gerichtliche Kontrolle eröffnet ist, weil dies – trotz ihrer Ungenügendheit – mindestens eine Rechtschutzmöglicheit darstellt. Schließlich hat der EGMR im Fall Rotaru darauf hingewiesen, dass die gesetzliche Grundlage Schutzvorschriften vorsehen muss.[98]

Als eine Anforderung an den Rechtsschutz stellt das BVerfg fest, dass eine Übermittlung und Nutzung der gespeicherten Daten grundsätzlich unter Richtervorbehalt zu stellen ist.

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97 EGMR, Urteil vom 30.09.2014 – Prezhdarovi gegen Bulgarien, Rn. 50, http://hudoc.echr.coe.int/eng?i=001-146565#{"itemid":["001-146565"]}, (Abgerufen am: 01.12.2015).

98 EGMR, Urteil vom 04.05.2000 – Rotaru gegen Rumänien, Rn. 59, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58586#{„itemid“:[„001-58586“]}, (Abgerufen am: 07.07.2015).

Der EGMR[99] hat schon mehrfach hervorgehoben, dass die die Maßnahme zulassende Stelle unabhängig sein muss.

Zudem hat der EGMR im Fall Iordachi bei der Verhältnismäßigkeitsabwägung berücksichtigt, dass seit 2003 für die Anordnung einer Telekommunikationsüberwachungmaßnahme ein Richter zuständig ist.[100]

Insofern trägt die Bestimmung über den Richtervorbehalt auch den Anforderungen des EGMR Rechnung.

Ferner hat das BVerfG darauf hingewiesen, dass für einen engen Kreis von auf besondere Vertraulichkeit angewiesenen Telekommunikationsverbindungen ein grundsätzliches Übermittlungsverbot vorzusehen ist.[101] Diese Bestimmung trägt der Anforderung des EGMR insofern Rechnung, als dass dies im Rahmen des Rechtsstaatsprinzips, das der EGMR im Rahmen des Begriffs ‚Rule of Law' berücksichtigt,[102] unerlässlich ist.

FAZIT

Bei den bisherigen Entscheidungen europäischer Verfassungs- und Obergerichte wurden im Hinblick auf die Verhältnismäßigkeitsprüfung der Vorratsdatenspeicherung folgendermassen unterschiedliche Bewertungen erkennen lassen:

Das bulgarische Oberste Verwaltungsgericht[103] hat zwar eine klare

99 EGMR, Urteil vom 15.01.2015 – Dragojević gegen Kroatien, Rn. 94, http://hudoc.echr.coe.int/eng?i=001-150298#{„itemid":[„001-150298"]}, (Abgerufen am: 17.11.2015); EGMR, Urteil vom 18.05.2010 – Kennedy gegen Vereinigtes Königsreich, Rn. 153, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98473#{„itemid":[„001-98473"]}, (Abgerufen am: 07.07.2015); EGMR, Urteil vom 28.04.2005 – Buck gegen Deutschland, Rn. 46, http://hudoc.echr.coe.int/eng?i=001-68920#{„itemid":[„001-68920"]}, (Abgerufen am: 13.11.2015).

100 EGMR, Urteil vom 10.02.2009 – Iordachi u. a. gegen Moldawien, Rn. 41 ff, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91245#{„itemid":[„001-91245"]}, (Abgerufen am: 17.05.2015).

101 BVerfG, Urteil vom 02.03.2010, Rn. 238, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/03/rs20100302_1bvr025608.html, (Abgerufen am: 10.09.2013).

102 EGMR, Urteil vom 24.09.1992 – Herczegfalvy gegen Österreich, Rn. 91, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57781#{"itemid":["001-57781"]}, (Abgerufen am: 07.08.2015).

103 Das Bulgarische Oberste Verwaltungsgericht, Urteil vom 11.12.2008, vgl. hierzu ALBRECHT, Hans-Jörg/BRUNST,Phillip/DE BUSSER,Els/GRUNDIES,Volker/KILCHLING,Michael/RİNCEANU, Johanna/KENZEL, Brigitte/NİKOLOVA,Nina/ROTİNO,Sophie/TAUSCHWİTZ,Moritz: „Schutzlücken durch Wegfall der Vorratsdatenspeicherung?", Gutachten der kriminologischen Abteilung des Max-Planck-Instituts für ausländisches und internationales Strafrecht, 2. erweiterte Fassung, Juli 2011, Teil G, S. 195 ff., https://www.mpg.de/5000721/vorratsdatenspeicherung.pdf, (Abgerufen am: 26.03.2020).

gesetzliche Regelung der Voraussetzungen für die Nutzung gespeicherter Daten angemahnt jedoch hat es trotzdem die Vorratsdatenspeicherung grundsätzlich verhältnismäßig gefunden.[104]
Das Bundesverfassungsgericht[105] hat auch insofern darauf hingewiesen, dass eine Vorratsdatenspeicherung von Telekommunikationsdaten grundsätzlich verfassungskonform ist. Das Gericht hat jedoch durch seine Urteil die Grenzen für eine zulässige Vorratsdatenspeicherung für Zwecke der Strafverfolgung und Gefahrenabwehr gesetzt.[106]

Auf der anderen Seite haben die rumänische[107] und tschechische[108] Verfassungsgerichte von einer grundsätzlichen Nichtvereinbarkeit der

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104 ALBRECHT, Hans-Jörg/BRUNST,Phillip/DE BUSSER,Els/GRUNDIES,Volker/KILCHLING,Michael/RİNCEANU, Johanna/KENZEL, Brigitte/NİKOLOVA,Nina/ROTİNO,Sophie/TAUSCHWİTZ,Moritz: „Schutzlücken durch Wegfall der Vorratsdatenspeicherung?“, Gutachten der kriminologischen Abteilung des Max-Planck-Instituts für ausländisches und internationales Strafrecht, 2. erweiterte Fassung, Juli 2011, S. 6, https://www.mpg.de/5000721/vorratsdatenspeicherung.pdf, (Abgerufen am: 26.03.2020).

105 BVerfG, Urteil vom 02.03.2010, A.z. Nr. 1 BvR 256/08, vgl hierzu ALBRECHT, Hans-Jörg/BRUNST,Phillip/DE BUSSER,Els/GRUNDIES,Volker/KILCHLING,Michael/RİNCEANU, Johanna/KENZEL, Brigitte/NİKOLOVA,Nina/ROTİNO,Sophie/TAUSCHWİTZ,Moritz: „Schutzlücken durch Wegfall der Vorratsdatenspeicherung?“, Gutachten der kriminologischen Abteilung des Max-Planck-Instituts für ausländisches und internationales Strafrecht, 2. erweiterte Fassung, Juli 2011, S. 3 ff., https://www.mpg.de/5000721/vorratsdatenspeicherung.pdf, (Abgerufen am: 26.03.2020).

106 ALBRECHT, Hans-Jörg/BRUNST,Phillip/DE BUSSER,Els/GRUNDIES,Volker/KILCHLING,Michael/RİNCEANU, Johanna/KENZEL, Brigitte/NİKOLOVA,Nina/ROTİNO,Sophie/TAUSCHWİTZ,Moritz: „Schutzlücken durch Wegfall der Vorratsdatenspeicherung?“, Gutachten der kriminologischen Abteilung des Max-Planck-Instituts für ausländisches und internationales Strafrecht, 2. erweiterte Fassung, Juli 2011, S. 6, https://www.mpg.de/5000721/vorratsdatenspeicherung.pdf, (Abgerufen am: 26.03.2020).

107 Das Rumänische Verfassungsgericht, Entscheidung vom 08.10.2009, Entscheidung Nr.1258, vgl hierzu ALBRECHT, Hans-Jörg/BRUNST,Phillip/DE BUSSER,Els/GRUNDIES,Volker/KILCHLING,Michael/RİNCEANU, Johanna/KENZEL, Brigitte/NİKOLOVA,Nina/ROTİNO,Sophie/TAUSCHWİTZ,Moritz: „Schutzlücken durch Wegfall der Vorratsdatenspeicherung?“, Gutachten der kriminologischen Abteilung des Max-Planck-Instituts für ausländisches und internationales Strafrecht, 2. erweiterte Fassung, Juli 2011, S. 5 f., https://www.mpg.de/5000721/vorratsdatenspeicherung.pdf, (Abgerufen am: 26.03.2020).

108 Das Tschechische Verfassungsgericht, Urteil vom 22.03.2011 vgl hierzu ALBRECHT, Hans-Jörg/BRUNST,Phillip/DE BUSSER,Els/GRUNDIES,Volker/KILCHLING,Michael/RİNCEANU, Johanna/KENZEL, Brigitte/NİKOLOVA,Nina/ROTİNO,Sophie/TAUSCHWİTZ,Moritz: „Schutzlücken durch Wegfall der Vorratsdatenspeicherung?“, Gutachten der kriminologischen Abteilung des Max-Planck-Instituts für ausländisches und internationales Strafrecht, 2. erweiterte Fassung, Juli 2011, S. 5 f., https://www.mpg.de/5000721/vorratsdatenspeicherung.pdf, (Abgerufen am: 26.03.2020).

Vorratsdatenspeicherung mit der rumänischen, Bzw. tschechischen Verfassungen sowie Art. 8 EMRK ausgegangen.
Allerdings ist die Vorratsdatenspeicherungsmassnahme, bzw. die gesetzlichen Grundlagen dieser Masssnahme in der Türkischen Rechtsordnung trotz der Schwere der Eingriff bei der Speicherung der Telekommunikationsverkehrs- und Internet Verbindungsdaten, verfassungsrechtlich nicht überprüft.

Angesichts der Tatsache, dass die Hoch Gerichte von BVerfG, EGMR und EuGH bei der Zulassung dieser Massnahme die *Maßstäben* dargelegt haben, ist festzustellen, dass die Türkischen gesetzlichen Grundlagen der Vorratsdatenspeicherungsmassnahme auch nach diesen Maßstäben überprüft werden sollen.

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ARBITRABILITY IN THE CODE OF CIVIL PROCEDURE AND THE CODE OF INTERNATIONAL ARBITRATION

Hukuk Muhakemeleri Kanunu ve Milletlerarası Tahkim Kanunu Uyarınca Tahkime Elverişlilik

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Abstract

Arbitration, which means that the parties resolve the disputes through a substitute judge, has been subjected to many regulations with various aspects, both nationally and internationally. Some of these regulations relate to which disputes can be resolved by arbitration. Arbitration is an alternative brought by the legislative power to the state's monopoly of the judiciary. Therefore, it is in a state's authority to determine which disputes can be arbitrated. States do not refrain from applying regulations on this issue. A common feature of these provisions is the width and uncertainty of their scope. When Turkey is the place of arbitration, arbitrability is determined in accordance with the provisions of the Code of Civil Procedure (CCP) and the Code of International Arbitration (CIA). This paper aims to determine the scope of the CPP and the CIA regulations, and examine the arbitrability in accordance with the aforementioned regulations. In addition, the relation between arbitrability and public order will be evaluated, in the light of Supreme Court decisions and the opinions in the Turkish doctrine.

Keywords Arbitrability, public order, standard terms, objective arbitrability, subjective arbitrability.

Özet

Tarafların *uyuşmazlıklarını ikame yargı* niteliğindeki hakem yoluyla çözümleme usulü olan tahkim gerek ulusal ve gerekse uluslararası birçok düzenlemeye farklı yönleriyle konu edilmiştir. Tahkime ilişkin bu düzenlemelerin bir kısmı hangi uyuşmazlıkların tahkim yoluyla çözülebileceğiyle ilgilidir. Tahkim devletlerin sahip olduğu yargı gücü tekeline yasama gücüyle getirilen bir alternatiftir. Bu sebeple hangi konularda tahkime gidilebileceğini belirleme yetkisi de devlete aittir. Tahkime elverişli olan/olmayan uyuşmazlıkların düzenlendiği hükümlerin ortak özelliği, kapsamlarının genişliğidir ve belirsizliğidir. Tahkim yeri Türkiye olan uyuşmazlıklardan hangilerinin tahkime elverişli olduğu, Hukuk Muhakemeleri Kanunu ve Milletlerarası Tahkim Kanunu *(yabancılık unsuru içeren uyuşmazlıklar için)* hükümleri uyarınca belirlenir. İşbu çalışma kapsamında da söz konusu belirsizliğin sınırları çizilmeye çalışılmış ve her iki kanun kapsamında da tahkime elverişliliğin karşılığı açıklanmıştır.

Anahtar Kelimeler Tahkime elverişlilik, kamu düzeni, genel işlem koşulları, objektif tahkime elverişlilik, sübjektif tahkime elverişlilik

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INTRODUCTION

Arbitration is an alternative brought by legislative power to the state's monopoly of the judiciary. Therefore, it is in a state's authority to determine which disputes can be arbitrated. States do not refrain from applying regulations on this issue. A common feature of these provisions is the width and uncertainty of their scope[1]. In this case, the boundaries of arbitration for both national and international regulations is an issue that remains important[2]. This paper aims to determine the scope of the Code of Civil Procedure (CCP) and the Code of International Arbitration (CIA) regulations, and examine the arbitrability accordance with the aforementioned regulations. In addition, the relation between arbitrability and public order will be evaluated, considering Supreme Court decisions and the opinions in the Turkish doctrine.

I. The Scope of the CCP in terms of Arbitration and the Code of International Arbitration: The Element of Foreign

Arbitration[3] which is the procedure used by parties to settle their disputes through arbitrators (*named as substitute jurisdiction*), has been subject to many different national and international regulations. Some of these arrangements relate to which disputes may be resolved by arbitration. If a dispute can be settled by the arbitrators designated by the parties, rather than through the parties' agreement, the dispute is considered as arbitrable. When Turkey is the place of arbitration, arbitrability is determined in accordance with the provisions of the CCP and the CIA[4].

Under the CCP, arbitration is regulated by articles[5] 407 to 444 (*the eleventh part of the Code*). Art. 407 clarifies the scope of application of the provisions

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1 Mehmet Sarı, "Tahkime Elverişlilik", Terazi Hukuk Dergisi, Cilt: 4, Sayı: 32, Nisan 2009, p. 147.

2 The answer to the question of whether a dispute is arbitrable varies, according to the law applicable to the dispute concerned. (Ercüment Erdem, Yargıtay Kararları Işığında Tahkime Elverişlilik ve Kamu Düzeni İlişkisi, 2017, http://www.erdem-erdem.av.tr/yayinlar/hukuk-postasi/yargitay-kararlari-isiginda-tahkime-elverislilik-ve-kamu-duzeni-iliskisi-16.08.2020). Therefore, for example, a dispute that is not arbitrable under Turkish law may be considered arbitrable under US law. Arbitrability is also necessary to enforce foreign arbitral awards in Turkey. Because when the subject of arbitrament is not arbitrable according to Turkish Law, recognition and enforcement of this arbitrament will not be possible.

3 Arbitration, which literally means consolidating, securing, and making judgments, is a method for settling disputes by arbitrators. (Hilmi Ergüney, Türk Hukuku'nda Lügat ve Istılahlar, İstanbul, 1973, p. 430; Türk Dil Kurumu Büyük Sözlük, -16.08.2020).

4 This Code is applied for disputes which include element of foreign. See also, I.

5 According to CCP art. 444: "*For the issues regulated in this section, other provisions of this Code shall not apply unless otherwise provided.*" Because of this provision, the doctrine argues that the arbitration section of the Civil Procedure Law is a separate Code in itself. (see also: Pekcanıtez/Taş-Korkmaz/Akkan/Özekes, p. 2336). Counting this part as a

of arbitration under the CCP. According to this: "*These provisions stated in this Code are applied as a rule*[6]*, when a dispute does not contain the foreign element in the sense defined by the Code of International Arbitration Law, and when Turkey is determined as the place of arbitration"*[7]. In this case, whether the provisions of the CCP will apply is a question to be answered according to the arbitration agreement or the arbitration clause executed by the parties[8].

separate Code, has no contribution to the arbitration provisions. In addition, if the provisions about arbitration are to be deemed as separate from of the other provisions of the CCP, the discussions will increase and become inextricable especially about *ratione temporis* of arbitration provisions. Moreover, as *Kalpsüz* says: "It should not be overlooked that such a provision is not an undertaking and that even if this provision does not exist, it will give special provisions to general provisions". (Turgut Kalpsüz, Türkiye'de Milletlerarası Tahkim, Ankara, Yetkin Yayınları, 2. Bası, 2012, p. 29). Therefore CCP art. 444, should be considered a provision which emphasizes that the provisions on arbitration are special provisions (*lex specialia*).

6 It should not be omitted that CCP art. 424 also accurately clarified: "*The Parties may freely decide the rules of procedure to be applied by the arbitrator or arbitral tribunal, without prejudice to the mandatory provisions of this section; or the parties may determine the arbitration procedure by referring to any arbitration rules. If there is no such agreement between the parties, the arbitrator or arbitral tribunal shall carry out the arbitral proceedings in a manner of the provisions takes places in this Section.*" In this case, for example, when the parties decide to apply the "*UNCITRAL Principles for ad-hoc Arbitrations*" in the arbitration agreement for arbitration proceedings, the proceedings should be conducted on the basis of these rules, provided that they are not contrary to the mandatory provisions of the CCP. Because the rules governing the arbitration (*lex arbitri*) and the rules of procedure to be applied to the arbitration proceedings are different. The law governing the arbitration procedure is determined on the basis of each country's own regulations. The parties may determine the rules of procedure to which the arbitration proceedings shall be subject to the extent permitted by *lex arbitri* (check out the art. 424 of CPP for Turkish Law). See also: Murat Atalı, İbrahim Ermenek, Ersin Erdoğan, Medeni Usul Hukuku, Ankara, Yetkin Yayınları, 2018, p. 726). Moreover, if the parties have stated that the law of foreign countries (*substantive law*) will be applied to the basis of the dispute between them, this does not mean that the rules of this country's law also will be applied to the arbitration procedure. Unless otherwise stated by the parties.

7 *Kalpsüz,* criticize this provision, on the grounds that the element of *locus*, loses much of its importance. (Kalpsüz, p. 29).

8 Arbitration agreement is an agreement that provides for settling of disputes between the parties through arbitrators instead of state courts. Instead of the term of arbitration contract, the arbitration agreement is used/preferred in the doctrine. Therewithal the term of arbitration agreement is used in the Code of International Arbitration (see also: CIA art. 4). By contrast in the Code of Civil Procedure: "The agreement in which the arbitration is decided by the parties is called an arbitration agreement." is used. "*Schiedsvereinbarung*" is preferred in German law and Swiss law (Swiss FUK. Art. 357; German ZPO § 1029). Anglo-American law "*Arbitration Clause*" is used (see also: Piero Bernardini, "The Arbitration Clause of an International Contracts", Journal of International Arbitration, CILT 9, 1994, p. 45, HEINONLINE -17.08.2020). In this study, arbitration clause or arbitration agreement is preferred.

States regulate the legal regime of the arbitration procedure to clarify the rules that will be applied when an arbitration takes place in their country. The legal text guiding these regulations was originally prepared by UNICTRAL[9] to ensure uniformity in "*ad-hoc arbitration*". Arbitration in Turkey is also subject to regulations under Turkish law. In this context, the rules to be followed in the arbitration process are regulated on the basis of the "*element of foreign*". In other words, if the place of arbitration is Turkey, and the dispute contains an element of foreign, the CIA[10] will be followed; if does not contain this element, the provisions of the CCP[11] will be followed.

When the place of arbitration is Turkey, and the dispute comprises the foreign element, the arbitration process is not subject to the CCP[12], but to the

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9 For full text see also: https://uncitral.un.org/en/texts/arbitration -16.08.2020.

10 The Code of Civil Procedure is not the first law to contain regulation on arbitration. Like the Code of Civil Procedure, previous Code of Civil Procedure (*which entered into force in 1927*) contained articles regulate the arbitration. However, this Code is identified insufficient by doctrine because of several reasons such as: *deficiencies in legal infrastructure, courts consider arbitration as an exceptional remedy, the failure of courts to support arbitration, and inadequate knowledge of the potential users and their representatives of arbitration.* It is argued that all these prevent the development of arbitration in Turkey (Hakan Pekcanıtez, Hülya Taş Korkmaz, Mine Akkan, Muhammet Özekes, Medeni Usul Hukuku, İstanbul, On İki Levha Yayıncılık, Dinamik Kitap, 2. Sürüm. 2018, p. 2335). Alternatively, Article 125 of the Constitution was amended with the Code N. 4446 adopted in 1999. Thus, concession agreements became one of the arbitrable legal transactions. With Code no 4501, named: "*The principles to be followed in case of arbitration proceedings in disputes arising from concession arrangements and contracts related to public services*" and Code of International Arbitration, arbitration has begun strengthening its position in Turkey (Cemal Şanlı, Emre Esen, İnci Ataman Figanmeşe, Milletlerarası Özel Hukuk, İstanbul, Vedat Kitapçılık, 4. Bası, 2015, p. 598). In the preparation of the Code of Civil Procedure, the texts based on the Code of International Arbitration and the Code of International Arbitration were taken as basis in order to ensure uniformity of the regulations on internal arbitration. Thus, it is stated that the legal infrastructure for the formation of the culture of arbitration has been substantially completed. (see also, Pekcanıtez/Taş-Korkmaz/Akkan/Özekes, p. 2336). For more detailed information about the History of Arbitration in Turkey see also: Fatih Aydemir, Türk Hukukunda Tahkim Sözleşmesi, İstanbul, On İki Levha Yayıncılık, 2017, p. 17 vd.

11 International and national arbitration could not be gathered under one roof In the Code of International Arbitration. Instead, national arbitration is regulated separately in the Code of Civil Procedure. Hakan Pekcanıtez, "Yeni Hukuk Muhakemeleri Kanunu'nun Tahkime İlişkin Hükümleri", ICC Milletlerarası Tahkim Semineri, Ankara, 2011, p. 63. Ramazan Arslan, "Hukuk Muhakemeleri Kanunu'nun Tahkime İlişkin Hükümleri" ICC Milletlerarası Tahkim Semineri, Ankara, 2012, p. 25.

12 There were significant differences between the principles of arbitration between previous Code of Civil Procedure and Code of International Arbitration. However, during the preparation of the Code of Civil Procedure (CCP), the regulations in the UNCITRAL's Model Code on Arbitration and Code of International Arbitration (CIA) were taken as the

CIA[13]. As it is stated in Art. 407 of the CCP: "*These provisions stated in this Code are applied as a rule when a dispute does not contain the foreign element in the sense defined by the Code of International Arbitration Law, and when Turkey is determined as the place of arbitration*". In addition, Art. 1/2 of the CIA contains a rule similar to Art. 407 of the CCP. The foreign element[14] is determined according to CIA Art. 2, and International Arbitration Law applies to these disputes[15]. Accordingly, a dispute is assumed to contain the foreign element in either of the following cases:

i. The residence of settlement (*domicile*), habitual residence or workplaces of the parties are in separate states[16];

ii. The residence of settlement (*domicile*), habitual residence or workplaces of the parties:

   (a) In cases specified in the arbitration agreement or determined on the basis of this agreement (Turkey)

basis and developments in the international arbitration were also taken into consideration. Therefore, the differences between the CCP and the CIA provisions about arbitration have largely disappeared. (Pekcanıtez/Taş-Korkmaz/Akkan/Özekes, p. 2606). Despite all this, in doctrine *Pekcanıtez*, argues that there should be only one legal regulation/code for arbitration (see, Pekcanıtez/Taş-Korkmaz/Akkan/Özekes, p. 2607). But *Akıncı*, states that the requirements of international arbitration and domestic arbitration are not always the same, and that having two separate codes may turn into an advantage for Turkish arbitration practice. (see also: Ziya Akıncı, Milletlerarası Tahkim, İstanbul, Seçkin Yayıncılık, 2. Bası, 2007 p. 23; *Kalpsüz* also considers that the duality must be maintained (see, Kalpsüz, p. 24). For details of the differences between the two codes see also: Murat Atalı, "A Comparison of the International Arbitration Law and the Provisions of the Code of Civil Procedure Relating to Arbitration", Festschrift für Peter Gottwald, Beck, 2014, p. 33-44.

13 The UNCITRAL Model Law on International Arbitration, which constitutes the source of the legal regulations mentioned in the preparation of both CCP and CIA, has been accepted in 99 countries or states, including Germany, the United States of America (8 States), Australia, China, India, Scotland, Japan, Korea, Canada, Russia, New Zealand Greece. Model Code was prepared in 1985, and in 2006 some additions were made to the Model. (see, https://uncitral.un.org/en/texts/arbitration -17.08.2020).

14 More detailed information about foreign element see also: Nomer/Ekşi/Gelgel, p. 3 vd.; Akıncı, p. 55 vd.

15 The Code of International Arbitration is applied whether the dispute is commercial or not. This feature of the code differs from the UNCITRAL model code on arbitration (Vedat Raşit Seviğ, "Milli ve Milletlerarası Tahkim", Prof. Dr. Gülören Tekinalp'e Armağan, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, 2003/1-2, p. 644).

16 It is not the nationality that is used to determine the element of foreign/alienation, as it is clearly understood from the letter/word of the article. Therefore, when domicile or habitual residence of foreign nationals which is a party to the dispute, is Turkey, citizenship is not enough to provide foreign element, in the meaning of CIA. (Akıncı, p. 61).

(b) Where an essential part of the obligations arising from the main contract will be performed[17], or where the issue of conflict is most relevant with another state;

iii. The fact that at least one of the partners of a company that is party to the main contract constituting the basis of the arbitration agreement has brought in foreign capital[18] in accordance with the statute on incentives for foreign capital,[19] or in order to apply this contract, it is necessary to enter into loan or guarantee agreements to obtain capital from abroad; or

iv. The actual contract or legal relationship constituting the basis of the arbitration agreement, supply the capital or property transfer from one country to another[20].

According to above mentioned provision:

(1) The definition of foreign element and therefore the scope of CIA is enormously broad. Besides the standard factors assessed for the determination of the existence of a foreign element, such as the residence

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17 It is argued that a significant part of the obligations arising from the main contract is meant to be fulfilled where the performance of the characteristic performance of the contract between the parties is to be fulfilled. (Akıncı, p. 63). For more detailed information about characteristic performance see also, Ergin Nomer, Devletler Hususi Hukuku, İstanbul, Beta Basım Yayın A.Ş., 22. Bası, 2017, p. 276; Şanlı/Esen/Ataman Figanmeşe, p. 268). Likewise, paragraph (II/b.) is criticized for failing to attach importance in practice because of the following paragraph (IV). Because if the place of performance of the contract is different from either the place where the relationship is most closely connected, or where the place of residence of the parties (*domicile*), or the place where the parties' habitual residence or workplaces are located, then there will be a transfer of goods or capital from one country to another within the meaning of Article 2/4. This situation constitutes an element of foreignness in accordance with Article 2/4 itself. (Akıncı, p. 64).

18 In Turkish law, the existence of the foreign element is determined by taking the company headquarters as the basis, not the source of the capital of the company (Şanlı/Esen/Ataman Figanmeşe, p. 112; Akıncı, p. 65). However, the scope of this paragraph headquarters of the company is involved in even Turkey, on the basis of the source of capital (without considering the ratio of foreign capital) can be expressed as expanding the definition of a foreign element. With this part of the provision, it is argued that it is suitable with the requirements of commercial life but is unnecessary because the loan or guarantee agreement is within the scope of paragraph 4 of the same article (Akıncı, p. 65).

19 Code no: 4875: Code of Foreign Direct Investment, Official Journal (o. j.) 17.6.2003, N. 25141.

20 This paragraph is the most comprehensive paragraph of the article. This paragraph emphasizes that the importance of the economic character of the relationship between the parties should not be overlooked. (Cemal Şanlı, Milletlerarası Ticari Tahkimde Esasa Uygulanacak Hukuk, Ankara, Banka ve Ticaret Hukuku Araştırma Enstitüsü, 1986, p. 31). With this paragraph, it has been accepted as a criterion for the foreign element of trans-border goods or capital transition. And so, it has adopted the broadest criterion that can be envisaged for international arbitration (Akıncı, p. 67).

of the parties or the place of performance, the existence of foreign element is also determined with an economic approach.

(2) It is usual that different legal systems have adopted different principles for determining the domicile or habitual residence of the parties. The law of the judge (*lex fori*) shall be taken as basis when it is necessary to determine the domicile or habitual residence of the parties[21]. In this case, the place of residence of both natural and legal persons shall be determined according to Turkish law in accordance with the date of the lawsuit[22]. Even though it is not clearly stated in the wording of the article, only one of the party's settlement/residential area, place of habitual residence or the place where the workplace is outside Turkey, should be sufficient for the presence of a foreign element. In the doctrine it is stated that the contrary interpretation is incompatible with the spirit of the law (*the search for the condition mentioned for both parties*)[23].

(3) It is argued that the phrase "place of performance of the significant portion of obligations arising out of contract" refers to the place of performance of the characteristic deed arising out of the contract.[24]. As such, the provision (2/b) is criticized for not attaching importance to the following paragraph (2/4). Hence, when the place of performance of obligation is different than the place where the realitonship is most closely connected to, place of residence, place of usual residence or place of work of the parties, there will be a transfer of goods or capital from one country to another within the meaning of Article 2/4. In this case, it already constitutes a foreign element[25] in accordance with Article 2/4 of the Code.

Although the International Arbitration Law defines the foreign element, the meaning of this term is controversial in its doctrine[26]. The Code of International Arbitration is not the only code that has a consequence on whether the foreign element is present. However, the element of foreign will be determined on the basis of CIA when the place of arbitration is Turkey. This determination will draw the boundaries of the application area of CCP and CIA. In this

21 Akıncı, p. 61.

22 The Code of International Private and Procedural Law (CIPPL), Art. 3

23 Akıncı, p. 62.

24 Akıncı, p. 63; For more detailed information about characteristic performance see also, Ergin Nomer, Devletler Hususi Hukuku, İstanbul, Beta Basım Yayın A.Ş., 22. Bası, 2017, p. 276; Şanlı/Esen/Ataman Figanmeşe, p. 268.

25 Akıncı, p. 64.

26 For the details of discussion see also: Ergin Nomer/Nuray Ekşi/Günseli Gelgel, Milletlerarası Tahkim Hukuku, İstanbul, Beta Basım Yayın A.Ş., 5. Bası, 2018, p. 3 vd.; Kalpsüz, p. 15 vd.; Ersin Erdoğan, Medenî Usûl Hukuku Kurallarının Yer Bakımından Uygulanması, Ankara, Yetkin Yayınları, 2016, p. 13.

respect, for example, any disputes which the place of arbitration is Turkey and related to the legal order of more than one country, CIA is not applicable[27]. For example, Turkish citizens may decide British law as the governing law for a sale contract that has no connection with the UK and where the parties are two Turkish traders while deciding that any disputes arising from the sale contract shall be resolved by arbitration in Turkey. In such case, Turkey will be the place of arbitration and the British Law will be applied to this dispute or disputes arising from this sale contract. In this example, in which multiple countries' legal order comes into play, such disputes may be considered to contain a foreign element according to Turkish law doctrine. But it would not be a dispute containing a foreign element in the sense of CIA. Therefore, the rules governing the arbitration proceedings of such dispute would be CCP.

Besides that CIA Art. 1/2: "*This Code is applied for disputes which contain a foreign element and the place of arbitration is determined as Turkey; or the provisions of this Code shall apply to disputes when the provisions of this code are selected by the parties or the arbitrator or arbitral tribunal are selected.*" In this case, if it is decided that a dispute with arbitration place in Switzerland shall be subject to the provisions of the CIA, the CIA shall apply even if the place of arbitration is not Turkey. However, it should not be forgotten that it is not sufficient to decide that Turkish law will be applied to disputes that are subject to arbitration. Because such clauses determine only the substantive law which will be applied to the dispute unless otherwise stated by the parties clearly. In addition parties are free to choose not to apply CIA's provisions, for a dispute included in its field of application. In such cases, even when the arbitration place is Turkey, the CIA's provision shall not apply.

II. Arbitrability

A. Objective Arbitrability (Matter of Dispute)

Arbitrability concerns whether it is possible to settle a dispute before an arbitrator[28]. The question of whether a dispute is arbitrable can be answered through a dual assessment of both procedural law (*objective arbitrability*)

[27] See also Şanlı/Esen/Ataman Figanmeşe, p. 3.

[28] The term of arbitrability was first used in the 1923 Geneva Protocol (Burak Huysal, Milletlerarası Ticari Tahkimde Tahkime Elverişlilik, İstanbul, Vedat Kitapçılık, 2010, p. 12). In Civil Law System, (*this system also includes Turkish Law System*), a distinction is made between the arbitrability and scope of the arbitration agreement. But in the Anglo-American legal system, the concept of arbitrability is a more advanced concept, including the conditions for the validity and scope of the arbitration agreement. See also, Paul F. Kings, "Judicial Review and the Limits of Arbitral Authority: Lessons from a Law of Contract" St. John's Law Review, Winter 2007, 81- 1/2, p. 101, HEINONLINE -18.08.2020).

and substantive law (*subjective arbitrability*)[29]. In the context of procedural law, arbitrability relates to whether the dispute is subject to the will of the involved parties. Accordingly, if the subject matter of the case can be subjected to "*settlement, acceptance and waiver of claim*", the dispute is suitable for arbitration in terms of procedural law[30] (*objective arbitrability*).

Arbitrability in terms of substantive law means the existence of a power of disposition over the subject matter and the exercising of this authority through free will[31]. Arbitration is an alternative to state jurisdiction, but disputes for which the Courts have the exclusive jurisdiction remain in every legal system[32]. These are counted as:

- Disputes considered to be closely related to public interest (*Public order is particularly confused with cases where the authority of the arbitrator or the arbitral tribunal conflicts with a publicly authorised body*).
- Disputes in which groups considered to be the weakest parts of society are party to the conflict.

The following sections will illustrate these limitations on the settlement of disputes through arbitration.

1. Relationship Between Arbitrability and Public Order

Under Turkish law, arbitrable disputes under both CCP and CIA are limited in terms of the dispute [33] (*objective arbitrability*). According to CCP Art. 408, 'disputes arising from real rights on immovable properties or disputes which are not subject to the will of the parties are not arbitrable'. CIA Art. 1/4 also states that[34], 'This code is not applicable to the disputes arising from real rights

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29 Huysal, p. 197.

30 Kalpsüz, p. 27; Kuru, p. 726; Kuru/Arslan/Yılmaz, p. 784

31 Marc Blessing, "The Law Applicable to the Arbitration Clause and Arbitrability", ICCA Congress Series No: 9, 1999, p. 181, HEINONLINE -18.08.2020). It is controversial whether arbitration constitutes an interference with the judicial rule of the state. *Pekcanıtez*, Ali states that since the main thing in private law is the superiority of the will of the parties, as a result of this, the disputes between the parties can also be resolved by the persons they have chosen (*arbitrators*) and the arbitration is not an exceptional dispute resolution (Pekcanıtez/Taş- Korkmaz/Akkan/Özekes, p. 2603). Nevertheless, it is also argued that arbitration constitutes a limit to the judicial power of the state and is therefore exceptional (Nuray Ekşi, Hukuk Muhakemeleri Kanunu'nda Tahkim, İstanbul, Beta Basım Yayın A.Ş., 2019, p. 99).

32 Huysal, p. 13; Kings, p. 100.

33 In Turkish law, the first regulation on the eligibility of arbitration was made with *Mecelle*. *Mecelle* Art. 1841 states that: *Arbitration is permissible* in *Cases regarding property,* (Pekcanıtez/Taş-Korkmaz/Akkan/Özekes, p. 2635).

34 In previous Code of Civil Procedure (Law No. 1086), disputes arising from real rights on immovable properties was not included that the article related arbitrability. Previous Code of Civil Procedure (Law No. 1086) Art. 518 stated that: "*Disputes which are not subject to*

on immovable properties in Turkey and disputes which are not subject to the will of the parties. Both provisions underline that 'disputes arising from real rights on immovable properties are not arbitrable. Therefore, any dispute in which their resolution might require a chance of entitlement of real property rights of an immoveable is deemed unarbitrable.[35]

One of the particular disputes at this point is the disputes arising from the preliminary contracts for real estate sales. If the debtor who does not fulfil his obligation to make a declaration of will despite promising to sell his immovable property, it should be assessed whether this dispute can be settled by arbitration. As is known, under Turkish law, the creditor of the promise to sell the immovable will ask the judge to declare the will when the debtor does not perform his contractual debt. When the creditor wins this case, the judge's decision is a formative judgement. However, it is argued that in practice and in the doctrine, the person promised in favour of the immovable sale contract is directly referred to in Turkish Civil Code Art. 716, the court may request the transfer of immovable property to claimant[36].

This limitation is based on the acceptance that the land registry exists for the sake of the public order[37]. In other words, '*disputes arising from real rights on immovable properties are considered as related with public order*'[38].

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the will of the parties are not arbitrable"). This was a controversial issue in the doctrine and jurisprudence. (see also Sarı, p. 151). However, HMK ended this discussion.

35 For example, disputes concerning sales of contract, hypothec, fiducia are not subjected to arbitration. The holder of a real right on the immovable does not only occur as a result of voluntary transactions. In addition, disputes arising from right to preemption which arises directly from law (*Turkish Civil Code, Art. 732*), are not arbitrable.

36 See SC ACC., D. 08.01.2004, N. 2004/14-610, Decision N. 2004/656; SC 3. CC., D. 05.02.2013, N. 2012/18832, Decision N. 2013/1562, Kazancı İçtihat Bilgi Bankası, 18.07.2019; Necip Kocayusufpaşaoğlu, Türk Medeni Hukukunda Gayrimenkul Satış Vaadi, İstanbul, 1959, p. 170; Fikret Eren, Mülkiyet Hukuku, Ankara, Yetkin Yayınları, 4. Bası, 2016, p. 231; contrariwise see also: –on the grounds that the relevant opinion removes the difference between the promise of sale and the contract of sale- M. Kemal Oğuzman/Özer Seliçi/Saibe Oktay Özdemir, Eşya Hukuku, İstanbul, Filiz Kitapevi, 21. Bası, 2018, p. 394). Pursuant to this opinion, the court decision has the same effect as the provision given in the case to be opened violation of the immovable property transfer debt in sale agreement. Hereby, the dispute becomes disputes arising from real rights on immovable property. It is not possible to resolve such disputes by arbitration.

37 See, SC 15. CC., D. 13.12.1990, N. 1990/4306, Decision N. 1990/5480; SC 15. CC., D. 18.03.1986, N. 1985/3919, Decision N. 1986/1044 (Kazancı İçtihat Bilgi Bankası -18.07.2019); SC 14. CC., D. 7.3.2016, N. 2015/12196, Decision N. 2016/2883 (Lexpera İçtihat-18.08.2020).

38 The Supreme Court of Appeals has decided that the termination of the construction contract in return for land share, will have consequences as the immovable property and is not arbitrable. (SC 15. HD, D. 23.09.2002, N. 2002/4321, Decision N. 2002/4067, YKD 2003/6, p. 929). In another decision, the Supreme Court of Appeals made the following

CCP Art. 408 and CIA Art. 1/4 clearly state that '*disputes not subject to the will of the parties*[39] *are not also arbitrable*'[40]. In this case, disputes which are not arbitrable are regulated by mandatory provisions and cannot be subject to parties' wills by nature. At this point, as a rule, disputes regarding enforcement[41] and bankruptcy[42] law are not arbitrable since these disputes closely relate to the public order due to their characteristics.

explanations regarding the limits of arbitration: *In the case of real rights, and immovable property, can only be arbitrable when the parties of the disputes may free to deal with. Apart from these, the agreements regarding the subject of the real estate to be subject to arbitration are invalid. Because of that; a- It cannot be understood that the parties have drawn up the arbitration agreement in accordance with the validity of the article 213 of the Turkish Code of Obligations. Therefore, the arbitration agreement between the stakeholders on the partition in kind of immovable property is invalid. Therefore, the arbitrator's decision based on an invalid arbitration agreement is also invalid*." (SC 4. HD, D., 14.05.1974, N. 1974/2094, Decision N. 19742496, Kazancı İçtihat Bilgi Bankası -18.08.2020).

39 Huysal, p. 13;

40 *Ekşi*, argues that this criterion on arbitrability does not fully satisfy the doubts that may arise in determining which dispute is arbitrable in practice. (Ekşi, p. 78). Özsunay on the other hand, argues that this criterion on arbitrability reflects the classical understanding, that this understanding may persist for a while and that it is more appropriate to adopt a new understanding that accepts any disputes of an asset can be resolved through arbitration. (Ergun Özsunay, MTO Tahkim Kuralları, İstanbul Barosu Dergisi, 2012, C. 86, Sayı 2, p. 57). See also, Nevhis Deren Yıldırım, Milletlerarası Tahkimin Esaslı Sorunları, İstanbul, Alkım Yayınevi, 2004, p. 28 vd. At this point, when the articles and regulations of other countries is examined, for example according to the Swiss Law on Private International Law, all kinds of disputes regarding its assets are arbitrable (Art. 177). Likewise, according to the German Code of Civil Procedure, disputes concerning the economic interests of the assets are arbitrable (ZPO art. 1030). French Civil Code (which is entered into force 2004) art. 2059 considers all disputes which are subject to the will of the parties are arbitrable. Same principle is also adopted by Italy, Belgium and Netherlands (Italian Code of Civil Procedure, art. 806; Belgian Code of Civil Procedure, art. 1676/1; Netherland Code of civil Procedure, art. 1020/3). UNCITRAL Model Code on Arbitration does not contain a provision which defines arbitrability. There is also no definition for arbitrability under American Law. This is determined by court decisions (see, II/A./2.).

41 The action for annulment of the objection, whose nature has been discussed for a long time, is not a law enforcement institution, but a claim for substantive law. Before to this case, since there were enforcement proceedings, the effect of the case on the proceedings and the results of the case were also regulated in the Code of Enforcement and Bankruptcy. Likewise, the restitution claim is not an institution of enforcement bankruptcy law.

42 "*…According to CCP art. 408: "disputes arising from real rights on immovable property or disputes which are not subject to the will of the parties are not arbitrable. Bankruptcy proceedings are not arbitrable since they are not subject to the will of the parties."* (SC 23. CC., D. 21.04.2014, N. 2013/9183, Decision N. 2014/3124, Lexpera İçtihat-18.08.2020).

A distinction is made in the doctrine in relation to the arbitrability[43] of intellectual and industrial property law[44] disputes. This distinction shall be made on the basis of whether the intellectual and industrial rights are required (*for example patents and trademarks*) or not (*for example copyright*) to be registered[45]. Regarding the rights that are registered, disputes on registration and cancellation are not arbitrable. However, the subjective rights, shall be accepted as arbitrable[46]. In addition, considering that intellectual property rights are absolute rights, disputes arising from such rights[47] may be qualified as arbitrable.[48] In situations where rights that are not registered are subject to dispute[49], such disputes shall be deemed arbitrable without limitation[50].

In cases where the will of the party alone is not sufficient to end the dispute and judge must make an independent assessment of the party's will, the acceptance or compromise will determinate the case[51]. This criterion was used in prior CCP Art. 95/2 to answer the question of whether it is possible to end a case by compromise or acceptance. It is stated that the criterion, which is

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43 It should also be noted that intellectual property disputes are not limited to the license agreement. In addition, there are many disputes regarding intellectual property rights in the transfer of a business enterprise, joint ventures, mergers and acquisitions. (Marc Blessing, "Arbitrability of International Property Disputes", Arbitration International, Volume 14, Number: 4, 1997, p. 197 vd., HEINONLINE -19.08.2020).

44 Intellectual property disputes have increased considerably since 1990. Among the ICC disputes, the number of disputes relating to the license agreement increased to the 3rd place. (Huysal, p. 220).

45 Pekcanıtez/Taş-Korkmaz/Akkan/Özekes, p. 2634.

46 Countries adopting the same approach: Germany, Spain, Netherlands, Italy, France, Sweden (Huysal, p. 226).

47 Mustafa Dural, Suat Sarı, Türk Özel Hukuku Cilt I Temel Kavramlar ve Medeni Kanunun Başlangıç Hükümleri, İstanbul, Filiz Kitapevi, 2018, p. 152.

48 Huysal, p. 230; The judicial practice on the issue is the same way. See also: SC 11. CC., D. 16.1.2012, N. 2011/15015, K. 2012/178; SC ACC., D. 27.09.1999, N. 2006/4-60, Decision N. 2006/74 D. 15.3.2006; SC ACC., D. 19.10.2005, N. 2005/3-560, Decision N. 2005/587; SC 11. CC., N. 1999/5222, Decision N. 1999/7186, Kazancı İçtihat Bilgi Bankası -19.08.2020).

49 Huysal, p. 230.

50 Under American law, it is considered arbitrable, including those relating to the invalidity of intellectual property right. The arbitration agreement is valid for disputes regarding the validity, use and infringement of the patent rights. Other intellectual property rights, such as trademark, copyright, trade secrets, are also considered arbitrable. However, in the aforementioned disputes, the arbitrator's decision shall have consequences only between the parties (*inter partes*) to the dispute, such decisions shall not affect third parties (*erga omnes*) (W. D. Plant, "Arbitrability of International Property Issues in the United States" Objective Arbitrability Antitrust Disputes International Property Disputes, ASA Conference Zurich, 1993, ASA Special Series, Number: 6, 1994, p. 121, HEINONLINE -19.07.2019).

51 Hatice Özdemir Kocasakal, "Tahkim Şartı İle İlgili İptal Sebepleri", XI. Milletlerarası Tahkim Semineri, Ankara, 2014, p. 56.

given in this provision should be applied for arbitrability even if the provision (*Art. 95/2, from the Law no. 1086*) is excluded from recent CCP (*the Law no. 6100*) code[52]. The cases where the parties do not have a power to accept or settle are disputes that subject to the principle of *ex officio* examination[53]. Conflicts which are subject to the principle of ex officio examination are not arbitrable[54], since these disputes are not subject to the free will of the involved parties. In such cases, for example, the formation of legitimacy, custody, paternity and divorce proceedings is not arbitrable[55].

The public order and the political and economic policies of the country that has been chosen by the involved parties as the place of arbitration are effective in determining whether a dispute is suitable for arbitration[56]. These criteria are also effective in determining the limits of arbitration in Turkish law. Therefore, in Turkish law, as in every national law, there is a close relationship between arbitrability and public order[57]. However, these two terms are different from each other[58]. Having only the public order criterion

52 Özdemir Kocasakal, p. 56.

53 Pekcanıtez/Taş-Korkmaz/Akkan/Özekes, p. 2634.

54 In addition, if a judicial monopoly has not been created in favor of the court with the rule of authority, this does not in itself make the dispute unfit for arbitration. (Deren Yıldırım, p. 30). In cases of definite authority, even the fact that authority is from public order does not change this result. In the presence of a definite authority, the monopoly of the judiciary should be understood: the ultimate legal protection is to be provided only by the court whose jurisdiction is assigned. For example, the jurisdiction of the courts is from public order according to CCP Art 1. The parties cannot designate the jurisdiction of court. The court of general jurisdiction is the civil courts of first instance for the disputes regarding the assets and the immaterial right (CCP art. 2). However, of the aforementioned disputes, in particular the disputes concerning the assets are arbitrable, as a rule. (*Pekcanıtez*, is stated that: disputes concerning the existence of persons are arbitrable, as a rule. When it is considered what the disputes concerning the immaterial rights (name change, divorce, paternity, etc.) in principle, it is appropriate to express that they are not suitable for arbitration.

55 Özdemir Kocasakal, p. 56.

56 Erdem, p. 2.

57 Erdem, p. 2.

58 Public order and arbitration issues should be evaluated separately. Indeed, these two terms were regulated Turkey is also a party, in the New York Convention dated 10.06.1958, which is Turkey also a party of it. In this Agreement, Art. 5/2., Issues of non-compliance with public order and arbitrability are discussed separately. (for the full text of the agreement see also, https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf -23.08.2020). It is stated that: "(Art. 5/2) *Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a). The subject matter of the difference is incapable of settlement by arbitration under the law of that country or; (b). The recognition or enforcement of the award would be contrary to the public policy of that country.* An arbitral award will be given in the case, will be subject to recognition and enforcement

in determining whether a dispute is arbitrable implies that no adequate examination has been carried out.[59]

The Court of Cassation, however, uses non-arbitration[60] in a manner that is synonymous with public order, and it assesses arbitrability from this perspective.[61] Examples of the aforementioned case law in the Court of Cassation include disputes in which the arbitrators decide on the value-added tax (VAT) during the arbitration proceedings. In these proceedings, the arbitrators decide on the recourse of the VAT paid by the claimant to the other party. In a case that was settled for enforcing of this decision, the court of the first instance accepts the enforcement claim. The Supreme Court of Appeals overturns the decision of the local court, arguing that the arbitral award was made on a tax-related matter and that this matter is the subject of the administrative judiciary and therefore involves the public order.[62]

proceedings in Turkey. The arbitrator's decision concerns a contract for the sale of drugs signed in Holland. This enforcement claim, is rejected on the grounds that constitute a violation of the Turkish public order even if the case is arbitrable in principle.

59 This discussion also arises within the framework of mandatory rules for disputes within the scope of the CIA. Mandatory (*directly applicable rules*) are mandatory provisions to be applied without regard to the conflict of laws rules in a dispute involving a foreign element. (Şanlı/Esen/Ataman Figanmeşe, p. 7). These rules exist to regulate the social organization of the state or to realize the economic and social policies of the state (for example: Code on the Protection of the Value of Turkish Currency). These rules relate to material law/ substantive law. However, the debate on whether the disputes to which the rules concerning the protection of the capital market and competition are to be arbitrable, arise from the fact that the rules governing this field are mandatory rules/directly applicable rules. The US Supreme Court ruled that such disputes are not arbitrable. See, Wilko v. Swan, https://caselaw.findlaw.com/us-supreme-court/346/427.html -23.08.2020). In addition to competition disputes, the rules for protection of the weak are also known as mandatory rules/directly applicable rules, and there is also a discussion about disputes that are subject to these rules on whether they are arbitrable or not (see, II./A./2.).

60 *"...However, the parties to a contract may choose arbitration to settle the disputes between them in matters that do not concern the public order and depend on their desires*." SC 11. CC., D. 12.04.2005, N. 2004/6686, Decision N. 2005/3600, Kazancı İçtihat Bilgi Bankası -23.08.2020.

61 The doctrine criticizes this jurisprudence of the Supreme Court. And it is stated in the doctrine that the adoption of a criterion such as public order unregulated by law as a precondition for arbitration has survived to this day as a work of insecurity in the arbitral institution. (Huysal, p. 203).

62 Istanbul 3rd Commercial Court of First Instance dated 25.07.2005, N. 2004/922, Decision N. 2005/646, Huysal, p. 198. This decision is criticized in the doctrine. The decision of the arbitrator is not directly related to tax, but whether a tax paid by one of the parties is recourse to the other party. This issue is one of the issues on which is subject to the parties' free will, and in this respect it cannot be said that it concerns public order. (Erdem, p. 3).

2. Need for Protection of the Weaker Party in Arbitration Contracts

If a dispute is subject to the will of the parties, as a rule, arbitration may be preferred for settling of a dispute. Nevertheless, the need to protect the weaker side in a dispute requires the limits of arbitration to be reconsidered. As such, it is stated in the Turkish doctrine that a dispute is not arbitrable if there is a superior interest to be protected[63].

In this context, one possible controversial dispute involving arbitrability is regarding the residential and roofed workplace rental contracts[64]. The doctrine states that such a dispute is arbitrable when the leasing contract relating to the immovable property is commercial[65]. However, the doctrine also considers disputes arising from rental agreements unsuitable for arbitration. In addition, irrespective of whether a lease contract for a residential or roofed workplace is of a commercial nature[66], disputes

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63 Ömer Ulukapı, Medeni Usul Hukuku, Konya, Mimoza Yayıncılık, 2014, p. 532 vd.; Pekcanıtez/Taş-Korkmaz/Akkan/Özekes, p. 2635.

64 Under German Law, ZPO art. 1030/2 states that: "*An arbitration agreement regarding legal disputes arising in the context of a tenancy relationship for residential space in Germany is invalid. This shall not apply to the extent the residential premises concerned are of the type determined in section 549 subsection (2) numbers 1 to 3 of the Civil Code (Bürgerliches Gesetzbuch, BGB).*" Excluded contracts are from rent relationships established for settlement purposes: "*1. residential space that is leased only for temporary use, 2. residential space that is part of the dwelling inhabited by the lessor himself and has largely to be furnished with furniture and fixtures by the lessor himself, provided that permission to use the residential space has not been given for permanent use to the lessee with his family or with persons with whom he maintains a joint household set up permanently, 3. residential space that a legal person under public law or a recognized private welfare work organization has leased to permit use by persons in urgent need of accommodation if, when the lease was entered into, it drew the attention of the lessee to the intended purpose of the residential space and to its exemption from the provisions referred to above.* " (official translation of BGB and ZPO see, https://www.bmjv.de -23.08.2020).

65 Ekşi, p. 82; Pekcanıtez/Taş-Korkmaz/Akkan/Özekes, p. 2635; The Supreme Court also acknowledges that commercial lease contracts are arbitrable disputes. *"...In the 11th article of the contract dated 01.08.2005 and the 7th article of the lease contract dated 01.10.2005, it was decided that the dispute between the parties will be resolved by two arbitrators from the Chamber of Commerce and Chamber of Craftsmen. In his petition submitted to the court during the defendant's time, he stated that the dispute with the plaintiff should be resolved through arbitration. First of all, while the provision regarding arbitration in the lease agreement and the objection of the defendant in this direction should be evaluated within the framework of the civil procedure code, it is not correct to decide on the merits of the case without considering the first objections of the defendant in this direction...."* (SC 6. CC., 6. CC., D. 30.1.2013, N. 2012/9581, K. 2013/1334, Lexpera İçtihat -26.08.2020).

66 In international trade, residential and roofed workplace rents, the dispute does not always have a weak side. Similarly, in a dispute subject to the CIA, the Court of Cassation ruled that the eviction case was arbitrable. (see, SC 19. CC., D. 16.12.2004, N. 2004/5413, Decision N. 2004/12656, Kazancı İçtihat Bilgi Bankası -23.07.2019). Likewise, the existence of the

regarding the eviction of the immovable property and the rental value[67] are considered unfit for arbitration[68].

Labour laws are the primary rules established to protect the weaker party. It is axiomatic in the doctrine and supported by judicial decisions that disputes arising from employment contracts, cannot be resolved by arbitration[69].

Similar to employment contracts, almost all states recognise the need for consumer protection amongst their economic and social policies[70]. For example, the Turkish Consumer Protection Code (CPC) requires that certain disputes must be settled by consumer arbitration committees. CPC article 68/1 states: "Provided that the rights of the parties in the Bankruptcy and Enforcement Law are reserved; It is obligatory to apply to county consumer arbitration committees in disputes with a value of less than four thousand Turkish Liras, to provincial consumer arbitration committees in disputes below six thousand Turkish Liras, and to provincial consumer arbitration committees in disputes between four thousand and six thousand Turkish

mandatory provisions of the Turkish Code of Obligations do not imply that the dispute on its own is not arbitrable regarding rented workplaces which are commercial business subject to CCP. However, it is also a fact that the legislator subjects the housing and roofed workplace rents to the same provisions, independent of the nature of the contract, as the tenant must be protected. In this case, it can be argued that the dispute should not be considered as arbitrable.

67 Admission that the determination of rent is from the public order is not particularly accurate especially for disputes involving foreign element (Huysal, p. 139). Likewise, in the housing and roofed workplace rental agreements for disputes subject to CCP, the mandatory CCO Art. 344 does not apply to business transactions. Therefore, it should be accepted that the disputes are arbitrable.

68 Decision about rent see also: SC 3. CC., D. 02.12.2004, N. 2014/13018, 2014/13409; Judicial decision about the evacuation of the immovable see: SC ACC., D. 26.12.1972, N. 1971/6-138, Decision N. 1972/128, Kazancı İçtihat Bilgi Bankası -23.08.2020.

69 The Court of Cassation considers that the arbitration agreement made before the termination of the employment contract is invalid, whereas the arbitration agreement made after the termination is valid. According to this: "…It is undisputed that the worker is economically weak against the employer and is legally dependent on the employer in the establishment and maintenance of the employment contract. *The worker is under the authority of the employer, and acts with his instructions. Employee is under control and has no freedom of will. However, with the termination, the dependence disappears. Both the methodology and nature of the legal relationship between the parties lead to the conclusion that it is only possible to bring the cases of reinstatement to the special arbitrator only after the termination of the employment contract. Otherwise, the worker is forced to go to a trial process against which he is foreign. And this is contrary to the purpose of the labor law.* (SC 9. HD, D. 03.11.2008, N. 2008/5830, Decision N. 2008/29774; see also: SC 22. HD, D. 28.06.2012, N. 2012/12, Decision N. 2012/14853, Lexpera İçtihat-23.08.2020).

70 Christian Twigg-Flesner, Hans Micklitz, "Think Global: Towards International Consumer Law", Journal of Consumer Policy, Springer Science Business Media, LLC., 2010, p. 202.

Liras in metropolitan cities (for the year 2020)"[71]. For disputes above these values, an application to consumer arbitration committees cannot be done.

Both the doctrine and Court of Cassation agree that disputes which are not subject to the will of the two parties constitute disputes concerning the public order, and that consumer disputes concerning the public order are ineligible for voluntary arbitration[72]. However, CPC Article 68/5 states that it is possible for consumers to apply to alternative dispute resolution authorities. The doctrine therefore argues that there is no legal obstacle to the settlement of consumer disputes by arbitration, other than the case law of the Court of Cassation based on the insecurity of arbitration[73].

The reason for this approach -that consumer disputes are not arbitrable- is so that the costs associated with such proceedings do not prevent consumers from accessing their rights. However, the first and foremost consideration of arbitration in consumer disputes is that the arbitration clause is often a standard contract term[74]. In such a case, even if it is accepted that a consumer dispute is arbitrable, the willingness of the parties to settle the dispute through arbitration, which is the first condition of discretionary arbitration, should be considered[75].

B. Substantive-Material Law Aspects of Arbitrability: Subjective Arbitrability

Arbitrability relates to the nature and also the parties of the dispute. Thus, as previously mentioned[76], suitability can be divided into two categories: objective arbitrability (*ratione materiae*) and subjective arbitrability (*ratione*

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71 The nature of the consumer arbitration committee and the nature of its activity is controversial in the doctrine. (Makbule Serra Korkut, Medenî Usûl Hukuku Esasları Çerçevesinde Tüketici Uyuşmazlıklarının Çözümünde Tüketici Hakem Heyetleri, İstanbul Sosyal Bilimler Enstitüsü, Yayımlanmamış Yüksek Lisans Tezi, 2018 (https://tez.yok.gov.tr/UlusalTezMerkezi/tezSorguSonucYeni.jsp -23.08.2020).

72 Gülen Sinem Tek, "Tüketici Mahkemelerinin Görevi, Yetkisi ve Tüketici Mahkemelerinde Yapılan Yargılamanın Usulü", Kazancı Hukuk Araştırmaları Dergisi, Nisan 2015, p. 138; Huysal, p. 129; SC 13. CC., D. 20.10.2008, N. 2008/6195, Decision N. 2008/12026, Lexpera İçtihat- 23.08.2020.

73 Gökçe Kurtulan, "Türk Hukukunda Tüketici Uyuşmazlıklarının Tahkime Elverişliliği", Türkiye Barolar Birliği Dergisi, Sayı 131, 2017, p. 254.

74 See also, II/2.

75 As a matter of fact, in America, companies have started to make provisions that all disputes will be settled by individual arbitration in order to prevent class action. These attempts were successfully concluded and when the Federal case records were examined, it was found that between 2010 and 2014, four-fifths of the cases were rejected because they had to be resolved by arbitration; 134 of the 162 lawsuits filed in 2014 were rejected (https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=1&referer=https://www.google.com/ -23.08.2020).

76 see, II./A.

personae)[77]. The fact that a dispute cannot be resolved through arbitration is related to objective arbitrability[78]. Accordingly, the arbitration agreement is invalid for any dispute that the parties are not allowed to go to arbitration by law[79].

Subjective arbitration relates to the ability to become a party of an arbitration agreement[80]. The parties' ability to go to arbitration is related to the legal nature of the arbitration and the arbitration agreement[81]. When an arbitration agreement is considered a substantive law agreement or a substantive law agreement with procedural implications, the existence of the capacity to act; when the arbitration agreement is considered a procedural agreement, the capacity to sue and standing to sue become important conditions of validity. When the capacity to sue and standing to sue are regarded in terms of the capacity to exercise rights and to act, principles regarding substantive law (capacity to make transactions) become relevant. In such a case, the general principles of

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77 Sarı, p. 150; Huysal, p. 11; Ali Yeşilırmak, "Güncel Yargıtay Kararları Işığında HMK'nın Tahkim Hükümlerinin Değerlendirilmesi", Zirve Üniversitesi Hukuk Fakültesi Dergisi, C. 3, S. 3, Eylül 2014, p. 310.

78 See also, II./A.

79 If the arbitration agreement is invalid, the parties must file an objection to the non-arbitration. The objection to the arbitration shall be filed with the board after the arbitral tribunal has been formed. In case of a rejection of the objection, the dispute can be argued in the case of the cancellation of the arbitrator's decision. If an appeal to the court is made before the commencement of the arbitration proceedings or during the arbitration proceedings, the court rejects this appeal for lack of jurisdiction. The authority to examine such an objection does not belong to the court but to the arbitral tribunal. The source of this authority is the principle of the referee's decision on his own authority. The arbitrator/arbitrators may automatically consider the non-arbitrability of the arbitration, even if no objection to arbitration is filed. The arbitrator must take into account the limitations imposed by the public order or public interest in his jurisdiction. This is a public referee's assignment. (Pekcanıtez/Taş-Korkmaz/Akkan/Özekes, p. 2636).

80 As a rule, the arbitration proceedings are based on an agreement/a contract. This agreement could be part of a contract (*arbitration clause*) or could be a separate contract just about arbitration. (Nevhis Deren Yıldırım, Milletlerarası Tahkimin Esaslı Sorunları, İstanbul, Alkım Yayınları, 2004, p. 21). Likewise, the arbitration agreement can be concluded without dispute or after the dispute arises.

81 The legal nature of the arbitration contract in the doctrine is controversial. In accordance with the majority opinion in the doctrine, the Court of Cassation describes the arbitration agreement as a procedural law agreement. (SC ACC. D. 6.12.1969, N. 1969/866, Decision N. 1970/5, Lexpera İçtihat-24.07.2019). For the details of the discussion and the results of the qualification difference see also: Yavuz Alangoya, Medeni Usul Hukukumuzda Tahkimin Niteliği, İstanbul, İstanbul Üniversitesi Yayınları, 1973, p. 52 vd.; Nevhis Deren Yıldırım, "Tahkim Ve Objektif Açıdan Tahkime Elverişlilik", Prof. Dr. Yavuz Alangoya İçin Armağan, İstanbul, Alkım Yayınları, 2007, p. 48 v.; Aydemir, p. 64). This discussion affects the legal nature of the arbitral awards. For example, if the parties have decided on the arbitration clause, the will of any of the parties shall not be subject to misrepresentation.

the capacity to make transactions apply to the arbitration agreement, regardless of the legal nature of the arbitration agreement.

Moreover, an arbitration agreement is a contract in the sense of the Law of Obligations. Therefore, all of the standard terms required of a contract must be included in the arbitration agreement[82]. The most related provisions of the Turkish Code of Obligations with the arbitration agreement, are standard terms provisions (TBK m. 20-25)[83]. Currently, most contracts are based on standard texts, regardless of their type (e.g. commercial or consumer)[84]. The validity of arbitration clauses in contracts depends on the party who did not prepare the text or is not specifically informed/warned about the arbitration clause. Otherwise, the arbitration clause is deemed as unwritten (*not to have legal force*)[85]. In fact, when typical arbitration conditions in contracts are examined, it can be seen that the balance between the parties is impaired by granting the right to take the dispute to arbitration to only one of the parties[86] (asymmetric

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82 For example, if the parties have decided on the arbitration clause, the will of any of the parties shall not be subject to misrepresentation (TCO Art. 31). Furthermore, the arbitration agreements, including the arbitration clause, are independent of the original contract. Therefore, the situation that causes the invalidity of the contract does not directly spread to the arbitration clause/contract. (Aydemir, p. 119). For example, the arbitration agreement is still valid if the performance of the sale contract is impossible. Therefore, the performance of the contract should be requested by arbitration and the effect of impossibility on the sales contract should be evaluated in the presence of the arbitrator/arbitrators.

83 If the contract with the arbitration clause is in the nature of a consumer transaction, unfair terms (CPC art. 4) supervision is also activated.

84 TCO art. 20/1 states that: "*Standard Terms are contractual stipulations which have been drafted solely by a party and submitted to the other party in advance of a contract is concluded so as to be used in many similar contracts subsequent. When classifying these terms, no regard should be made upon their scope, font type or shape or whether they are located in the text or annex of the contract*."

85 Which type of invalidity corresponds to the unwritten count is controversial in the doctrine. With reference to: (1) There is an opinion that argues that a contract which is deemed unwritten should be considered as non-existence (for this opinion see, Ahmet Kılıçoğlu, Türk Borçlar Hukuku, Genel Hükümler, Ankara, Turhan Kitapevi, 16. Bası, 2012, p. 117), (2) Another opinion argues that the relevant provisions of the Turkish Code of Obligation, in particular Art. 22's last sentence, the type of invalidity here should be nullity. (For this opinion see, M. Kemal Oğuzman, Turgut Öz, Borçlar Hukuku Genel Hükümler Cilt 1, İstanbul, Vedat Kitapçılık, 14. Bası, 2018, p. 166). (3) It is also argued that what is intended here is partial non-existence. (For this opinion see, Fikret Eren, Borçlar Hukuku Genel Hükümler, Ankara, Yetkin Yayınevi, 23. Bası, 2018, p. 221). (4) Another view considers the invalidity here as flexible invalidity. (For this opinion see, Gökhan Antalya, Borçlar Hukuku Genel Hükümler Cilt 1, İstanbul, Legal Yayıncılık, 2012, p. 106). However, the point that has been allied is that the arbitration clause in question cannot be raised against the person who is unaware of it.

86 Gary Born, "International Commercial Arbitration", Kluwer Law International, 2009, p. 732 (www.archive.org -27.08.2020).

arbitration agreement)[87]. In such cases, although there is information about the existence of the arbitration clause, assuming the clause as one of the standard terms of the contract, such clauses may be subject to *content-check* and therefore be null and void[88]. If the relevant arbitration clause in an asymmetric arbitration agreement and is not a standard contract term and it is drafted as a result of the parties' negotiation[89], then an assessment should be made of the characteristics of the concrete event, and the validity of the arbitration clause should be considered under these conditions.

C. Arbitrability Restrictions Arising from Mandatory Rules

Arbitrability can be the subject of codes other than the Code of Civil Procedure or the Code of International Arbitration. For example:

- ***TCO article 262*** states that: '*The buyer whose residential area is Turkey shall not waive the jurisdiction of the court in the settlement in case of any disputes arising from the sale contract in instalments to which he is a party, nor may he conclude an arbitration agreement'*.
- ***TCO Art. 263*** states that: "(1) *The provisions regarding the sale in instalments shall also apply to transactions carried out for the same*

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87 This is not the only way that an asymmetric or unilateral arbitration contract is concluded. While one of the parties is granted the right to apply only to an arbitration center, the arbitration agreement is asymmetrical in this way as this equality will be disrupted if the other is given an unlimited opportunity to apply to the arbitration center or to the court (Aydemir, p. 129, Ekşi, p. 83).

88 TCO Art. 25 states that: "*Standard terms cannot contain provisions, contra bonos mores, which are in the disadvantage and in the detriment of the other party*." The fact that only the parties who have drawn up the contract has this right disrupts the balance between the parties to the contract. As a matter of fact, the Court of Cassation has ruled in the same direction for the asymmetric arbitration clause in a consumer contract. (SC 13. CC., D. 25.9.2006, N. 2006/7789, Decision N. 2006/12275, Lexpera İçtihat- 28.08.2020). However, if the provision provides the right to apply only to the person to whom the addressee is subject to the standard terms, the arbitration clause shall be deemed to apply.

89 Asymmetric arbitration agreements should be considered within the framework of the principle of freedom of contract, unless there is a weak party, such as an employer or consumer. (Emre Esen, "Taraflardan Sadece Birine Tahkime Müracaat Hakkı Tanıyan Tahkim Anlaşmalarının ve Özellikle Kıyı Emniyeti Genel Müdürlüğü'nün Kurtarma Yardım Sözleşmesi'nde Yer Alan Tahkim Şartının Geçerliliği", İstanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi, Cilt: 9, Sayı: 2, Temmuz 2010, p. 153). However, it is probable that such provisions should be considered by the Court of Cassation that they do not express their certain will to resolve the dispute by arbitration. The Court of Cassation decides that the dispute cannot be solved by arbitration since the arbitration will is not explicitly and without doubt in the contracts where both the juristiction clause and the arbitration clause are included: (SC 15. CC., D. 13.4.2009, N. 2009/1438, Decision N. 2009/2153; SC 15. CC., D. 18.6.2007, N. 2007/2680, Decision N. 2007/4137, Lexpera İçtihat- 28.08.2020; See also Hakan Pekcanıtez, "Tahkim İlk İtirazı", Makaleler Cilt 2, İstanbul, On İki Levha Yayıncılık, 2016, p. 828).

economic purpose. (2) *In the case of lending contracts for the purpose of purchasing a carriage, the seller may transfer the sale price to the lender with or without the ownership of the property, or if the seller and the lender have agreed in another way, to ensure the delivery of the goods to the buyer to pay the sale price later in instalments, the provisions regarding sales in instalments shall be applied by mutanis mutandis.*" In this case, the loan agreements mentioned are also not arbitrable.

- ***TCCO Art. 1271/2***[90] states that: "*Arbitration agreements cannot be concluded in carriage of passengers by sea contract before the request for compensation arises*".

Therefore, such legal relations are no longer arbitrable because of the mandatory provisions of the law. The relevant provisions were those introduced to protect the weak side of the contract; and these provisions also indicate the legislator's approach to the issue of arbitration.

CONCLUSION

The results of this study can be summarized as follows:

1. Arbitration has a long history and an important place in Turkish law, but its main focus is on the international arena. For this reason, the procedure of resolving the disputes of the parties through an arbitrator as substitute jurisdiction has been subject to many national and international regulations.
2. The two most important codes for arbitration on behalf of Turkish law are the Code of Civil Procedure and the Code of International Arbitration.
3. The Code of Civil Procedure *is applied as a rule*[91] *when a dispute does not*

[90] The Article is based on the Athens Convention of 2002's Article 17, paragraph 3 and Article 18 as provided in its legislative intention. (*Athens Convention relating to the Carriage of Passengers and their Luggage by Sea*) Turkey is not a party to the Athens Convention, and later Turkey did not participate in this agreement. In this respect, the regulation of the Convention has no direct effect on Turkish law. However, since the referenced German Commercial Code was shaped on the basis of the provisions of the said contract, the principles stipulated in the contract also had an indirect impact on Turkish law.

[91] It should not be omitted that CCP Art. 424 also accurately clarified: "*The Parties may freely decide on the rules of procedure to be applied by the arbitrator or arbitral tribunal, without prejudice to the mandatory provisions of this section; or the parties may determine the arbitration procedure by referring to any arbitration rules. If there is no such agreement between the parties, the arbitrator or arbitral tribunal shall carry out the arbitral proceedings in a manner of the provisions takes places in this Section.*" In this case, for example, when the parties decide to apply the "*UNCITRAL Principles for ad-hoc Arbitrations*" in the arbitration agreement for arbitration proceedings, the proceedings should be conducted on the basis of these rules, provided that they are not contrary to the mandatory provisions of the CCP. Because the rules governing the arbitration (*lex arbitri*) and the rules of procedure to be applied to the arbitration proceedings are different. The law governing the arbitration procedure is determined on the basis of each country's own

contain foreign element in the sense defined by the Code of International Arbitration Law and when Turkey is determined as the place of arbitration. Code of International Arbitration is applied when the place of arbitration is Turkey, and the dispute comprises foreign element.

4. It is in the hands of the state to determine what kind of disputes are arbitrable, which is an alternative to state proceedings. Also, it is qualified as arbitrability in the legal literature.
5. Arbitrability, is one of the validity conditions for the merits of the arbitration agreement. Whether a dispute is eligible for arbitration (*arbitrable*) is of great importance for the validity of the arbitration agreement as well as for the recognition and enforcement of foreign arbitral awards.
6. Both Code of Civil Procedure and Code of International Arbitration explicitly regulated that the disputes concerning the real rights on immovable property in Turkey are not arbitrable. This is determined by considering whether the provision to be given at the end of the dispute creates a change in the ownership of the immovable property.
7. In addition to the disputes concerning the real rights on immovable property, the legislator explained the suitability of arbitration by introducing a customary criterion. This criterion is the parties' say on the subject of the dispute. In other words, the dispute shall be treated as be arbitrable only if they can save freely on the dispute. The determination of the boundaries of these provisions is made clear by practice and doctrine. Hence cases that are not subject to the will of the parties, such as divorce and paternity, are considered to be unsuitable for arbitration. In this context, arbitrability is limited to public order and the protection of the weak.
8. In most of its decisions, the Court of Cassation does not find the dispute arbitrable since the subject of the dispute is ***from the public order***. Public order is also a criterion for determining whether a dispute is arbitrable. However, it is noteworthy that the provisions governing the arbitrability exclude a criterion that the issue of conflict is from the public order. Therefore, the arbitrability should not be based solely on public order, and these two concepts, each with separate enforcement disabilities, should not be confused.

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regulations. The parties may determine the rules of procedure to which the arbitration proceedings shall be subject to the extent permitted by *lex arbitri* (check out the art. 424 of CPP for Turkish Law). See also: Murat Atalı, İbrahim Ermenek, Ersin Erdoğan, Medeni Usul Hukuku, Ankara, Yetkin Yayınları, 2018, p. 726). Moreover, if the parties have stated that the law of foreign countries (*substantive law*) will be applied to the basis of the dispute between them, this does not mean that the rules of this country's law will also be applied to the arbitration procedure. Unless otherwise is stated by the parties.

9. In addition, in cases where the legislator makes it clear that it is not suitable for arbitration, dispute cannot be resolved through arbitration (*such as TCO Art. 262*) It can be stated that the aim of such regulations is to protect the weak side.

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List of Abbrevations

A/art.	: Article
CCP	: Code of Civil Procedure
CIA	: Code of International Arbitration
CPC	: Code on Consumer Protection
D.	: Date
N.	: Number
p.	: Page
TCC	: Turkish Civil Code
TCO	: Turkish Code of Obligation
TCCO	: Turkish Commercial Code

DATA PROTECTION IN THE EUROPEAN UNION FRAMEWORK IN GENERAL AND IN CRIMINAL INVESTIGATIONS

The Balance between National Security and the Right to Privacy*

Avrupa Birliği Uygulamasında Genel Olarak ve Ceza Soruşturmaları Yönünden Kişisel Verilerin Korunması

Milli Güvenlik ve Mahremiyet Hakkı Dengesi

Judge Onur HELVACI**

Graduate Thesis Article

Abstract

This article has two aims: to elaborate the current data protection framework in the European Union, and to illustrate data protection framework in the criminal investigations, both with specific reference to the balance between the protection of the right to privacy and national security.

Accordingly, this article is divided into two main parts. The first part lays out the primary documents of current legislative framework, analyses the old model of EU data protection, and chronologically elaborates of court rulings, in order to produce a complete narrative of the development of data protection framework in the EU. Correspondingly, European Convention on Human Rights (ECHR), Charter of Fundamental Rights of the European Union (CFR), the Treaty on the Functioning of the European Union (TFEU) and the Treaty of Lisbon are primarily investigated. Secondly, Convention 108, Directive 95/46/EC, Council Framework Decision 2008/977/JHA and the invalidated Data Retention Directive are elaborated. Thirdly, European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) rulings and their role in the data protection model reform are chronologically explained.

Özet

Bu makalenin iki temel amacı vardır. Birincisi, Avrupa Birliği hukukunda kişisel verilerin korunmasıyla ilgili mevcut hukuki modeli incelemek; ikincisi de bu hukuki modelin cezai soruşturmalar ve kovuşturmalar üzerindeki etkilerini açıklamaktır. Her iki konu da mahremiyet hakkının korunması ile kamu güvenliği arasındaki denge gözetilerek incelenmiştir.

Bu doğrultuda, makale iki ana bölümden oluşmaktadır. Birinci bölümde, AB hukukunda kişisel verilerin korunmasına dair hukuki modelin gelişimiyle ilgili eksiksiz bir anlatı sunmak açısından sırasıyla kaynak metinler incenmiş, geçmişte yürürlükte olan model açıklanmış ve kronolojik bir yöntemle mahkeme kararlarının temel aldığı esaslar anlatılmıştır. Bu minvalde öncelikle, Avrupa İnsan Hakları Sözleşmesi (AİHS), Avrupa Birliği Temel Haklar Şartı, Avrupa Birliği'nin İşleyişi Hakkındaki Antlaşma ve Lizbon Antlaşması'nın ilgili kısımları incelenmiş, sonrasında, Avrupa İnsan Hakları Mahkemesi (AİHM) ve Avrupa Birliği Adalet Divanı (ABAD) kararlarının temel aldığı esasları belirlemek amacıyla geçmişte yürürlükte olan 108 No'lu Avrupa Konseyi Sözleşmesi (Kişisel Verilerin Otomatik İşleme Tabi Tutulması Karşısında Bireylerin Korunması Sözleşmesi), 95/46/EC sayılı AB Konseyi ve AB Parlamentosu Direktifi, 2008/977/JHA sayılı Konsey Çerçeve Kararı ve ABAD kararı ile geçersiz kılınan Veri Saklama Direktifi gibi ikincil belgeler ele alınmış, her iki mahkemenin (AİHM ve ABAD) kararları kronolojik olarak irdelenmiştir.

* This article has been prepared by making some changes from the thesis used in the LLM program at the Trinity College Dublin.

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The second part elaborates the implications of the new data protection system over the criminal and police matters. Further, data privacy against combatting crime and crime investigations are tackled in the international surveillance and security bodies through the topic of personal data exchange across borders and authorities such as Europol, Eurojust and others.

Finally, the article concludes that the EU has switched to a data protection system that focuses on the protection of personal privacy rights rather than national security rules as a result of the developing technology and the violations experienced in recent years.

Keywords General Data Protection Directive (GDPR), Law Enforcement Directive (LED), Data Retention Directive (DRD), Personal Data, Surveillance, Data Retention, Data Subject, Data Process, Data Protection, Right to Privacy.

İkinci bölümde ise, AB hukukunun mevcut kişisel verileri koruma modelinin, suçla mücadele ve ceza kovuşturmaları karşısında kişisel verilerin gizliliği ile Europol, Eurojust gibi sınır ötesi kişisel veri paylaşımı/değişimi yapan uluslararası gözetleme ve güvenlik kuruluşları üzerindeki etkisi ele alınmıştır.

Makalede, gelişen teknoloji ve son yıllarda yaşanan hak ihlalleri neticesinde, AB hukukunda kişisel verilerin gizliliği hakkını ulusal güvenlik meselelerine karşı daha fazla korumaya meyilli olan bir veri koruma sistemine geçildiği sonucuna varılmıştır.

Anahtar Kelimeler AB Genel Veri Koruma Tüzüğü, AB Polis ve Yargı Direktifi, AB Veri Saklama Direktifi, Kişisel Veri, Veri Gözetimi, Verilerin Saklanması, Veri Sahibi, Veri İşlemesi, Verilerin Korunması, Gizlilik (Mahremiyet) Hakkı.

INTRODUCTION

Increasingly widespread use of information and communication technologies (ICT) and transition to the post-industrial social order has facilitated the collection, storage, processing and distribution of personal data. Access, utilization and collection of data have been further enabled and expedited through social networks, cloud computing, big data analysis, location-based services and farther technological developments such as smart cards. Accordingly, many countries show efforts to harmonize their legal infrastructures in respect of data protection with current technological developments in the recent years, which eventually contributed to the emergence of protection of the personal data as a field of legal regulation both in the fields of private encounters and realm of criminal and police matters.

Yet, the data protection law in the European Union is, particularly after it had gone through a reform in the recent years, one that provides the highest protection to the personal data and yet aims at striking a balance between the protection of personal, thus the right to privacy and the legitimate use of personal data. One highly crucial area of utilization of personal data is the criminal and police matters. The authorities of the Member States, in their fight against serious crimes and terrorism, occasionally interfere with the fundamental right of right to privacy.

Comprehension of privacy, particularly in the face of wide scholarly debate, e.g. between Warren and Brandeis[1] until the 1890s and later innovative definitions by Inness[2], Solove[3], Marshall and Thomas[4] as examples, could render difficult since it substantially refers to a variety of rights or freedoms in the context of different legislation. While the variety of definitions in the academic literature are high in number[5], providing a more substantial analysis of a definitive margin, such as the EU, offers a higher possibility of understanding what right to privacy actually corresponds to in practice[6]. Protecting the privacy in the digital age should inevitably correspond to effective and efficient democratic governance as well as an essential recognition of awareness of the key concepts of right to privacy, and embedding them into data protection systems, in which legal safeguards should be fundamentally implemented.

1 Samuel D. Warren & Louis D. Brandeis, "The Right to Privacy" [1890] 4 HLR 193.
2 Julie C. Inness, *Privacy, Intimacy and Isolation* (OUP 1992) 2-7.
3 Daniel J. Solove. "Conceptualizing Privacy" 90 CLR [2002] 1087, 1088.
4 Daniel Marshall and Tim Thomas, *Privacy and Criminal Justice* (Palgrave Macmillan 2017) 4-5.
5 Wolf J. Schünemann and Max-Otto Baumann, "Introduction: Privacy, Data Protection and Cybersecurity in Europe" in Max-Otto Baumann and Wolf J. Schünemann (eds) *Privacy, Data Protection and Cybersecurity in Europe* (Springer 2017) 1, 2-3.
6 Paul Freund, "Address to the American Law Institute", in *Proceedings of 52nd Annual Meeting of the American Law Institute* (ALI 1975) 42-43.

In terms of the infrastructure and the construction of data protection, the Snowden case revealed that the "domestic and international legal frameworks failed to keep up with the technological advancements"[7] until then. In the EU, revelations together with the rulings of European courts showed that the data protection of the personal right to privacy was not sufficient in general, and the balance of state interference was not legitimized as it should have been. Further, the courts concluded that balance is not limited to monitoring and regulating the legal framework of data protection; but should also be a precious matter in criminal and police forces particularly in the fight against serious crime, cross-border crime and terrorism. Both crime investigation and crime prevention structurally infringe the right to privacy, and this infringement is enhanced through the technological developments. The comprehensiveness of data collection is directly in competition with the personal right to privacy, and thus a balance between the two interests become a crucial concept in the maintaining security of nations in balance with maintaining the security of the human rights.

The aim of this article is twofold. The first one is to elaborate on the current data protection framework in effect in the European Union, together with the narrative of its development in regard to both old legislative model and the chronological court rulings. The second aim of this article is to illustrate the impact of the new legislative framework of data protection over criminal investigations. Both aims are tailored with a specific focus of the balance between the protection of the right to privacy and national security. Overall, it aims at providing the reader with satisfying situational analysis of the current model of data protection applied in the EU, with a narrative of the stages and important turns both in the legislative documents and in the rulings as a determinant of today's model; and applications and possible implications of the new model on the criminal investigations, particularly in the fight of the EU Member States against serious crimes and terrorism.

Accordingly, the structure of this article is tailored in accordance with the two-fold aim, into two main sections.

The first section lays out the primary documents of current legislative framework, analyses the old model of EU data protection, and chronologically elaborates on court rulings in order to produce a complete narrative of the development of data protection framework in the EU, and to what extent this framework strikes a balance between right to privacy and matters of national security as two competing phenomena.

In this light, a list of primary documents in effect that establish the foundations of the right to privacy are firstly elaborated, particularly because

[7] Reema Shah, "Law Enforcement and Data Privacy: A Forward-Looking Approach" [2015] YLJ 543, 545.

the rest of the documents, both those that are invalidated and those that are currently in effect, have the origins and further are defined by them: European Convention of Human Rights (ECHR)[8], Charter of Fundamental Rights of the European Union (CFR)[9], Treaty on the Functioning of the European Union (TFEU)[10] and the Treaty of Lisbon[11]. Further, in this first section, the EU data protection model and the balance sought to be stricken before the General Data Protection Regulation (GDPR)[12] has been elaborated, drawing upon the main regulatory documents of data protection such as Data Protection Convention (Convention 108)[13], Directive 95/46/EC[14] of the European Parliament and of the Council, the Council Framework Decision 2008/977/JHA[15] that specifically regulates the data protection in criminal and police matters, and the Data Retention Directive[16]. However, it would be insufficient to fully comprehend the balance in practice between the Member States' interference and the personal right to protection, without elaborating on the rulings of the European Courts. Accordingly, the third chapter of the first section deals with the European Courts' trends and rulings on data protection and data retention in the areas of national security and criminal and police matters. With this concern, the third chapter aims at elaborating the court rulings. Thus, this part draws upon the crucial case laws that guided the development and thus the reform of the European model of both European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU) until the reform, particularly highlighting the problematic issues that leaded to the reform that

8 The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) [1950] CETS No. 005.

9 The Charter of Fundamental Rights of the European Union [2000] 2000/C 264/01.

10 Consolidated Version of the Treaty on the Functioning of the European Union [2007] OJ C 326.

11 Treaty of Lisbon [2009] OJ C 306.

12 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L/119.

13 Convention No.108 on data protection: Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data [1987] ETS No. 108.

14 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 [1995] OJ L 281.

15 Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters [2008] OJ L 350.

16 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L 105.

took effect in 2018. Consequently, this chapter, as a natural result of the course, lays down the foundational documents that regulate the data protection in the EU: the GDPR and Directive 2016/680 of the European Parliament and the Council (LED)[17].

The second section of the article aims at elaborating the impact of the current data protection regime of the EU on the criminal investigations and processes. In accordance, firstly, two main documents that are in direct relation with criminal investigations are analysed: GDPR and Directive 2016/680 (LED). The GDPR is elaborated particularly as regards to the manner it refers to the LED in criminal and police matters, and thus in the second section, the LED is elaborated in detail in reference to its scope, principles, provisions of rights of the data subject and the DPAs. While a case law or a ruling of neither the ECtHR nor the CJEU exist that directly refer in their ruling to the GDPR or the LED, possible problems that could impede the original aims of the commissions to draft both the GDPR and the LED are explained in the final part of the third chapter. Finally, data privacy in the EU model against combatting crime and crime investigations in international surveillance and security bodies, such as exchange of personal data by police across borders, protection of data in police matters of Europol and the European supervision on national procedures are elaborated.

I. THE EUROPEAN UNION LAW ON DATA PROTECTION FRAMEWORK: PRIMARY DOCUMENTS AND THE DEVELOPMENT UNTIL GDPR

1. PRIMARY DOCUMENTS IN DATA PROTECTION IN EUROPEAN LEGAL FRAMEWORK

This chapter lays out the primary foundational documents in data protection in the European model, which establishes the basis of further regulations and directives. European Convention of Human Rights and Charter of Fundamental Rights of the European Union, together with the Treaty on the Functioning of the European Union and Treaty of Lisbon are the primary and main documents that define the right to privacy and right to data privacy.

1.1.European Convention on Human Rights (ECHR)

Article 8 of ECHR guarantees the right to personal data protection and the respect for private life, family life, home and correspondence, laying down

[17] Directive (EU) 2016/680 of the European Parliament and of the council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] OJ L 119.

the conditions under which restrictions of this right are permitted.[18] Yet, European Court of Human Rights (ECtHR) complemented the legislation with its ruling, to interpret data protection broadly to include any interception of communications, various forms of surveillance, and storage of personal data by public bodies. While respect for private life and the right to privacy was not listed as a fundamental right in ECHR, it was ECtHR's primary motivation to find a balance between the interference to the right.

1.2.Charter of Fundamental Rights of the European Union (CFR)

The CFR was drafted and signed in 2000. In 2009, through the Treaty of Lisbon, it was made into a binding document for all the ratified parties. It regulates personal data protection system, in accordance with the Treaty of Lisbon, as a fundamental right.

CFR is particularly crucial due to the proportionality principles it establishes in accordance with the conception of the Treaty of Lisbon.[19] These principles are of high importance due to the methodology to be followed in striking a balance between data protection and other interests. Instead of introducing new, CFR puts emphasis on rights that already exist.[20] In that sense, it strengthens ECHR and ECtHR ruling.

1.3.Treaty on the Functioning of the European Union (TFEU)

Article 16 of TFEU[21], with amendments through the Treaty of Lisbon, provides the legal basis and the rules on personal data for data processing under EU law, making the right to privacy a fundamental right.

1.4.Treaty of Lisbon

Lisbon Treaty shapes the right to privacy in the EU today. Coming into force in 2009, it aims at modifying the EU's architecture for the protection of fundamental rights in a general prospect. Amending TEU[22] and TFEU, the

18 European Convention of Human Rights (n 8) Art. 8(1)(2).

19 Treaty of Lisbon (n 11) Art. 52(1).

20 EU Declaration No 1 concerning the Charter of Fundamental Rights of the European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon [2017].

21 Article 16 reads as such: "(1) Everyone has the right to the protection of personal data concerning them. (2) The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices, and agencies, and by the Member States when carrying out activities which fall within the scope of Union Law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities. The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union."

22 Treaty of European Union, Consolidated version [2012] OJ C 326.

Treaty ascribed CFR the same legal value as the treaties. Again, the Treaty deconstructs the pillar system previously effective, in which security and justice regarding the legislation of data protection and right to privacy were divided between pillars. In the amendments introduced by the Treaty, the pillar system was replaced by a stronger basis for the development of a clearer and more effective data protection system that aims at unifying the implementation and application in the Member States.

2. DATA PROTECTION AND NATIONAL SECURITY BEFORE THE GDPR

Before GDPR was introduced, the main documents for data protection in the EU were the Convention 108, Directive 95/46/EC, Council Framework Decision 2008/977/JHA and Data Retention Directive. This chapter lays out the fundamental points of the documents, indicating the importance of each.

2.1.Convention 108

Convention 108[23] aimed at strengthening data protection while on one hand addressed to the requirements of new legal rules in the face of increasing technological developments, and on the other guided the Member States to implement the principles to national laws.[24] Convention 108 is not in the jurisdictional authority of the ECtHR, yet in cases such as *Amman v. Switzerland*[25] and *Rotaru v. Romania*[26], ECtHR touched upon the processes that Convention 108 has foreseen, through the Article 8 of ECHR that specifies right to privacy and data protection. *Schrems*[27], *Zakharov*[28] and *Szabo*[29] cases demonstrated the necessity of renewing and modernizing the Convention 108. Modernized Convention 108 took effect in 2018. Convention 108 has been brought before ECtHR by the European citizens for action, thus ECtHR enforced Convention 108 indirectly. To complement the Convention 108, Police Data Recommendation[30] was adopted in 1987 for setting up the guidelines of implementation and application. Due to the Convention 108 and its guideline, the data retention is strictly limited with the legitimate and proportional purpose of collection, while its transfer was also strictly tied to the fact that there was a legitimate interest for the exchange.

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23 Convention 108 (n 13).

24 Explanatory Report to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg [1981] ETS 108.

25 *Amann v. Switzerland* App no 27798/95 (ECtHR, 16 February 2000).

26 *Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000).

27 C-362/14, *Maximillian Schrems v. Data Protection Commissioner* [GC] [2015] ECLI:EU:C:2015:650.

28 *Roman Zakharov v. Russia* App No 47143/06 (ECtHR 22 October 2009).

29 *Szabó and Vissy v. Hungary* App No 37138/14 (ECtHR, 12 January 2016).

30 CoE Police Data Recommendation No. R (87) 15 [1987].

2.2.Directive 95/46/EC

Data Protection Directive 95/46/EC[31], effective between 1995 and 2018, offered a globally recognized data protection framework for protecting the right to privacy in accordance with technological developments. The intention of the Directive was to protect the individual right to privacy and free movement of personal data.[32] Originally it was an outcome of collective efforts given in the Member States independently. Several member states at the time of declaration of the Directive, have already adopted national data protection laws to serve for their domestic requirements.[33]

Yet, the Directive was proved to have weak points.[34] Difficulties that showed in time in national implementations indicated that the harmonization that the Directive aimed was insufficient. The uneven implementation of enforcement across the Member States both for punishment and for affecting behaviours varied, bringing upon an unclear rationale for enforcement as an outcome.[35]

The link between the concept of personal data and real risks that this data faced were unclear, and the scope did not leave room for data that stand in between personal and other information. One Opinion[36] provided a clearer definition of what personal data should be, through a description of relation to an individual in regard to content, purpose or result, criticizing the Directive.

2.3.Council Framework Decision 2008/977/JHA

Directive 95/46/EC did not apply to the area of police and judicial cooperation in criminal matters or any matter outside of the internal market.[37] EU adopted the Council Framework Decision 2008/977/JHA[38] to protect the individual data in the processes of police and judicial cooperation in criminal matters. While it is a separate document, its articles reiterated the principles

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31 Data Protection Directive (n 14).

32 Christopher Kuner, "An International Legal Framework for Data Protection: Issues and Prospects" [2009] 25 CLSR 313, 315.

33 The German state of Hesse adopted the world's first data protection law in 1970, which only applied to that state. Sweden adopted the Datalagen in 1973; Germany adopted the Bundesdatenschutzgestez in 1976; and France adopted the Loi relatif à l'informatique, aux fichiers et aux libertés in 1977. In the United Kingdom, the Data Protection Act was adopted in 1984. Finally, the Netherlands adopted the Wet Persoonregistraties in 1989.

34 Federico Fabrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (OUP 2014).

35 Douwe Korff, "EC Study on Implementation of Data Protection Directive 95/46/EC (2002)", <http://dx.doi.org/10.2139/ssrn.1287667> accessed on 15 May 2019.

36 Art. 29 WP Opinion No 4/2007 on the concept of personal data (WP136 – 01248/07/EN) <https://www.clinicalstudydatarequest.com/Documents/Privacy-European-guidance.pdf> accessed on 20 May 2019.

37 *See* Article 3(2) of the Directive (n 14).

38 Council Framework Decision (n 15).

established in the Convention 108 as well as the Directive 95/46/EC, aiming at ensuring the data protection in the cross-border cooperation between the officially authorized bodies involved in the criminal processes, and at ensuring the balance between national security and the individual data protection.

2.4.Data Retention Directive

The Directive 2002/58,[39] aiming at the deletion of metadata that were no longer required for billing purposes unless the subscriber agreed to its retention, entered into force primarily as a legal response to the 9/11 terrorist attacks in 2001.[40] Yet, it became even a more heightened issue of debate, particularly after the bombings of Madrid in 2004. The debates were again fired by London underground attacks on 2005.[41] The public opinion strengthened on the argument that more surveillance was necessary in the European territory to protect against acts of political violence.

Data Retention Directive,[42] the direct political and legal result of the debates of the preceding five years, was adopted in 2006 aiming harmonization of national requirements for the mandatory retention of communications data. While it was not explicitly a document aimed at regulating the police and criminal jurisdiction processes, its purpose was to ensure the data's availability between 6 months to 2 years for the investigation and prosecution of serious crime. Still, its preamble referred to the authorities of law enforcement. In short, the purpose of this directive was to regulate the bulk collection and storage of digital communications, which is called the metadata, through cyber mass surveillance systems.[43]

The Directive, while stating that *"[s]everal Member States have adopted legislation providing for the retention of data by service providers for the*

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39 European Parliament, 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 [2002] OJ L 201.

40 Lukas Feiler, "The Legality of Data Retention Directive in Light of the Fundamental Rights to Privacy and Data Protection", [2010] 1 EJLT 18, 22.

41 Elspeth Guild and Sergio Carrera, "The Political and Judicial Life of Metadata: Digital Rights Ireland and the Trail of the Data Retention Directive", [2014] CEPS Paper in Liberty and Security in Europe, 2-3.

42 Data Retention Directive (n 16).

43 Privacy International, 'Metadata' 23 October 2017 <https://www.privacyinternational.org/node/53> accessed on 10 May 2019. Metadata is information about the communication and includes, inter alia, the location that the communication derived from, the device that sent it, the time it was sent and information about the recipient. Yet, doctrine often use notions of "lawful interception" and "surveillance" exchangeably, stating that the lawful interception of metadata is a targeted surveillance required by law enforcement authorities and should not be considered as mass surveillance. *See* Stefan Schuster (ed.), *Mass Surveillance: Part 1 - Risks and opportunities raised by the current generation of network services and applications* (STOA Report European Parliamentary Research Service, Brussels, 2015), 8.

prevention, investigation, detection, and prosecution of criminal offences. Those national provisions vary considerably..."[44] still left wide discretion to Member States in defining the conditions that justified access to the retained data. Further, the definition of "serious crime" in regard to its investigation, detection and prosecution was left, through the general formula of Article 1, to the discretion of the Member States, thus have been the origin of numerous constitutional challenges particularly in Romania,[45] the Czech Republic,[46] and Germany.[47] Through the landmark judgment of the Court of Justice of the European Union (CJEU), the Data Retention Directive was invalidated on 8 April 2014.[48]

3. EUROPEAN COURTS' TRENDS AND RULINGS ON DATA PROTECTION AND DATA RETENTION IN NATIONAL SECURITY, CRIMINAL AND POLICE MATTERS BEFORE THE GDPR

ECtHR and CJEU cases shaped the EU model for the balance between national security and right to privacy. Both the CJEU's and ECtHR's rulings contributed to the strengthening of personal protection of right to privacy, and to the balance, particularly after the Snowden's revelations and the NSA scandal. This chapter, while providing an analysis of the rulings of both Courts, lays out the framework and the chronological shift of both of them from either a neutral balance between the right to privacy and the national security issues, or holding natural security slightly over the right to privacy, to tilting the balance towards a system where personal fundamental right to privacy is protected more.

3.1. ECtHR

While ECHR does not regulate the right to data protection, it regulates its twin right, the right to privacy. Convention 108[49] principally could not be brought in front of ECtHR directly, yet ECtHR traditionally used Convention 108 and CoE Police Data Recommendation[50] in its rulings.

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44 Data Retention Directive (n 16), Recital 5.

45 Curtea Constitutional˜a [Constitutional Court] decision No. 1258, Oct. 8, 2009 (Romania) (holding that the national law implementing the Data Retention Directive violates constitutional and ECHR data protection principles).

46 N´alez ´ Ustavn´Iho soudu ze dne 22.5.2011, (U´ S) [Decision of the Constitutional Court of March 22, 2011], Pl. U´ S 24/10 (Czech) (holding the national law implementing the Data Retention Directive unconstitutional).

47 Bundesverfassungsgericht [BVerfG] (Constitutional Court) Mar. 2, 2010, 125 BVerfGE 261 (Ger.).

48 CJEU, Joined Cases C-293/12 and C-594/12 Digital Rights Ireland and Seitlinger and Others.

49 Convention 108 (n 13).

50 Police Data Recommendation (n 30).

The first landmark decision that dealt with the balance was *Klass and Others v Germany* in 1978.[51] Applicants complained that German Law violated their right to privacy through allowing for surveillance of personal mails, post and telecommunication without notification. ECtHR was obliged to provide a balance between issues of national security and individual right to privacy, after agreeing agreed that the surveillance interfered with the rights of the applicant. The Court did not find any violation of Article 8 since the governmental interference was justified through the interests of national security and for the prevention of disorder or crime. Still, for the sake of the balance, the Court explicated that a balance between the measures for countering terrorism must be present, to avoid possible abuses.

In *Leander v. Sweden*[52] case in 1987, Mr. Leander was refused entrance in the security check to an official building due to the background check. Mr. Leander complained to the Court that such data storage without any notification infringes his right to privacy. Yet, the Court found that the interference and the data storage by the government in order to prevent serious crimes and protect national security was justified. The Court elaborated that security checks through stored background data was legitimized and proportionate since the building subject to the security check consisted elements of national security. In both decisions, the Court emphasized the fact that national legislation is obliged to provide safeguards against governmental abuse of infringing individual right to privacy; and found that in both cases the safeguards are tools of balance. The Court, again, reiterated this approach in *Uzun v. Germany*[53] case. Accordingly, ECtHR demonstrated a standard pattern in holding national security higher than the data privacy in the paradigm of the balance between the two interests.[54]

The Court's standard pattern also reiterated that safeguards and balance are important in the interference: governmental interference should be immune to the abuse of the right to privacy. Thus, ECtHR required efficient safeguarding strategies against abuse, obligating the national law systems to provide adequate protection against arbitrary interference with Article 8. Such as in *Amann v Switzerland*[55] case, the Court emphasized that the balance between the governmental interference to the right to privacy should assess the measure's nature, scope, duration, the grounds required for ordering the surveillance

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51 *Klass and Others v. Germany* App No 5029/71 (ECtHR, 6 September 1978).

52 *Leander vs. Sweden* App No 9248/81 (ECtHR, 26 March 1987).

53 *Uzun v Germany* App No 25623/05 (ECtHR, 2 September 2010).

54 Jennifer Chandler, 'Privacy Versus National Security: Clarifying the Trade-Off,' in Ian Kerr, Carole Lucock and Valerie Stevens, (eds.) *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford University Press, 2009), 131-138.

55 *Amnan v. Switzerland* (n 25).

measure, the authorization of the body that ordered the measure and the type of the remedies that the law provides in the case of disproportionate restriction. Further, in *Amann v Switzerland*, the Court pointed out that interference should be "in accordance with the rule of law". It reiterated the condition of the restriction of being in accordance with the law in *Rotaru v Romania.*[56] Again, in *Liberty and Others v the United Kingdom*[57], the Court decided on a violation of Article 8, emphasizing that UK was insufficient in its articulation of adequate protection against abuse of power, the scope or manner of exercise of the very wide discretion conferred on the authorities to intercept and examine external communications. In particular, the UK law, due to the Court, did not establish an accessible and foreseeable indication of the procedure to be followed for selection of examination, sharing, storing and destroying intercepted material.

Two other conditions of balance appear further. The limitation of the right to privacy should be "strictly necessary or safeguarding democratic institutions"[58] to avoid providing an "unfettered power" [59] to the national law, even if the balancing measures were left to the discretion of Member States. Further, the restriction should strictly originate from a legitimate aim. In sum, the tradition and of the ECtHR in finding justification in the interference with the right to privacy depends on; the interference to be (1) in accordance with the law[60], (2) pursuing a legitimate aim[61] and (3) necessary in a democratic society[62].

Yet, the Court required a proportionality test to check if the Member State complied with the requirements of legitimate interference. The proportionality test involved adjudicating on normative issues to find the existence of a proper relation between the benefit gained by the realisation of the State's aim through interference with the right, and the harm caused to the applicants entitled to enjoy the right to privacy. In *Leander v Sweden*[63], the Court provides the methodology of the proportionality test, together with the concept of Margin of Appreciation[64]. The first step in the proportionality test is to define the margin

56 *Rotaru v Romania* (n 26) para 48.

57 *Liberty and Others v United Kingdom* App no 58243/00 (ECtHR, 1 July 2008).

58 *Kennedy v The United Kingdom* App No 26839 05 (ECtHR, 10 May 2010), para. 58.

59 *Iordachi and Others v Moldova*, App No 25198//02, (ECtHR, 10 February 2009).

60 Relevant cases: *Rotaru v. Romania* (n 27); *Taylor-Sabori v. The United Kingdom* App No. 47114/99, (ECtHR, 22 October 2002); *Vukota-Bojić v. Switzerland* App No. 61838/10 (ECtHR, 18 October 2016). *See also:* ECtHR, Association for European Integration and Human Rights and *Ekimdzhiev v. Bulgaria*, No. 62540/00 (ECtHR, 28 June 2007); *Shimovolos v. Russia*, App No. 30194/09 (ECtHR, 21 June 2011).

61 *See also Peck v. the United Kingdom*, No. 44647/98 (ECtHR, 28 January 2003).

62 *Khelili v. Switzerland,* No. 16188/07 (ECtHR, 18 October 2011); *S. and Marper v. the United Kingdom* [GC], App Nos 30562/04 and 30566/04 (ECtHR, 4 December 2008) and Leander v. Sweden (n 52).

63 *Leander v Sweden* (n 52).

64 Margin of Appreciation refers to a latitude of deference or error which the Strasbourg

of appreciation of the Member State, and ECtHR defines it as wide due to the fact that the Member State was considered to be best entitled to examine the needs for its own national security. The same approach was evident in *Weber and Saravia v. Germany,* in which the Court did not find a violation of Article 8 due to its reception of a wide margin of appreciation.[65] In the decision, the Court referred to six minimum safeguards that originate from proportionality, foreseeability and accessibility: (1) the nature of the offences which may give rise to an interception order; (2) a definition of the categories of people liable to have their telephones tapped; (3) a limit on the duration of telephone tapping; (4) the procedure to be followed for examining, using and storing the data obtained; (5) the circumstances in which recording may or must be erased or the tapes destroyed; and (6) the precautions to be taken when communicating the data to other parties.

The proportionality test that requires Member States to comply with foreseeability and accessibility as the safeguards were evident in a variety of cases such as *Liberty and Others v the UK*[66]and *Zakharov v. Russia*.[67] Yet, the *Zakharov* verdict further introduced three additional factors in the secret surveillance governmental measures for national security purposes: the arrangements for supervising the implementation of secret surveillance measures, notification mechanisms and the remedies provided for by national law. The methodology of the proportionality test, the wide interpretation of the margin of appreciation of the Member States are reiterated in cases such as *Centrum för Rattvisa v. Sweden*[68] *and Kennedy v. the United Kingdom*.[69]

The most recent verdict of the Court on the proportionality and balance is the benchmark case of *Big Brother Watch and Others v the United Kingdom.*[70] As Milanovic states, it was a "victory for the fundamental right to privacy and freedom of expression over surveillance."[71] The applications to the court, in the *Big Brother* case, were filed after the revelations by Edward Snowden, the former contractor with the US National Security Agency, about programmes

organs will allow to national legislative, executive, administrative and judicial bodies." *See* H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff Dodrecht 1996) 13-15.

65 *Weber and Saravia v. Germany*, Application no 54934/00 (ECtHR, 29 June 2006).

66 *Liberty and Others v. United Kingdom* (n 57).

67 *Zakharov v. Russia* (n 28).

68 *Centrum för Rattvisa v. Sweden,* Application no. 35252/08 (ECtHR, 19 June 2018).

69 *Kennedy v the United Kingdom* (n 58).

70 *Big Brother Watch and Others v. The United Kingdom*. Application No 58170/13 (ECtHR, 13 September 2018).

71 Marko Milanovic, "ECtHR Judgement in Big Brother Watch v. UK", EJIL: Talk! September 17, 2018, <https://www.ejiltalk.org/ecthr-judgment-in-big-brother-watch-v-uk/> accessed on 28 May 2019.

of surveillance and intelligence sharing between the USA and the UK. The applications were concerned with the journalists' complaints, centred upon three types of surveillance: the bulk interception of communications, intelligence sharing with foreign governments and the obtaining of communications data from service providers. The Court's decision addressed the proportionality of bulk interception programmes in a more elaborated manner in comparison to e.g. *Centrum för Rättvisa v. Sweden*.[72] The Court decided that the bulk interception regime violated Article 8 due to its lack of clarity and foreseeability that disabled the adequate safeguards. Yet, it did not find any violation in sharing intelligence of both Article 8 and Article 10, because the domestic procedure for challenging secret surveillance measures was foreseeable, accessible and thus safeguards adequate.

As a conclusion, a couple of analyses can be made. First of all, ECtHR seems to have interpreted the notion of private life very broadly that it involved aspects of professional and public behaviour of surveillance. In that sense, it was the Court's tradition to seek for striking a balance and reconciliation with other legitimate interests and rights[73] in governmental intervention to the right to privacy, even if it is not listed as a fundamental right in Article 8. Secondly, the ECtHR consistently held that storing and retention of personal data by public authorities structurally was an interference with Article 8; and thus, in every interference the proportionality test must be complied with.[74]

A crucial issue in the context of electronic communications has always been for the ECtHR the interference by public authorities with the rights to privacy and data protection, including methods of surveillance or interception of communications, listening or tapping devices. As stated in *Allan v. the United Kingdom*[75]*, Roman Zakharov v. Russia*[76] and *Szabo and Vissy v. Hungary*[77] cases, mass surveillance by the public authorities and law enforcement bodies can be justified and permissible only if the measures are necessary in a democratic society in the interests of protection of national security, public safety, monetary interests of the state, the suppression of criminal offences and protection of data subject or the rights and freedoms of others.

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72 *Centrum för Rattvisa v Sweden* (n 68).

73 European Union Agency for Fundamental Rights and CoE, Handbook on European Data Protection Law 2018, (FRA 2018), 37-42.

74 *See Leander v. Sweden* (n 52); *M.M. v. the United Kingdom*, App No. 24029/07 (ECtHR, 13 November 2012); *M.K. v. France,* App No. 19522/09 (ECtHR, 18 April 2013); *Aycaguer v. France*, No. 8806/12 (ECtHR, 22 June 2017); *B.B. v. France*, No. 5335/06 (ECtHR, 17 December 2009); and *S. and Marper v. the United Kingdom* (n 62).

75 *Allen v. The United Kingdom*, Application no. 25424/09 (ECtHR, 12 July 2013).

76 *Roman Zakharov v. Russia* (n 28).

77 *Szabo and Vissy v. Hungary* (n 29).

3.2.CJEU

The CJEU's jurisdiction in the field of data protection aims at determining whether or not a Member State has fully complied with its obligations under EU data protection law, together with interpreting EU legislation to ensure it is applied in all Member States in a unified manner efficiently and effectively. Even after the adoption of GDPR, the case law remains relevant in regard to striking a balance between the limitation of the right to privacy and the individual right to privacy.

There are three periods of CJEU regarding its attitude to ensuring a balance between data protection and national security issues. The periods could be classified by the CJEU's utilization of CFR as a reference document together with ECHR.

3.2.1.CJEU until 2000

Until 2000, the CJEU decisions were in full compliance with the ECtHR's trends of recognizing the Member States' constitutional traditions on the limitation of the rights. In this era, the existence of EU's secondary law on data protection provided the entry point for the Court's legal reasoning.[78] The Court primarily aimed at protecting the fundamental rights and freedoms of natural persons and in case of need, and providing balance between "free movement of personal data and the protection of private life."[79] In other words, the early years of the CJEU favoured the free movement of personal data over any other intervention, and took the best possible precautionary measures to limit the restriction of the right to privacy.[80]

3.2.2.CJEU between 2000 and 2009

In the period between 2000 and 2009, the CFR of Fundamental Rights was not yet binding; however, the Court furthered its attempt to protect the rights to privacy by balancing data protection and legitimate purposes of intervention. Within the time, the Court invoked the ECHR and the CFR in parallel. An example of the CJEU's approach of holding both ECHR and CFR together could be seen in *Promusicae v Telefónica de Espana SAU*.[81] It was the first

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78 Kristina Irion, "A Special Regard: The Court of Justice and the Fundamental Rights to Privacy and Data Protection," in Faber et al (eds) *Festschrift für Wolfhard Kohte* (Baden-Baden: Nomos, 2016), 871, 879.

79 Joined cases C-465/00, C-138/01 and C-139/01 (*Rechnungshof v Österreichischer Rundfunk and Others and Christa Neukomm and Joseph Lauermann v Österreichischer Rundfunk*) [2003] E.C.R. I-04989, para. 70.

80 González Fuster, "Beyond the GDPR, above the GDPR", [2015] IPR <http://policyreview.info/articles/news/beyond-gdpr-above-gdpr/385> accessed on 28 May 2019.

81 CJEU, C-275/06, *Promusicae v Telefónica de Espana SAU* [20018] ECR-I- I-00271. In para. 32 it writes: "Data protection is based on the fundamental right to private life, as it

time that CJEU referred to CFR. Promusicae was a non-profit organization inholding producers and publishers of musical and audio-visual recordings, who filed a claim to the ECJ to order the internet service provider Telefonica to reveal personal data about its users, on the claim that the users were illegally accessing the IP-protected work of Promusicae clients without permission. In the process of identification of the fundamental right allegedly being infringed, with reference to the CFR. At the end, the CJEU found that "the Directives do not require Member States to impose such obligations for the purpose of initiating civil proceedings for the protection of IP rights, and that, when interpreting these Directives, Member states must strike a fair balance between the rights at issue and must take care to apply general principles of proportionality".[82]

Yet, after the adoption of the CFR by the EU, which shifted the union from a unitary system of recognition of applicable fundamental rights to a structurally binary one, the CJEU's decisions diverged from those of ECtHR, particularly due to the fact that the CFR and the ECHR did not have identical provisions on the rights to privacy and the balance in limiting them; and the CFR introduced new rights to the EU's fundamental rights system.[83]

Further, there has always been a legal ambiguity considering the balance between the national criminal and investigative authorities' right to limitation of the individual right to privacy, which originally fell under the scope of the Council Framework Decision 2008/977/JHA,[84] but has never been referred to by the CJEU. While after the terrorist attacks of 2001 of 9/11 the Court's attitude changed its course to protecting national security more in the face of right to privacy and data protection, the CJEU ruling still staying in line with the pro-European case law of ECtHR.[85]

In other cases, in both in 2009 and before 2009, CJEU did not necessarily always refer to the CFR. For example, while mentioning the CFR briefly in the

results in particular from Article 8 of the [ECHR]. The [CFR] confirmed that fundamental right in Article 7, and in Article 8 specifically emphasised the fundamental right to the protection of personal data, including important fundamental principles of data protection".

82 Global Freedom of Expression Team of Columbia University, "Promusicae v Telefónica de Espana SAU, Case C-275/06", <https://globalfreedomofexpression.columbia.edu/cases/ecj-promusicae-v-telefonica-de-espana-sau-case-c%E2%80%9127506/> accessed on 10 May 2019.

83 Gabriel G. Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU*. (Springer 2014), 213.

84 Council Framework Decision (n 15).

85 Hartmut Aden, "The Evolving Role of Courts for the European Multi-Level Security Setting," *Paper for the European Union Studies ASsociation (EUSA) Fourteenth Biennial Conference*, Boston, 4-7 March 2015, 9.

Satamedia[86] case only for recognition, in the *Rijkeboer*[87] case, the ECJ did not even mention the CFR at all but only referred to Directive 95/46.[88]

3.2.3.CJEU after 2009

Starting from 2009, the CFR became legally binding in EU; thus, CJEU started using Article 8 of the CFR instead of a solely applying Article 8 of the ECHR. In other words, as of particularly 2010, the Court started grounding its legal arguments directly on the CFR.[89] As demonstrated by the CJEU in the *Schecke and Eifert* case[90], the Court from the start willingly shifted to the CFR from the ECHR Article 8. It was in the *Scarlet*[91] case that the CJEU effectively started using the CFR as its main document of reference. Further, Directive 95/46 together with the e-Privacy Directive[92] was used as supplementing material in *Deutshce Telekom*[93]. Finally in 2012 in the *Commission v Austria*[94] case CJEU made its verdict dominantly in reference to CFR.

Similar to ECtHR, CJEU sought for balance strictly in the interference. Primarily, the interference must be elaborated in the best possible manner in the law for the sake of the principle of foreseeability and the principle of restricting on legal basis. The limitations and the explanations in the law should be articulated in the best and clearest manner possible in order to provide the data subjects with sufficient precision about the individuals' obligations. Further, the scope and manner of the interference exercise of the governmentally authorised power should be made as clear as possible to avoid arbitrary interference and as ECtHR says, "unfettered power" abuse. In a variety of cases[95], the CJEU has decided that the limitations should be provided by law, and this condition is a strict element of the proportionality principle.

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86 C-73/07, *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy Satamedia Oy*, [2008] ECR-I-09831.

87 C-553/07, *College van burgemeester en wethouders van Rotterdam v M. E. E. Rijkeboer*, [2009] ECR-I- I-03889.

88 Directive 95/46/EC (n 14).

89 Joined cases C-92/09 and C-93/09 (*Volker und Markus Schecke GbR, Hartmut Eifert v Land Hessen*) [2010] E.C.R. I-11063.

90 Ibid.

91 C-70/10, *Scarlet* Extended SA v. Société belge des auteurs compositeurs et éditeurs (SABAM) [2011] OJ C 25.

92 Directive 2002/58/EC (n 39).

93 C-543/09, *Deutsche Telekom* AG v Bundesrepublik Deutschland [2011] ER-I-03441.

94 C-147/03, Commission of the European Communities v Republic of Austria [2005] ER-I-05969.

95 For relevant cases, *see*: Joined cases C-203/15 and C-698/15, *Tele2 Sverige AB v. Post-och telestyrelsen and Secretary of State for the Home Department v. Tom Watson, Peter Brice, Geoffrey Lewis, Opinion of Advocate General Saugmandsgaard [2016] ECLI: EU:C:2011:255*; C-70/10, *Scarlet* (n 91) Opinion of Advocate General Cruz Villalón.

Diverging from the ECHR and ECtHR system, for CJEU proportionality principle's requirements are not met only by providing the scope, manner and matter of the restriction in the law. The limitations should further respect the essence of the right in order to be in full compliance with the proportionality principle. The *Schrems* case[96] constitutes a good example of the requirement of respecting the essence of the right. The case was on the protection of individual right to privacy within the scheme of transfer of the personal data to third countries, particularly the United States. Maxmillan Schrems, an Austrian citizen, complained about the transfer of his data on Facebook from the Irish subsidiary of Facebook to the servers present in the US, which he claimed that the US servers did not have sufficient personal data protection, particularly after the Snowden revelations about the possibility of accessing huge amounts of content that are withheld in the internet service provider firms such as Facebook. The CJEU, finding violation of the right to privacy, decided that the transfer of the personal data to a third country was not a matter of necessity, thus did not meet the standards of proportionality because it did not respect the essence of the right while interfering. Transfer of the data to the third country, in this case, the US was legitimized through a Safe Harbour agreement that has been adopted in 2000. Thus the CJEU, finding a violation of the essence of the right to privacy, examined the validity of the Commission decision in light of the CFR, concluding that "the right would be rendered meaningless if the US public authorities were authorized to access communications on a casual basis, without any objective justification based on concrete considerations of national security or crime prevention that are specific individual concerned, and without those surveillance practices being accompanied by appropriate safeguards against abuse of power."[97]

Schrems was not a landmark decision by the CJEU only because it invalidated the Safe Harbour agreement[98] on the fact that it did not respect the essence of the right to privacy or that it did not render proportionality through clarification of the process or through provision of adequate safeguards, but also because of the another factor that CJEU introduced to the concept of proportionality: "legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data". This fact, opined CJEU, was in direct opposition to the essence of the fundamental right and the obligation of the Member States to provide effective judicial protection.

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96 C-362/14, *Maximillian Schrems* (n 27).

97 Handbook (n 73), 44.

98 2000/520/EC: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the council on the adequacy of the protection provided by the safe Harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C [2000] 2441OJ L 215.

Another landmark decision that changed the scope of the data protection systems in the EU legal order was *Digital Rights Ireland*[99]. In the case, the Irish High Court and the Austrian Constitutional Court *(Verfassungsgerichthof)* filed before the CJEU to examine the legality of EU Data Retention Directive[100], in the light of Articles 7, 8 and 11 of the CFR. Evaluating the compatibility of DRD with the CFR, which obliged electronic communication service providers to retain traffic and location data for at least six months up to 2 years and thus allowed for competent national authorities to access the data for the purpose of preventing, investigating, detecting and prosecuting serious crimes, the CJEU declared the Directive invalid on the grounds that the retained data "taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them". In that sense, the CJEU reiterated that the essence of the right to privacy had to be considered at all times during the interferences to the fundamental right, and the purpose cannot exceed the legitimate aim of national security. The Directive's articulation was found by the CJEU to be in direct interference with the right to privacy and personal data protection without a legitimate purpose of accessing data about the everyday life of the data subject, thus allowing for an adverse effect on the essence of the mentioned rights.

The mentioned cases of the CJEU also introduced and reiterated another element of the lawful intervention of the right to privacy: necessity and proportionality in accordance with Article 52(1) of the CFR. In the wording of the CFR, it is obliged that the governmental practice of interference can be deemed justified only if they are necessary and proportional. Necessity, in this context, corresponds to both the objective pursued by the interference with the fundamental right and the level of intrusion in the measures adopted. CJEU introduced a strict necessity test, holding that "derogations and limitations must apply only in so far as strictly necessary". Once the necessity is addressed by the government in regard to the interference, a proportionality test should be conducted, which aims at discovering if the advantages ensuing the restriction outweighed the disadvantages exercised on the right to privacy or not[101]. In the

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99 Joined cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [GC] [2014] ECLI:EU:C:2014;238.

100 Data Retention Directive (n 16).

101 European Data Protection Supervisor (EPDS), Necessity Toolkit, 11 April 2017, 5 <https://edps.europa.eu/data-protection/our-work/publications/papers/necessity-toolkit_en> accessed on 22 May 2019.

Digital Rights Ireland case, the CJEU decided that the Directive's articulation of the possibility of intervention with the right to privacy, which took effect on all the EU community, allowed for the data collectors to retain metadata that includes the data of people's everyday lives, which was only against the principle of being in accordance with the law since it was never defined with a legitimate purpose, but also because it lacked any objective criteria that would ensure the access of the national authorities to the retained data with a strict necessity. Again, in the *Volöer un Markus Schecke* case[102], the CJEU concluded that imposition of an obligation to publish personal data that relates to persons with specific connection with the State offices (in this particular case, a beneficiary of aid from agricultural funds) was deemed exceeding the strict necessity obligations and did not withhold the legitimate aim of pursuing the fight against serious crime, thus disproportionate.

The last justification element of any limitation on the right to privacy, as decided by the CJEU, was the observation that the interference held "objectives of general interest". The objectives of general interest correspond to all the other rights and general objectives as declared and elaborated in the other documents of EU, such as the TEU. Reiterating the principle of being "in accordance with law", it is obligated by the CJEU that any limitation exercised on the right to privacy must explain the objective of general interested that is pursued with and by the limitation since this elaboration is deemed necessary to overall evaluate the necessity and proportionality[103].

As a conclusion, as evident in both the *Promusicae*[104] case in 2008 and the other cases particularly after 2009 when the Court diverged in its ruling practice from the ECtHR, the Court decided upon a strict proportionality test in order to restrict the right to privacy in favour of a legitimate restriction. Accordingly, due to the Court, the limitations on the rights and freedoms that are recognized by the CFR could be admissible only if the limitations are (1) provided by the law; (2) respect the essence of the right to data protection; (3) subject to the principle of proportionality; and (4) meets the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

The change in the approach of the CJEU to the data protection can be traced particularly in *Google Spain*[105]*, Digital Rights Ireland, Schrems* and *Tele2Sverige and Watson* cases. As elaborated above, within the decision of

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102 Joined cases C-92/09 and C-93/09 (n 89).

103 A relevant case that elaborates this factor is: C-291/12, *Michael Schwarz v. Stadt Bochum* [2013] ECLI:EU:C:2013:401.

104 C-275/06 (n 81).

105 C-131/12, *Google Spain SL v. Agencia Espanola de Proteccion de Datos (AEPD)* and Mario Costeja Gonzales. [2014] ECLI:EU:C:2014:317.

these cases, CJEU specifies further on the extent and the scope of Articles 7 and 8 of the CFR in its attempt to find the balance between the right to privacy and conflicting interests. While the CJEU, in *Digital Rights Ireland* and *Schrems* cases seek for a balance between digital privacy and security, in *Google Spain* case the CJEU sought for a balance between the right to privacy and freedom expression in the digital world. As Vanoni states, these cases demonstrate the first set of cases that point out to the increase in the level of privacy in protection in the EU.[106] In a sense, the period after 2009 of the CJEU witnessed a significant strengthening of the right to privacy in jurisdictional terms through the establishment of its primacy over other interests. Further, it is important to note that The Safe Harbour Agreement, invalidated through the *Schrems* case, can also point out the importance that CJEU gives to the digital sovereignty of the EU. As Zeno-Zencovich states, through the invalidation of Safe Harbour Agreement, EU established "its own judicial supremacy over questions of the highest political level,"[107] thus may be interpreted as pushing the right to privacy in a data-centric approach that could create "a potential risk of radicalizing the right to privacy to the detriment of legitimate interests and rights that are constitutionally also protected."[108]

One of the most important cases of CJEU on data protection in the context of criminal matters was *Tele2/Watson* case[109] which included guidance on the rules around the retention of communications of data and the safeguards that must be in place to protect them. In the decision, important and precise conclusions were made about the intrusiveness of traffic and location data collected by the police. The CJEU held that the purpose for retention must be limited to fighting serious crime as the only objective to justify such a serious interference. Again, retention in the criminal and police matters should be targeted to what is strictly necessary to fight serious crime. Further, the Court stated that as a general rule, access can only be granted to data about individuals who are actually suspected of or implicated in serious crimes. Yet, in criminal investigations such as terrorism or cross-border crime, access to the data of others might be granted where there is objective evidence to deduce

106 Luca Pietro Vanoni, "Balancing privacy and national security in the global digital era: a comparative perspective of EU and US constitutional systems," in I. Violini and A. Baraggia (eds). The Fragmental Landscape of Fundamental Rights Protection in Europe: The Role of Judicial and Non- Judicial Actors (Elgar Publishing 2018), 7-8.

107 Vincenzo Zeno-Zencovich, "Intorno alla decisione nel caso Schrems: la sovranita digitale e il Governo internazionale delle ret idi telecomunicazione," in Giorgio Resta and Vito Zeno-Zenovich, La protezione transnazionale dei dati personai (TrE-PRESS 2016), 9.

108 Vanoni (n 106), 13.

109 Joined cases C-203/15 and C-698/15 (n 95).

that it might make an effective contribution to combatting these crimes. In the decision, it was stated that access to the data is required to be subject to prior review by a court or independent authority and the data subjects must be informed as soon as possible.

Again, apart from its invalidation of Data Retention Directive 2006/24/EC, *Digital Rights Ireland* case was very important in showing the balance between the intervention and interference, and the fundamental right.[110] CJEU's findings about the access and process of data by the competent national authorities were indicative in the Court's opinion of the requirements of regulation about the data processing in criminal and police matters. In the decision, the legality test of the interference foreseen by any directive that regulates the data protection should involve ten standards: A regulation (1) should lay down clear and precise rules governing its scope and application; (2) must provide minimum safeguards to protect personal data against abuse, and clear safeguards against any unlawful access to the data; (3) should provide rules even stricter in the cases where personal data is subject to automated processing, than where it is not so subject; (4) should lay down a differentiation among electronic communication and traffic data in light of the objective of fighting serious crime; (5) should lay down limits on the personal data collected in regard to time, geographical zone, circle of specific people; (6) should make the limits in a manner that they are informed by objective criteria related to the purposes of prevention, detection, and prosecution of criminal offences, where the concept of "serious crime" is not left to the discretion of national law; (7) should lay down substantive and procedural conditions which control national authorities' access to the data and its use; (8) should lay down objective criteria regarding the bodies authorized to access the data; (9) should lay down the rules about the prior report that competent national authorities or an independent administrative body should carry out before any request to access to data, to ensure the monitoring of the successful application of the regulation; and (10) should lay down differentiated categories of data and data subjects that foresee different periods of retention.

As a conclusion of the analysis of the rulings of both courts, it is evident that both of them shifted to a political and legal position where the right to data privacy is better and more strictly protected. A further analysis of the rulings together with the LED will be conducted in the conclusion part of this article.

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[110] Elspeth Guild and Sergio Carrera, "The Politial and Judicial Life of Metadata: Digital Rights Ireland and the Trail of the Data Retention Directive", SAPIENT online CEPS Papers, 2014. < https://www.ceps.eu/wp-content/uploads/2014/08/EG%20and%20SC%20Data%20retention.pdf. > accessed on 20 June 2019.

II. DATA PROTECTION AND NATIONAL SECURITY IN THE EU MODEL IN POLICE AND CRIMINAL MATTERS IN THE ERA OF GDPR AND DIRECTIVE 2016/680 (LED)

After the data reform in 2016, while the primary documents[111] remained (only with an amendment to Convention 108), the in-effect secondary documents are the General Data Protection Regulation (GDPR)[112] and Directive 2016/680 of the European Parliament and the Council (hereafter referred as Law Enforcement Directive/LED).[113] In this chapter, the details of the two sibling regulations, GDPR and LED, are elaborated, with the emphasis given on the LED in order to highlight the concept of balance between data protection and national security issues in the scope of criminal investigations and prosecutions.

1. REASONS FOR DATA PROTECTION REFORM

As seen from the ECtHR and CJEU rulings, the reasons that required attention from the EU are several. Yet, we can classify them into four: (1) the attempt of EU to enact data protection regulations that promotes the uniformity of law in the EU within the greater framework of Digital Single Market Strategy; (2) the rampantly increasing possibility of data circulation across borders, which in time brought difficulties of enforcing privacy laws in foreign jurisdictions that would undermined the privacy of EU citizens; (3) developments that were revealed in 2013 by Edward Snowden Case together with other US-based internet players such as Google, Facebook, Apple and others to breach the data privacy of millions of private users; and (4) a series of seminal decisions of the CJEU that introduced new legal practices and a new understanding to the data protection and the right to privacy in the implementation and utilization of the internet in Europe.

The Digital Single Market Strategy[114] aimed for unification and the promotion of uniformity of the law and legal systems in the EU, particularly regarding the data protection legislative instruments. The ongoing legislative framework adopted in 1995 and effective until 2016, did not offer a uniform methodology of implementation. In time, EU has witnessed the arousal of new legal challenges in right to privacy,[115] due to the new technological

111 *See* chapter one of the first section above.

112 GDPR (n 12).

113 Directive 2016/680 (n 17).

114 Press Release, European Commission, Commission Proposal on New Data Protection Rules to Boost EU Digital Single Market Supported by Justice Ministers, June 15, 2015 <http://europa.eu/rapid/press-release_IP-15-5176_en.htm> accessed on 18 May 2019; *also see* Note from Presidency to Council June 11, 2015, <http://data.consilium.europa.eu/doc/document/ST-9565-2015-INIT/en/pdf> accessed on 18 May 2019; addressing the preparation of GDPR.

115 *See* chapter three of the first section above on EU Court's ruling and the challenges defined

developments and the multiplicity of forms and methods of implementation of data protection. Yet, as Van der Sloot opines, CoE has always focused on protecting fundamental rights of the EU residents,[116] reflecting a positive duty of the EU for the accelerated concern of the EU to keep up the legislative framework to the Directives and the Treaty of Lisbon[117], together with the positive duty of implementation of an effective protection of personal data and effective regulation of the transmission of such data.[118] Lisbon Treaty has been particularly effective in forcing the EU to establish an independent individual right to data protection that is centered upon the right to privacy.

Meanwhile, various seminal decisions of the CJEU highlighted the missing points of the existing EU data protection framework, exposing further the deficiencies of the Directive's implementation in Member States' national law and particularly jurisdictive practices.[119] Nevertheless, the Directive already left a wide possibility of discretion to the Member States in defining the conditions that justify access to retained data. Various examples can be provided for both implementation of new legal regulations as well as declaration of invalidity by the court: while *Google Spain* case proposed serious consequences for search engines in the line of "right to be forgotten" as implemented by the case to empower individuals to assert their rights to privacy against the internet companies,[120] the 2014 decision of the CJEU already declared the previous Directive 2006/24/EC on data retention invalid.[121]

2. GDPR

As Viviane Reding, the European Commission vice-president and justice commissioner, explained in her proposal of the GDPR on 25 January 2012, the GDPR would aim for data protection framework in a harmonious manner to provide EU residents a high level of personal data protection.[122] Further, it is the GDPR that the LED finds its way of application in criminal manners.

in decisions.

116 Bart van der Sloot," Legal Fundamentalism: Is Data Protection Really a Fundamental Right" in Roland Leenes et al (eds), *Data Protection and Privacy: (In)visibilites and Infrastructures* (Springer 2017).

117 Treaty of Lisbon (n 11).

118 For a variety of cases that demonstrate the urgent necessity of a broader data protection regulation in EU together with EU's positive duty to provide the legal framework efficiently for protecting personal data, *see* ECtHR, *Refah Partisi (The Welfare Party) and others v. Turkey,* App Nos. 41340/98, 41342/98, 41343/98 and 42344/98, Grand Chamber Judgment of February 13, 2003.

119 Mira Burri and Rahel Schar, "The Reform of the EU Data Protection Framework: Outlining Key Changes and Assessing Their Fitness for a Data-Driven Economy," JIP [2016], 488.

120 Case C-131/12, *Google Spain* (n 105).

121 Joined Cases C-293/12, C-594/12, *Digital Rights Ireland* (n 48).

122 W. Gregory Voss, "Preparing for the Proposed EU General Data Protection Regulation: With or without Amendments," Business Law Today [2012] 1, 2.

Due to Article 2 of GDPR[123], the material scope applies to any processing of personal data, which should be interpreted in a very broad manner when considered together with the EU's aim of ensuring the highest level of protection possible.[124] Processing corresponds to any operation or operations over data that include any collecting, recording, organizing, structuring, storing and erasing of data, regardless of the technological change that provides these operations, and thus including personal data that is processed through computers, smartphones, webcams, dashcams, camera drones, collected through wearables or other smart devices, and stored in any kind of IT system or computer screen.[125] It is, by scholars such as Echmann and Helfrich[126] and Dammann and Simitis[127], believed that the extent of operations as defined in GDPR includes any act of data processing as possible, such as any act of deletion of the data or mere reading of data by an individual.

The exemptions that are listed to the material scope of the applicability of GDPR takes EU law Article 8(2) of the CFR as the origin point, which specifies that personal data must be processed *on the basis of the consent of the person concerned or some other legitimate basis laid down by law*. Thus, there are two principles in constructing the exemptions from GDPR: consent and collecting and processing as foreseen by law.[128]

Yet, GDPR does indeed enshrine a special rule concerning the lawfulness of processing personal data relating to criminal convictions and offences.[129] Instead, it foresees application of LED in this context, through Article 2(2). While Article 10 and Article 16 could be related to the principles that apply to

123 Article 2 of GDPR reads: "This regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system."

124 Paul Voigt and Axel von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide* (Springer 2017) 10-12.

125 *See* Article 4(2) of GDPR.

126 *See* Eugen Ehmann and Marcus Helfrich, EG-Datenschutzrichtlinie: Kurzkommentar, 1999, 4.

127 Dammann/Simitis, EU Data Protection Directive, Art. 7, Explanations Section 1.

128 Further, Article 6 of GDPR conditions the lawfulness of processing of data to at least one of these six legitimate grounds: consent, performance of a contract, legal obligation, vital interests, task in the public interest, and legitimate interests. Again, Article 9 reiterates the basic principles by letting lawful process of data in the conditions of: consent, employment and social security law, vital interests, political/religious not-for-profits, data manifestly made public, legal claims, substantial public interests, medical purposes, public health, archiving, scientific or historical research.

129 Gabriela Zanfir-Fortuna and Teresa Troester-Falk, *Processing Personal Data on the Basis of Legitimate Interests under the GDPR: Practical Cases* (The Future of Privacy Forum and Nymity (2017), 5-6.

both the LED and GDPR together, the connection between GDPR and LED is mainly the reference to LED in Article 2(2) of the GDPR.

3. LED

Adapted together with GDPR, LED in order to remedy the shortcomings of both Data Protection Regulation and Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, of which the rules applied only to police and judicial data when subject to exchange among Member States, excluding the domestic processing of personal data by state officials and law enforcement bodies.

3.1.Aims of the Directive: Balance between Right to Privacy and National Security, and Crime Prevention

First of all, it should be noted that balance is one of the most prominent aims of the LED. According to Article 4/c, the data collection must be "adequate, relevant and not excessive in relation to the purposes for which they are processed", where the relevance of the data refers to the purpose of their collection, which is "prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security" as mentioned in Article 1. Thus, the balance is firstly drawn upon the collection of data, "to be struck between the individual's right to privacy and the public interest to prosecute EU frauds".[130]

Further, the aim of balance between the right to privacy of the individual and the public interest in reference to the EU crimes and frauds, highlights the principle of proportionality as stated in Article 52(1) of the EU CFR of Fundamental Rights. Thus, the Directive is not only in accordance with the CFR of Fundamental Rights through the GDPR's compliance with the CFR, but it also revives the fundamental principles of the CFR through emphasizing the principle of proportionality within the application of the articles of the Directive.[131]

The Directive aims to establish the balance primarily through the principles that rule over the data collection by law enforcement authorities. LED foresees that collected by the law enforcement bodies should be (1) processed lawfully and fairly; (2) collected for specified, explicit and legitimate purposes and

[130] Alessandro Bernardi and Daniele Negri, Investigating European Fraud in the EU Member States (Bloomsbury 2017), 145-146.

[131] Paul de Hert and Vagelis Papakonstantinou, "The New Police and Criminal Justice Data Protection Directive: A First Analysis," New Journal of European Criminal Law 7 [2016] 7, 10.

processed only in line with these purposes; (3) adequate, relevant and not excessive in relation to the purpose in which they are processed; (4) accurate and updated where necessary; (5) kept in a form which allows identification of the individual for no longer than is necessary for the purpose of the processing; and (6) appropriately secured, including protection against unauthorised or unlawful processing. The time limits are, on the contrary to invalidated Data Retention Directive 2006/24/EC, is left to the Member States to establish time limits for erasing personal data or for regular review of the need to store them. Further, unlike Data Retention Directive 2006/24/EC, LED requires the legal authorities to make a clear distinction between the data of different categories of persons, such as a category for those with serious suspicion of being have committed or about to commit a criminal offence, those who have already been convicted of criminal offence, victims of criminal offences, and parties to criminal offences such as potential witnesses.

3.2.The Scope and Focal Points of the Directive

Since one of the aims of the process of drafting the new Directive was to address the shortcomings of the Framework Decision 977/2008/JHA,[132] the scope of application was one of the issues to be addressed in the revision draft of the LED. In that sense, the scope has been one of the primary issues of the drafting of the new Directive, described in the first five chapters of the Directive. Contrary to the 977/2008/JHA, which had a substantially restricted scope to apply only to the exchanges of data between the investigative authorities of the Member States and not to the processing of data in the repressive domain occurring within their national territories, the Directive covers all personal data processing undertaken in the law enforcement contexts, including the police and the criminal justice, and particularly regardless of whether the processing takes place within domestic borders or crosses national borders. Yet, the scope of the Directive is deemed as problematic in the scholarly work, as elaborated in the following sections.

3.3.Principles and Lawfulness of the Data Processing

In some matters, it could be stated that the LED reiterates what have already been established in the Directive 95/46/EC yet applied specifically processing of personal data in the police matters. Due to LED, Article 4(1) and Article 6, the processing of personal data must be (1) lawful; (2) fair; (3) transparent; and (4) must be used for specific purposes mentioned in law. Each of the conditions is bounded to a set of other explicit or implied conditions. Article 4 lays out the principles relating to processing of personal data.[133] Further, the purpose for the

[132] Ibid, 12.

[133] Article 4 of the LED reads, and directly establishes the principles of LED: "Member

processing of personal data should be explicit and legitimate, and determined at the moment of collection of data. Again, Recital 26 states that individuals should be informed of possible risks, rules, safeguards and right in relation to the processing of their personal data and the methodology of using the rights.

In of Article 8 the GDPR, there are six legal bases of lawful and fair data processing is established: (1) consent; (2) performance of a contract; (3) compliance with legal obligation; (4) vital interests; (5) public interest and (6) legitimate interest of the controller. Again, in accordance with the GDPR but leaving the irrelevant bases, the LED adopts the same approach in Article 8.[134] Through the implementation of the principles and the lawfulness of the processing of personal data, the primary aim is to strike a balance between individual data protection and the interests of the police and criminal justice processes. Additional to the Article 4 of LED that sets out the basis of the principles and the lawfulness that the national law systems of the Member States must abide by, Article 5[135] establishes the obligatory time limits, primarily for the sake of a balance. Accordingly, the Member States are expected to establish time limits for erasing personal data, or for a regular review of the need to store such personal data for criminal justice purposes.

3.4.Rights of the Data Subject

The principle of proportionality is not limited to the principles of restriction and the time limit as explained above. In Article 6[136] of the LED, it is imperative

States shall provide for personal data to be: (a) processed lawfully and fairly; (b) collected for specified, explicit and legitimate purposes and not processed in a manner that is incompatible with those purposes; (c) adequate, relevant and not excessive in relation to the purposes for which they are processed; (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay; (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which they are processed; (f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures."

134 Article 8 of the LED reads: "Member States shall provide that the processing of personal data is lawful only if and to the extent that processing is necessary for the performance of a task carried out by a competent authority for the purposes set out in Article 1(1) [the purposes set in the title of the Directive] and is based on Union or Member State law."

135 Article 5 of the LED reads: "Member States shall provide for appropriate time limits to be established for the erasure of personal data or for a periodic review of the need for the storage of personal data. Procedural measures shall ensure that those time limits are observed."

136 Article 6 of the LED reads: "Member States shall provide for the controller, where applicable and as far as possible, to make a clear distinction between personal data of different categories of data subjects, such as: (a) persons with regard to whom there are

that the law enforcement authorities must make distinction between data of different categories of persons, since referring to a set of special rights granted to individuals in order for them to effectively exercise their right to data protection consists of a basic component of the EU approach in data protection.[137] These rights are defined particularly as the right to information, access and rectification, which if not restricted, could undermine police and criminal justice work structurally. In that sense, the LED seeks to find a balance between the right to information, access and rectification and concerns of the police and other law enforcement related agencies and processes.

In Article 12[138] of the LED, the rights of the data subject, in reference with Article 6, are established, in accordance with the structure of the GDPR. Article 12 lays down the modalities applicable over all of the individual rights, aimed at identifying the data controller as the responsible actor. The Directive further lays down an analysis of the rights given to the data subject in Article 12, in

serious grounds for believing that they have committed or are about to commit a criminal offence; (b) persons convicted of a criminal offence; (c) victims of a criminal offence or persons with regard to whom certain facts give rise to reasons for believing that he or she could be the victim of a criminal offence; and (d) other parties to a criminal offence, such as persons who might be called on to testify in investigations in connection with criminal offences or subsequent criminal proceedings, persons who can provide information on criminal offences, or contacts or associates of one of the persons referred to in points (a) and (b)."

137 De Hert and Papakonstantinou (n 131), 12.

138 Article 12 of the LED reads: "1. Member States shall provide for the controller to take reasonable steps to provide any information referred to in Article 13 and make any communication with regard to Articles 11, 14 to 18 and 31 relating to processing to the data subject in a concise, intelligible and easily accessible form, using clear and plain language. The information shall be provided by any appropriate means, including by electronic means. As a general rule, the controller shall provide the information in the same form as the request. 2. Member States shall provide for the controller to facilitate the exercise of the rights of the data subject under Articles 11 and 14 to 18. 3. Member States shall provide for the controller to inform the data subject in writing about the follow up to his or her request without undue delay. 4. Member States shall provide for the information provided under Article 13 and any communication made or action taken pursuant to Articles 11, 14 to 18 and 31 to be provided free of charge. Where requests from a data subject are manifestly unfounded or excessive, in particular because of their repetitive character, the controller may either: (a) charge a reasonable fee, taking into account the administrative costs of providing the information or communication or taking the action requested; or (b) refuse to act on the request. The controller shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request. 5. Where the controller has reasonable doubts concerning the identity of the natural person making a request referred to in Article 14 or 16, the controller may request the provision of additional information necessary to confirm the identity of the data subject."

Articles 13[139] and 18[140], through establishing the framework of the information to be made available or given to the data subject, and the rights of the data subject in criminal investigations and proceedings respectively. As Article 13 states, the information to be provided to individuals is distinguished in two subsets. The second subset, which consists of the more substantial legal basis of the processing, storage period and recipients, is to be applied to only certain cases. The specific cases, which involve obstructing official or legal inquiries, investigations or procedures, covers the possibility of omittance and restriction of the data subject's rights, and the proportionality aimed with the exclusive structure of this articulation is left to the discretion of the Member State as stated in Article 13(2). Another right of the data subject is the right to access as established in Article 14[141], which is provided to individuals in the known

[139] Article 13 of the LED reads: "1. Member States shall provide for the controller to make available to the data subject at least the following information: (a) the identity and the contact details of the controller; (b) the contact details of the data protection officer, where applicable; (c) the purposes of the processing for which the personal data are intended; (d) the right to lodge a complaint with a supervisory authority and the contact details of the supervisory authority; (e) the existence of the right to request from the controller access to and rectification or erasure of personal data and restriction of processing of the personal data concerning the data subject. 2. In addition to the information referred to in paragraph 1, Member States shall provide by law for the controller to give to the data subject, in specific cases, the following further information to enable the exercise of his or her rights: (a) the legal basis for the processing; (b) the period for which the personal data will be stored, or, where that is not possible, the criteria used to determine that period; L 119/110 EN Official Journal of the European Union 4.5.2016 (c) where applicable, the categories of recipients of the personal data, including in third countries or international organisations; (d) where necessary, further information, in particular where the personal data are collected without the knowledge of the data subject. 3. Member States may adopt legislative measures delaying, restricting or omitting the provision of the information to the data subject pursuant to paragraph 2 to the extent that, and for as long as, such a measure constitutes a necessary and proportionate measure in a democratic society with due regard for the fundamental rights and the legitimate interests of the natural person concerned, in order to: (a) avoid obstructing official or legal inquiries, investigations or procedures; (b) avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties; (c) protect public security; (d) protect national security; (e) protect the rights and freedoms of others. 4. Member States may adopt legislative measures in order to determine categories of processing which may wholly or partly fall under any of the points listed in paragraph 3."

[140] Article 18 of the LED reads: "Member States may provide for the exercise of the rights referred to in Articles 13, 14 and 16 to be carried out in accordance with Member State law where the personal data are contained in a judicial decision or record or case file processed in the course of criminal investigations and proceedings."

[141] Article 14 of the LED reads: "Subject to Article 15, Member States shall provide for the right of the data subject to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information: (a) the purposes of and legal basis for

format of obtaining from the data controller information on data kept in its systems, but subject to important limitations that are established in Article 15[142], including again the obstruction of official or legal inquiries, investigations or procedures that could end up easily curtailing its effectiveness for individuals. The final right of the data subject is established in Article 16 of the LED as rectification, erasure and restriction of the processing, due to which individuals hold the right to request deletion or rectification of their personal data in the event of unlawful processing by the controller, a theme which was highlighted during the *Google Spain*[143] case as right to be forgotten.

3.5. The Role of DPAs (Supervisory Authorities)

Since the Directive 95/46, the role of the Data Protection Authorities (DPAs) increased substantially and visibly in the attempt to establish an independent state authority entrusted with the task of monitoring the application of data protection law within the Member States, to the extent that the DPAs have become the basic enforcement and monitoring data protection mechanisms in the EU today. Yet, in the context of police and criminal justice personal data

the processing; (b) the categories of personal data concerned; (c) the recipients or categories of recipients to whom the personal data have been disclosed, in particular recipients in third countries or international organisations; (d) where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period; (e) the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data concerning the data subject; (f) the right to lodge a complaint with the supervisory authority and the contact details of the supervisory authority; (g) communication of the personal data undergoing processing and of any available information as to their origin."

142 Article 15 of the LED reads: "1. Member States may adopt legislative measures restricting, wholly or partly, the data subject's right of access to the extent that, and for as long as such a partial or complete restriction constitutes a necessary and proportionate measure in a democratic society with due regard for the fundamental rights and legitimate interests of the natural person concerned, in order to: (a) avoid obstructing official or legal inquiries, investigations or procedures; (b) avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties; (c) protect public security; 4.5.2016 EN Official Journal of the European Union L 119/111 (d) protect national security; (e) protect the rights and freedoms of others. 2. Member States may adopt legislative measures in order to determine categories of processing which may wholly or partly fall under points (a) to (e) of paragraph 1. 3. In the cases referred to in paragraphs 1 and 2, Member States shall provide for the controller to inform the data subject, without undue delay, in writing of any refusal or restriction of access and of the reasons for the refusal or the restriction. Such information may be omitted where the provision thereof would undermine a purpose under paragraph 1. Member States shall provide for the controller to inform the data subject of the possibility of lodging a complaint with a supervisory authority or seeking a judicial remedy. 4. Member States shall provide for the controller to document the factual or legal reasons on which the decision is based. That information shall be made available to the supervisory authorities."

143 CC-131/12, *Google Spain* (n 105).

processing, the relationship between the DPAs and the courts and the judicial authorities of the Member States are more complicated due to the tension between the two authorities. As De Hert and Papakonstantinou suggest,[144] while the DPAs generally tend to take their monitoring powers seriously if not expansively and seek to apply them to all and any personal data processing executed within their respective jurisdictions, the judicial authorities of the Member State feel that the monitoring by a third party of their personal data process while executing their duties is unjustified, due to the fact that they too benefit from institutional independence and, that above all upholding law is their own mission. In that sense, the question of the relationship between the DPAs and the judicial/criminal authorities of the Member State is a highly importance practical manner in the absence of addressing of which, the whole Directive would be undermined, primarily because of the issues that this absence would create domestically and the impediment that it would cause to the primary aim of harmonization. Thus, the Directive successfully addresses to this obligatory requirement of clarification.

In that regard, the LED introduces and elaborates DPAs as an independent supervisory authority in the police and criminal justice matters of personal data processing in Article 41.[145] In the articulation of the Article, each Member State is obliged to provide one or more DPA to be responsible for the monitoring of the successful application of the LED, aiming primarily to protect the fundamental right to data protection and privacy. Further, it is understood that the DPAs are responsible of monitoring the applications of the Member State to ensure that the proportionality principle, above all, in the restriction of the fundamental right to privacy is met successfully and in accordance with the conditions established in the LED. The DPAs are welcomed, as in Article 41(2), to cooperate with each other in order to ensure the consistent application of the LED throughout the EU. Further, the DPA established in a Member State for the monitoring of the LED can, with the initiative and confirmation

144 De Hert and Papakonstantinou (n 131), 13.

145 Article 41 of the LED reads: "1. Each Member State shall provide for one or more independent public authorities to be responsible for monitoring the application of this Directive, in order to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the Union ('supervisory authority'). 2. Each supervisory authority shall contribute to the consistent application of this Directive throughout the Union. For that purpose, the supervisory authorities shall cooperate with each other and with the Commission in accordance with Chapter VII. 3. Member States may provide for a supervisory authority established under Regulation (EU) 2016/679 to be the supervisory authority referred to in this Directive and to assume responsibility for the tasks of the supervisory authority to be established under paragraph 1 of this Article. 4. Where more than one supervisory authority is established in a Member State, that Member State shall designate the supervisory authority which are to represent those authorities in the Board referred to in Article 51."

of the Member State, be the same body as with the DPA established to monitor the GDPR. In other words, the same DPA could look out for the successful implementation of the proportionality principle both in the matters that fall under GDPR and for matters of criminal investigation as stated in the LED.

Yet, when compared with the Article 29 Data Protection Working Party by the European Data Protection Board and the supervising mechanism established in the Directive 95/46, the DPAs that are established under the LED seems to be in accordance with their predecessors, which practically exercised soft regulatory power through publishing opinions and recommendations while issuing opinions aimed at the Member State involving the adequacy of the findings. However, it is not clear if the DPAs will continue to have the same level of the supervisory authority in the GDPR and the LED.

3.6.Possible Problems in the Future

While the LED is accepted widely in the literature to be better than the Framework Decision 2008/677/JHA, and while still not yet any relevant problems have been confronted by the Courts and thus presence of a ruling or a case law, there may be possible problems that could stem from the document, which are broadly related to scope, harmonization, and the failure to touch upon the entirety of data protection framework.

The first ambiguity that shadows the guarantee of success of LED is related to its scope. It is asserted in the literature that the scope of the Directive might not be as wide as it seems at first glance; on the contrary, its actual scope, when applied, is restricted particularly to certain extents defined in other parts of the Directive. We can classify the restrictions that relate to the scope of the Directive in three points: (1) the scope is restricted to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, yet does not directly and explicitly cover personal data processing in the context of criminal court proceedings; (2) since the Directive does not regulate the processing of data in the course of an activity which falls outside the scope of Union Law, yet leaves a wide range of interpretation to the national courts in defining which activities fall in and which fall out of the scope of Union law particularly when it comes to matters of safeguarding against and the prevention of threats to public security; and (3) the scope of the Directive does not address thus cannot be applied to the personal data processing by the Union institutions, bodies, offices and agencies, which implies that the personal data processing of these bodies are still regulated by the Regulation 45/2001.[146]

[146] 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 [2001] OJ L 008.

Particularly the ambiguity of "the scope of Union Law" that originates from the fact that it is left to the discretion of the Member States creates legal issues,[147] particularly because of the fact that while in the Recital and the Proposal[148] of the Directive 2016/680 "national security" is referred, the CoE Recommendations R(87)15, that regulates the use of personal data in the police sector refers to "state security", in which case the Union Law would have no word. The definitional ambiguity and inconsistency can create problems particularly in terms of national security issues that are of high importance for the EU, since the ambiguity if it falls under the scope of Union Law or not could interfere with the application of the GDPR and the Directive both.

Again, another problem about the scope corresponds to the ambiguity of definitive lines between the LED and GDPR, which proved to be complicated, as stated in the previous section of this Chapter. The EDPS[149] opinions of 2015 limited the definition of competent authority, thus complicated further the material scope delineation between GDPR and LED.[150] While at first glance the competent authorities that have the authority to process personal data for mentioned purposes are obvious, when considered with the Article 87(1) of the TFEU in order to extract a definition,[151] Member States still have the discretion

147 Recital 14 of the LED reads in this specific issue: "Since this Directive should not apply to the processing of personal data in the course of an activity which falls outside the scope of Union law, activities concerning national security, activities of agencies or units dealing with national security issues and the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 2 of Title V of the Treaty on European Union (TEU) [Specific provisions on the common foreign and security policy] should not be considered to be activities falling within the scope of this Directive."

148 Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data COM/2012/010 final –2012/0010 (COD).

149 European Data Protection Supervisor, "A Further Step Towards Comprehensive EU Data Protection," EDPS Recommendations on the Directive for data protection in the police and justice sectors, Opinion 6/2015, 28 October 2015 and European Data Protection Supervisor, "Annex to Opinion 6/2015: Comparative Table of Directive Texts with EDPS Recommendations" [2015].

150 In the Directive 2016/680, the processing of personal data is granted to the competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security. Yet, in the mentioned EDPS opinion, the Notion of competent authority has been limited. Among the competent authorities are listed traditional law enforcement authorities including police and criminal justice, customs and border guard, other public authorities such as Financial Intelligence Units and security service contractors.

151 Article 87(1) of the TFEU considers the competent authorities as "police, customs and other specialized law enforcement services in relation to the prevention, detection, and

of definition of their activities on their own in relation to their own system of law enforcement. This fact is indeed reiterated by the A29WP[152], in which the same data processing operation could be covered in different regulations in different Member States due to the definitions that structure the national laws. This problem has also been addressed in several Commission expert groups, leading to the discussion of if a competent authority should be defined by its main task of the office or the work at hand.[153]

Another issue that is likely to stem from the application of Directive 2016/680 seems like to difficulty in realization of the harmonization of the applications in the several jurisdictions of the Member States. As explained, the use of the data in the national measures regarding the purpose of the system, the period of data retention, the structures, geographic scope, the modalities of transport and the level of protection of personal data and information in regard to law enforcement processes still diverge highly in the Member States.[154] Further, the framework which Cocq considers as a loose international guidance[155] lead to further discrepancies, which implies that the ambiguity in the national-level application and the lack of harmonization of the national practices will lead to a contribution to even more discrepancies between the different jurisdictions of the Member States. As stated in the Article 3(1), LED articulates aiming at ensuring a consistent and high level of protection of natural persons in relation to the processing of personal data and to facilitate the free flow of personal data between competent authorities for the purposes set out in Recitals 4 and 7. Yet, it is understood from the articulation that it is possible for the Member States to provide higher data protection safeguards under their national laws since what LED provides is mere minimum protection. Still, in the sake of harmonization and in terms of consistency across the EU Member States, the ambiguity of the level of protection through the establishment of only the minimum level leads to the LED being far from ensuring an acceptable level of harmonization of personal data processing implementations in the criminal field among the Member states.

investigation of criminal offences" and judicial authorities.

152 Article 29 Data Protection Working Party. 2012. "Opinion 01/2012 on the Data Protection Reform Proposals." Adopted on 23 March 2012. 00530/12/EN WP 191, 26-28.

153 Mireille M. Cauana, "The reform of the EU data protection framework in the context of the police and criminal justice sector: harmonization, scope, oversight and enforcement," IRLCT, DOI: International Review of Law, Computers & Technology, DOI: 10.1080/13600869.2017.1370224, 6.

154 Susanna Villani, "Some Further Reflections on the Directive (EU) 2016/681 on PNR Data in the Light of the CJEU Opinion 1/15 of 26 July 2017", UNED, Revista de Derecho Politico 101 (2018), 899, 912.

155 Céline C. Cocq, "Information and intelligence: The current divergences between national legal systems and the need for common (European) notions", New Journal of European Criminal Law, 2017, 8(3): 352, 364.

A third problem that is embedded in the articulation of the LED is that the fact that the data protection framework is only partly covered, leaving the still-standing Regulation 45/2001, Regulation 2016/794 about the judicial cooperation of the police and Europol,[156] and the Prüm Decision.[157] While Regulation 45/2001 does not particularly create an inconsistency yet a double and ineffective system between the Member States' obligations of minimum cooperation and the personal data processing of the EU Institutions, bodies, offices and agencies, the Regulation 2016/794 actually paves the way to an inconsistency. The Regulation, having been adopted within a month after the LED, articulates in its Recital 40[158] the principles that the Regulation should comply with, including consistency with the LED. Yet, as will be elaborated in the next chapter in detail, there are discrepancies between the Europol Regulation and the LED.[159]

4. CONVENTION 108+: THE UPDATE OF DATA PROTECTION CONVENTION OF 1981 AND THE COE POLICE RECOMMENDATION OF 1987

While Convention 108 has been the first and longest binding international legal instrument in data protection,[160] it has been amended together with GDPR. In a broad manner, principles of transparency, legality, proportionality, accountability, data minimization, and privacy by design were acknowledged as of the key elements of lawful protection mechanisms that are adopted by EU by GDPR and LED.

Convention 108+ covers all fields of the processing of personal data, aiming to regulate the processing personal data in general. Thus, 108+ applies also to data protection in the area of police and criminal justice in regard to processing of genetic data, personal data relating to offences, criminal proceedings and convictions and any related security measures, biometric data that uniquely identify a person as well as any sensitive personal data, together with the Police

156 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016] OJ L135/53.

157 Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L 210.

158 *See* Recital 40 of the Regulation 2016/794 (n 156).

159 Céline C. Cocq, "EU Data Protection Rules Applying to Law Enforcement Activities: Towards a Harmonized Legal Framework?" [2016] NJECL 7(3) 263, 265.

160 Nina Gumzej, "The Council of Europe and the Right to Personal Data Protection: Embracing Postmodernity" [2013] Conference on the International Journal of Arts and Sciences, Proceedings 6(2) 13, 22.

Recommendation adopted by the CoE in 1987 in order to guide the Member States of implementation.[161]

The legal tasks of police and criminal justice authorities often require the processing of personal data, which by definition can lead to consequences for individuals concerned about the breach of fundamental rights. Convention 108+ provides the framework of principles in the context of personal data processing by police authorities.

5. DATA PRIVACY AGAINST COMBATTING CRIME AND CRIME INVESTIGATIONS IN INTERNATIONAL SURVEILLANCE AND SECURITY BODIES: THE EXCHANGE OF PERSONAL DATA ACROSS BORDERS

This section draws upon the overview of activities and regulations of data protection of the EU model in the international perspective. In this regard, in the first section, the Prüm Treaty is elaborated with the regulations of protection of data in police matters and Interpol and Europol. In the second section, codes of police conduct, and procedures are explained. In the third section, European supervision model and the DPAs that attempt to harmonize the procedures are elaborated.

The most important issue in data privacy and security in international surveillance and security bodies is the transnational exchange of personal data and how this exchange can be legitimized and regulated. LED establishes conditions for the transfer of personal data to third countries or international organizations. Due to the Article 32, 35 and 39 of the LED, the transfer should be (1) necessary; (2) transferred to a competent authority; (3) transfers to third countries or international organisations of personal data received in the course of cross-border cooperation requires the authorization of the Member State from which the data originate, (4) an adequacy decision[162] has been adopted by

[161] Handbook (n 73), 273-275.

[162] Substantially, the adequacy decision issued by the European Commission under the Directive is the first step of authorization of the transfer of personal data. The decision can apply to the whole territory of a third country or its specific sectors; only if there is an adequate level of protection ensured and the conditions as defined in the Article 36 of the Directive is met. In the existence of an adequacy decision together with the authorization of the Member State in accordance with Article 36(1), the transfer may be authorized, and the European Commission is obliged to monitor the developments that could impact the functioning of the decision. In the absence of an adequacy decision, transfers can be based on appropriate safeguards of the country that the data is going to be transferred. The analysis of the safeguards are to be conducted through a legally binding instrument such as a bilateral international agreement or an EU-authorized independent body for assessment of the safeguards, considering the possible cooperation agreements concluded between Europol and Eurojust and the third country or international organisation, in accordance with Article 37(1) of the LED. If there is no adequacy decision, or no appropriate safeguards

the European Commission about the safeguards that have been established; and (5) prior authorization is required from the originating competent authority.

The LED about the transfer of personal data to the third countries, or international organisations is in accordance with the ECtHR's previous ruling and the CoE Police Recommendation. The CoE Police Recommendation states that the use of police data should be strictly limited, and this fact has consequences for the disclosure of police data to third parties, and the transfer and sharing of the information. As an example, in the *Karabeyoğlu v. Turkey*[163] case, a violation of ECHR Article 8 was found due to the unlawful interference to the applicant's right to respect for his private life through the monitoring of telephone lines in the context of a criminal investigation into an illegal organisation to which he was suspected of belonging, or to which he was thought to aid or support. In the articulation of the case, it is stated that the data processing by the police and international transfer or disclosure should be restricted to foreign police authorities and be based on special legal provisions, mostly international agreements, unless it is necessary for the prevention of serious and imminent danger. Again, the CJEU's ruling about the transfer of personal data outside of the EU stated in the *Tele2/Watson*[164] case was in accordance with both the LED and the CoE Police Recommendation, stating that the national legislations are required to regulate the retained data to stay within the EU.

Complementing the LED, the exchange of information held by Member State law enforcement bodies are regulated by other instruments such as Council Framework Decision 2009/315/JHA[165], Council Decision 2000/642/JHA[166] and Council Framework Decision 2006/960/JHA[167] mostly organizing the cross-border cooperation between the competent authorities, particularly about the exchange of immigration and counter-terrorism data. Again, the Prüm

have been established, the transfers of personal data are allowed in specific situations that are explicitly defined in Article 38 of the Directive, which include the vital interests of the data subject or another person and the prevention of an immediate and serious threat about public safety, national security of a Member State or a third country.

163 *Karabeyoğlu v. Turkey*, App No. 30083/10 (ECtHR, 7 June 2016).

164 Joined cases C-203/15 and C-698/15, *Tele2 Sverige* (n 95).

165 Council of the European Union, Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States [2009] OJ 2009 L 93.

166 Council of the European Union, Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information [2000] OJ 2000 L 271.

167 Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [2006] OJ L 386.

Decision[168] is of particular importance that aims at helping signatory Member States to improve information systems to prevent and combat terrorism, cross-border crime and illegal immigration.

6. THE PRÜM DECISION

In reaction to the imminent terrorist attacks and further threats, Member States signed Decision 2008/615/JHA in the German city of Prüm, to be later mentioned as the Prüm Decision. It is basically a police cooperation agreement that aims to help signatory Member States to improve and guide data sharing in terrorism, cross-border crime and illegal immigration. The Prüm Decision establishes provisions in the areas of (1) automated access to DNA profiles, fingerprint data and national vehicle registration data; (2) the supply of data in relation to major events that have cross-border impacts and dimensions; (3) the supply of information to fight against terrorist offences; and (4) further measures for constructing and sustaining cross-border police cooperation. While it is a crucial step taken toward the Hague Programme that aims to strengthen freedom, security and justice in EU[169], and aims for further harmonization and integration of data protection and sharing systems within the EU particularly in order to prevent and fight terrorism, Rapporteur Correia and others have serious doubts about the democratic structure of the decision.[170]

7. THE SWEDISH INITIATIVE

The Framework Decision 2006/960/JHA, namely the Swedish Initiative, is another strong example of cross-border corporation within the EU in regard to the exchange of data collected, stored and held lawfully by the national law enforcement bodies. It particularly highlights the exchange of intelligence data as well as information, providing further specific data protection rules in accordance with the Article 8 to ensure the balance of the interference in the cross-border exchange. According to the Initiative, information and intelligence held by the EU Member States can and should be exchange through borders (1) for the purposes for which it has been supplied; or (2) to prevent an immediate and serious threat to public security. Cross-border data processing, apart from these two conditions, could also be valid on the sole condition of authorization from the Member State that holds the information. Further, the Initiative reiterates that the exchanged/shared information should

168 Decision 2008/615/JHA, on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (Prüm Decision) [2008] OJ L 210.

169 The Hague Programme for Strengthening Freedom, Security and Justice in the EU approved by the European Council on 5 November 2004.

170 Rapporteur: Fausto Correia, 10.04.2007, Working Document on a Council Decision on the stepping up of crossborder cooperation, particularly in combating terrorism and cross-border crime, Committee on Civil Liberties, Justice and Home Affairs.

be in accordance with the Convention 108, Additional Protocol to Convention 108[171], and Recommendation No. R (87) 15.[172]

8. EU PNR DIRECTIVE

The EU PNR Directive 2016/681[173] regulates the collection and storage of data that relate to the passengers of crucial activities are collected in order to prevent, detect, investigate and prosecute terrorist offences and serious crime. Processing PNR is obviously with its benefits for the law enforcement authorities to identify potential or known subjects, yet it directly interferes with the right to privacy of the individuals.

The articulation of the LED complicated the delineation of LED's application scope not only against GDPR but also against the airline companies, telecommunication operators and financial institutions that fall to be regulated by the LED itself.[174] One problem occurs in the PNR collection by the police authorities in detecting, investigating and prosecuting terrorism and other serious crimes through dangerous passengers.[175]

Article 15 of the 2016/681 links with Framework Decision 2008/977/JHA and thus Directive 2016/680 for that matter and entrusts the national supervisory authority with the responsibility to advice and monitor the application of the provisions illustrated within the national territory and to deal with complaints lodged by any data subject to verify the lawfulness of the data processing of the PNRs. Yet, as Villani states, the Directive 2016/681 "is almost silent about the procedure of analysis of the collected data" and Directive 2016/680 does not really compensate for the over-specified case of the collection of PNR data from non-competent authorities, creating a lack of clarity of the scope again. Such an ambiguity both in the definition of competent authorities to collect the data, and the transfer of these data to other competent authorities for the prevention, investigation, detection, intervention and prosecution of serious crime and terrorist threats against public security, in the absence of clear and precise rules governing the scope and the application of the measures that imposes at least minimum safeguards, would easily lead to abuse of power against the fundamental right, as have been witnessed in cases such as *Liberty*

171 Council of Europe (2001), Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows, ETS n. 108.

172 Recommendation No. R (87) 15 (n 30).

173 Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime [2016] OJ L 119.

174 Cauana (n 153), 5.

175 Susanna Villani (n 154), 913.

and Others v. the United Kingdom[176], *Rotartu v. Romania*[177], *S. and Marper v. the United Kingdom*.[178]

9. EUROPOL AND EUROJUST

Europol is the EU's law enforcement agency that aims at assisting with the prevention and investigation of organised crime, terrorism, and other forms of mostly cross-border crime. It is regulated by the Europol Regulation.[179] One of the most important duties of Europol, by structure, is to exchange the information it collects about the serious crimes and to serve as the information hub for intelligence analyses within the EU.

The Europol Information system collects data through both its own agencies and through other institutions and entitled public and private bodies among EU. Consisting of further focused centres such as European Counter-Terrorism Center (ECTC) and The European Migrant Smuggling Center (EMSC) it embraces and inholds vast data, and thus, it structurally is bound to interfere with the right to privacy.

Accordingly, the data protection regime that governs Europol's activities is bound to be regulated through the principles of data protection of EU. The primary document that regulates the data action of Europol is the EU Institutions Data Protection Regulation[180], while complemented with the GDPR, the LED and the Convention 108+.

Eurojust, being established in 2002, aims at promoting the judicial cooperation in criminal matters, investigations and prosecutions in the Member States.[181]

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176 *Liberty and Others v. the United Kingdom* (n 57).

177 *Rotartu v. Romania* (n 26).

178 *S. and Marper v. the United Kingdom* (n 62).

179 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JH [2009] OJ 2016 L 135.

180 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 institutions and bodies of the Community and on the free movement of such data [2000] OJ 2001 L 8.

181 Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ 2002 L 63; Council Decision 2003/659/JHA of 18 June 2003 amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2003] OJ 2003 L 44; Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2008] OJ 2009 L 138 (Eurojust Decisions).

10. OVERALL ANALYSIS OF CROSS-BORDER DATA TRANSFER

The cross-border transfer of data has been the issue of many cases, and especially of the landmark decision of *Schrems v Data Protection Commissioner*.[182] While the judgement affirms that the fundamental right to data protection should be protected in the context of international data transfers, it also demonstrates what is missing about the applicability of such an international intervention of the EU system. The case shows the tendency of the EU conception of the data protection to focus on tangible and legalistic mechanism than on protection in practice. This argument can be supported by a broader scheme of Prüm Decision and Swedish Initiative, together with the working areas of both Europol and Eurojust, which are not substantially practical but merely legal. Yet, it seems to be that the EU regulations merely consist of formalistic measures instead of practical.

CONCLUSION

As Richards states, due to the ever-increasing mass surveillance today, we are living in the age of an Orwellian dystopia that is keen to justify the harmful surveillance practices of the governments.[183] The data protection regimes and their relationship with the protection of fundamental human rights define the extent of the protection from this dystopia, and thus is worth giving attention to. In the course of relating data protection with fundamental human rights, Snowden's disclosures and the NSA Scandal which revealed the existence of top-secret mass surveillance programs to withhold unlimited, unfettered and unconfirmed personal data processing, collecting and processing such data in bulk became a problem for both the US and the EU citizens and officials.[184]

To understand the extent of data protection in the EU, the impact of the scandal and the course of development of the conception of the right to data protection, it is necessary to look at the balancing of national and public security and data protection in the EU level. It has already been clarified that GDPR is not applicable to the national security of the Member States or public security of the whole EU. In reference to Article 2(2)(3) of the GDPR, the legal instrument that deals with the possibility of processing data relating to public security is the LED. While there is no substantial outcome as a legal clash in the application of neither the GDPR nor the LED until now, it is important to

182 C-362/14, *Schrems* (n 27).

183 Neil M. Richards, "The Dangers of Surveillance", [2005] HLR Symposium on Privacy and Technology, 12, 49.

184 Anna Dimitrova and Maia Brkan, "Balancing National Security and Data Protection: The Role of EU and US Policy-Makers and Courts before and after the NSA Affair," [2018] 56 JCMS, 751, 755.

trace how the LED is located in the face of the ECtHR's and CJEU's trends and developments in approach.

The main idea behind the striking of balance also originates from the Article 8 of the ECHR, where it is stated that everyone has the right to respect for his private life, yet public authorities can interfere with the right to private life while protecting the interests of the national security or public safety. As Greer states, the notion of public safety should be understood both as national security and the prevention of crime and disorder.[185] In that regard, the act of balancing of the ECtHR has always been of high importance for the Court, which is evident in several cases such as *Klass and Others v Germany*, *Rotaru v Romania*. While in *Klass and Others* ECtHR did not find any violation of secrecy of mail and telecommunications restriction for the name of protecting national security, in *Rotaru* it found a violation of Article 8 due to the violent suppression of Romanian anti-government demonstration and the secret mass surveillance that were not in any way safeguarded in the Romanian national law. While ECtHR, in general, tends to favour the fundamental personal right and its protection, in *Segerstedt-Wiber and Others v Sweden*[186] judgment the ECtHR decided that storage of information by the public authorities with the legitimate aim of protection of national security and public safety was justifiable, thus ECtHR held national security higher over the fundamental right. ECtHR tended to fix the balance neutrally in the early case law, particularly balancing "two values in a rather neutral manner" that "allowed the courts to rely heavily on a factual background of the cases," thus prevailing "public security over privacy".[187] The reason for such a tendency has been defined as the act that European courts "dealt mostly with the post-WWII type of surveillance which cannot be assimilated to the global extent of the US mass surveillance."[188]

CJEU's approach to aiming at strengthening the fundamental right to data protection was in line with ECtHR's approach. Particularly in the *Schrems* case, the CJEU clarified the level of adequate data protection; and further for the first time analysing a regulation of international data transfers in light of the key provisions of EU treaty law of the TFEU and the CFR. Yet, as Kuner states, having control over the reach of EU data in the global context, even if it is possible to protect the EU personal data efficiently within EU borders, is nothing more than an illusion in the face of the foreign intelligence agencies that access the data of Europeans.[189] Again, the Schrems judgement

185 Sarah Greer, *The Exceptions to Article 8 to 11 of the European Convention of Human Rights* (Council of Europe Publishing 1997).

186 *Segerstedt-Wibert and Others v Sweden*, Application No. 62332/00 [ECtHR, 2016].

187 Dimitrova and Brkan (n 184), 763.

188 Ibid, 764.

189 Christopher Kuner, "EU Data Transfer Regulation Post-Schrems".18 German Law Journal,

forced the EU to face with the contradictions that the EU data protection faces, where "it was no longer possible to ignore the legal and logical incoherence of data transfer and regulation, or to pretend that an adequate level of data protection can be achieved on a global level by formalistic measures alone."[190] In that sense, it was a landmark decision that paved the way to providing a common ground to overcome the illusions of the data protection debate and to draft subtler and more down-to-earth regulations that actually aim at striking a balance and further protecting the fundamental rights of the individuals whenever possible.[191]

If we trace to the development of EU's approach to data protection systems, the first fact that we come across is that the EU, through the high number of terrorist attacks and even higher number of threats, attempted to creating an effective counter-terrorism legislation by shifting from *ex post facto* to a preventive counter-terrorism.[192] Treating the intelligence that consisted of personal data as a potential source of bulk information against terrorist activities, obviously led the way to an expansion of a security-oriented approach, which unavoidably interfered with the right to privacy and data protection.[193] Yet, balance seems to have been an important part of EU legislation in order to find a proportional methodology of interference which enables the Member States to interfere restricted only to the amount of necessity and within the borders of justifiable intervention, and thus it could be said that the balance that both European courts are seeking for implies a balance not only between the right to privacy and intervention o the States, but a balance between a securitarian

(2017), 881, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2732346> accessed on 4 May 2019.

190 Ibid, 918.

191 There are some criticisms in the literature against the handling of cases of the CJEU about data protection. The *Google Spain* case particularly has been the center of attention in regard to the criticism, focusing on two main subjects: (1) it has been claimed that the CJEU failed to discuss the contextually relevant position of the fundamental rights in the face of the expansive processing facilities of the Google, and thus did not follow Article 29 Working Party's interpretation of Article 7(f) Directive 95/46. In a sense, then, on the contrary of the ECtHR decisions, CJEU's wording seems to be not articulate enough, thus leaving space or diverse interpretations. As Guinchard states, it is evident that the CJEU "finds it difficult to establish methodically the contextual data flows associated with individual's rights and their processing, with cascading consequences for the proportionality analysis, thus echoing the wider debate on proportionality." For a detailed analysis of the criticism, *see* Audrey Guinchard, "Taking proportionality seriously: The use of contextual integrity for a more informed and transparent analysis in EU data protection law," European Law Journal 24 [2018]: 434-457.

192 Didier Bigo and Anastassia Tsoukala 'Understanding (in)security,' in Didier Bigo and Anastassia Tsoukala (eds) *Terror, Insecurity and Liberty* (Routledge 2008), 7-10.

193 Christopher Dockesey, "Four Fundamental Rights: Finding the Balance" 6 IDPL 195 [2016], 188, 197.

attitude and respect for fundamental rights. Both the CJEU and the ECtHR became prone to tilting what was once neutral balance in favour of the protection of fundamental rights in time. Particularly CJEU aimed at protection of the right to privacy in its last cases. *Digital Rights Ireland*[194] decision that ended in the quash of Directive 96/45 was ground-breaking in the sense that defining public security as legal grounds for the restriction of the right to privacy, yet the Court showed the way of how the restriction should be done legally and justifiably. Again, the *Schrems*[195] judgement that invalidated the Safe Harbour Agreement. The principles of proportionality affirmed in both cases have been reiterated in other landmark decisions such as *Tele2 Sverige*[196], emphasizing that any governmental interference to the fundamental right to data protection should be very carefully weighed by the government.[197] Schrems case could be considered as a response to the NSA Scandal and the mass surveillance practices of the US public authorities, specifically making a public statement that the public authorities in the EU system cannot be considered as bodies with limitless authority, but are responsible for offering an adequate level of data protection even in the face of the terrorist threats. Particularly *Google Spain*[198] case has defined an additional type of data privacy, that is related to data privacy but not exactly the same: dignitary privacy.[199] As seen from the analysis of the case law, both the CJEU and the ECtHR in recent years has ascribed the right to privacy high importance as a fundamental human right. The privacy and personal data protection in Europe have significantly increased through the intervention of the European courts, who as Dimitrova and Brkan claim to have "played a role as the entrepreneurs of policy reforms."[200]

As a final step of the EU's tendency to strike the balance slightly more in favour of the protection of personal data, LED aims to protect fundamental rights even in the face of national security. Both the victims and witnesses, but also suspects of crimes are acknowledged to have the right to have their data duly protected in the context of a criminal investigation or a law enforcement action. LED, in that sense, is a natural continuation of the course of both ECtHR and CJEU decision that insists on creation of the safeguards against unlawful and disproportional governmental intervention; pushing the EU to shift to a legislation that ensures personal data processing across the EU to

194 Joined cases C-293/12 and C-594/12, *Digital Rights Ireland* (n 99).
195 *Schrems* (n 27).
196 *Tele2 Sverige AB* (n 95).
197 Arianna Vedaschi, "Privacy and data protection versus national security in transnational flights: the EU-Canada PNR Agreement," [2018] 8 IDPL, 112, 126.
198 *Google Spain SL*, (n 105).
199 Robert C. Post. "Data Privacy and Dignitary Privacy: Google Spain, the Right to be Forgotten, and the Construction o Public Sphere", [2018] 67 DLJ 981, 983.
200 Dimitrova and Brkan (n 184), 764.

comply with the principles of legality, proportionality, necessity, with adequate and appropriate safeguards for individuals. Yet, LED aims at harmonising laws among the EU, which will make the prosecution and police work and collaboration easier in cross-border investigations, particularly in the combat against crime and terrorism.[201]

With the EU principles that the EU data protection canon depends on and that independently apply to each context, such as data quality standards, supervision, purpose limitation, proportionality, time and geographical limits, the existence of effective judicial review and access possibilities, it seems like the EU aims at providing the legal safeguards against the illegal interference with the fundamental rights. Since EU's system aims for a high level of data protection, as Boehm et al indicate, it cannot even be compared with the US law, in which EU-level data protection standards are not found.[202]

In other words, both in the context of ECtHR and in the CJEU seems to have become, particularly after the Snowden revelations, extremely sensitive about rendering unauthorized surveillance and dataveillance illegal in the borders of the EU, "allowing individuals to behave in an uninhibited manner and to exercise the rights guaranteed in democratic societies without fear of repercussion".[203] The two Courts, together with the result as GDPR and the LED of their jurisdiction, are interconnected both in their trends and their functioning. Even if the Snowden revelations and the terrorist attacks were both of high importance, the balancing has always been a natural course of the development of both Courts' attempt to negotiate between the rights, thus allowing "the courts to rely heavily on a factual background of the cases."

The analyses of the EU data protection system, together with specific reference to the balance between the right to privacy and national security in criminal investigations and police matters, was covered in this article as the main research question. The systematic division of the article followed the chronological development of the EU data protection before and after the GDPR and the LED. In doing so, this article demonstrated the course of development on how EU data protection system, in reference to balancing the right to privacy with public safety, tilted the weight of the balance to the direction of protecting the personal right to privacy more. Drawing upon the

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201 Vera Jourova, "How will the data protection reform help fight international crime?" Factsheet, Directorate General for Justice and Consumers [2016], 2.

202 Franziska Boehm and Markus Andress, "A Comparison between US and EU Data Protection Legislation or Law Enforcement Purposes: A Study" Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs/Civil Liberties, Justice and Home Affairs [2015], 69.

203 Orla Lynskey, "Deconstructing Data Protection: The Added-Value o a Right to Data Protection in the EU Legal Order" [2014] 63 ICLQ, 569, 591.

analyses in the article of the balance stroke by the ECtHR and CJEU, we believe that the current state of data protection in EU is a natural result of the development of the reception of right to privacy of both courts and the public opinion of the EU bodies.

As a conclusion, it must be reiterated that the data protection system in the EU, through the rulings of ECtHR and CJEU together with the adoption of LED opted for shifting towards a more protective manner of the fundamental right to individual privacy against issues of national security. Even if the national security matters rampantly became a more predominant concept due to recent and global rise of terrorism threat, EU framework evidently incorporates a stance that aims at aggravating the conditions for the governments to intervene to the individual right of privacy. Yet, this tendency is extracted solely from the frameworks and the chronological development of the rulings. Thus, without substantial application of the norms that are laid in the legal frameworks, it is impossible to evaluate if the framework will suffice to support the EU's concern of protecting the fundamental right of privacy against national security issues. Accordingly, in order to assess if EU framework supports its tendency, time and further applications are required.

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"THE ACCELERATED TRIAL" AS AN ALTERNATIVE FORM OF DISPUTE RESOLUTION IN TURKISH CRIMINAL PROCEDURE

Türk Ceza Muhakemesinde Alternatif Uyuşmazlık Çözüm Şekli Olarak "Seri Muhakeme"

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Research Article

Abstract

The "*Law on the of Amendment of Criminal Procedure Code and Certain Codes"* dated 17.10.2019 and numbered 7188 added an alternative procedure to the Criminal Procedure Code (CPC) in lieu of abolished Article 250 of the CPC. In accordance with Article 31 of the Code numbered 7188, the application of accelerated trial procedure has begun as of January 1, 2020. The accelerated trial procedure can be shortly summarized as a process that enables the court to conclude for the enlisted crimes in accordance with the written request of the public prosecutor to reduce the punishment in the event that the suspect accepts the offer from the public prosecutor in the presence of the defence council. The benefits of this procedure can be summarized as follows: regarding the suspect: milder punishment for the suspect, conversion into alternative sanctions, postponement, benefiting from delaying of the pronouncement of the judgment, suspect's prompt learning about his/her punishment; regarding the prosecution and the courts: procedural economy and within this context, completion of the procedure within a short period of time. In the study, how this alternative solution is regulated in our legislation, its conditions will be discussed in detail, and the regulation in comparative law will be very briefly mentioned.

Keywords: *Criminal Law, Criminal Procedure Law, The Accelerated Trial, The Accelerated Trial Procedure, The Public Prosecutor, Suspect, Defense Lawyer*

Özet

5271 sayılı Ceza Muhakemesi Kanunu'nun (CMK) mülga 250. maddesine 17.10.2019 tarih ve 7188 sayılı *"Ceza Muhakemesi Kanunu ve Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun"* ile eklenmek suretiyle seri muhakeme adı altında yeni bir alternatif uyuşmazlık çözüm yöntemi getirilmiştir. Seri muhakeme usulü, 7188 Sayılı Kanun'un 31'nci maddesi uyarınca 01.01.2020 tarihinden itibaren uygulanmaya başlanmıştır. Seri muhakeme usulü kısaca; kanunda belirtilen belirli suçlardan dolayı başlatılan ceza soruşturması kapsamında Cumhuriyet Savcısının (CS), şüpheliye, müdafi huzurunda yaptığı teklifin kabul edilmesi üzerine cezada indirim yapılması yönünde mahkemeye yazılı talepte bulunması halinde, mahkemenin talep doğrultusunda hüküm kurmasını sağlayan bir süreçtir. Kurumun yararları; şüpheli açısından daha hafif ceza, seçenek yaptırımlara çevirme, erteleme, hükmün açıklanmasının geri bırakılmasından yararlanma ve çabucak kendisi hakkında uygulanacak cezayı bilme, savcılık ve mahkemeler açısından ise; usul ekonomisi bu kapsamda özellikle de muhakemenin bir an evvel sonuçlandırılması şeklinde özetlenebilir. Çalışmada bu alternatif çözüm şeklinin mevzuatımızda nasıl düzenlendiği, şartları ayrıntılı şekilde ele alınacak, karşılaştırmalı hukuktaki düzenlemeye de çok kısaca değinilecektir.

Anahtar Kelimeler: *Ceza Hukuku, Ceza Muhakemesi Hukuku, Seri Muhakeme, Seri Muhakeme Usulü, Cumhuriyet Savcısı, Şüpheli, Müdafii*

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INTRODUCTION

The "*Law on the of Amendment of Criminal Procedure Code and Certain Codes*"[1] dated 17.10.2019 and numbered 7188 added an alternative procedure to the Criminal Procedure Code (CPC) in lieu of abolished Article 250[2] of the CPC. In accordance with Article 31 of the Code numbered 7188, the application of accelerated trial procedure has begun as of January 1, 2020. According to the report prepared for the purpose of demonstrating the grounds of the Code numbered 7188: "*the aim of this procedure is to remove the formalities within the procedure and accelerate the procedure with respect to the less important crimes and to ensure the disrupted public order through reacting against the committed crimes proportionally and effectively in a short period of time*" [3]. Hence, the Recommendation No. R (87) 18 of the Committee of Ministers of the Council of Europe Concerning the Simplification of Criminal Justice states that "(…) *member states should review their legislation with regard to out-of-court settlements in order to allow an authority competent in criminal matters and other authorities intervening at this stage to promote the possibility of out-of-court settlements, in particular for minor offences* (...)".

The accelerated trial procedure can be shortly summarized as a process that enables the court to conclude for the enlisted crimes in accordance with the written request of the public prosecutor to reduce the punishment in the event that the suspect accepts the offer from the public prosecutor in the presence of the defence council.

The benefits of this procedure can be summarized as follows: regarding the suspect: milder punishment for the suspect, conversion into alternative sanctions, postponement, benefiting from delaying of the pronouncement of the judgment, suspect's prompt learning about his/her punishment; regarding the prosecution and the courts: procedural economy[4] and within this context, completion of the procedure within a short period of time[5].

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1 See the Official Gazette dated 24.10.2019 and numbered 3092.

2 This Article was abolished by the Article 10 of the Code dated 02.07.2012 and numbered 6352. See the Official Gazette dated 05.07.2012 and numbered 28344.

3 See for the report: (Online) https://www.lexpera.com.tr/resmi-gazete/metin/RG801Y2019N30928K7188, 12.02.2020.

4 **ERDEM** Mustafa Ruhan/**ŞENTÜRK** Candide, "Ceza Muhakemesi Hukukunda Yeni Bir Kurum Olarak Seri Muhakeme Yöntemi" ["Accelerated Trial Procedure as a New Institution in Criminal Procedure Law"], Ceza Hukuku Dergisi, December, Issue: 41, 2019, p. 574.

5 This is supported by the following statement of the Office of Ankara Chief Public Prosecutor dated March 2020, even if the Amendment of the Code was realized in September 2019 and the procedure started in January 2020: "As a result of the accelerated trial procedure, approximately a thousand files were completed in a very short period like two months, whereas their investigation and prosecution would have been normally completed in a

The procedure regarding the accelerated trial is set forth under new Article 250 of the CPC and the Regulation on the Accelerated Trial in Criminal Procedure issued by the Ministry of Justice[6].

A. THE ACCELERATED TRIAL PROCEDURE IN COMPARATIVE LAW

In comparative law, first thing to underline about accelerated trial procedure is that we are far behind to regulate it as we were in other alternative procedures. For example, in the US, the foretold procedures, almost same as today, were brought to discussion in 1972's[7] (see: Barker v. Wingo, 407 U.S. 514 (1972)), they were regulated in many states[8], and were considered before the Congress at federal level in 1974, 50 years before us via "Speedy Trial Act of 1974"[9]. The concerned Act recognises that "the suspect and the defendant shall enjoy the right to speedy and fast trial in addition to fair trial foreseen by the Sixth Amendment to the United States Constitution[10]."

The accelerated trial procedure is regulated within the article 358-362 of the Switzerland Criminal Procedure Code, within the paragraf 416 of the German Criminal Procedure Code[11]. And also within the "*Section Eleven of the Canadian Charter of Rights and Freedoms*" in Canada, within the "*Article 6 of the European Convention on Human Rights*" in the European Union, within the Article 37 of the Constitution in Japan and finally within the Constitution of the Republic of the Philippines[12].

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period from three months to a year". See: Online; https://www.milliyet.com.tr/gundem/seri-muhakeme-ile-bin-dosya-sonuclandi-6157871, 15.02.2020.

6 Official Gazette dated 31.12.2019 and numbered 30995 (4. Repeated)

7 In fact, it is seen that an article titled "*a speedy trial*" was added to the Virginia Bill of Rights in June 1776 in the United States, which is shaped around British Law. See online, https://en.wikipedia.org/wiki/Speedy_trial, 31.08.2020. History of Speedy Trial in UK see: online, https://law.jrank.org/pages/10299/Sixth-Amendment-Speedy-Trial.html#:~:text=The%20right%20to%20a%20speedy,in%20jail%20for%20an%20indefinite, 31.08.2020.

8 See online, https://en.wikipedia.org/wiki/Speedy_Trial_Clause, 31.08.2020.

9 **SHESTOKAS David John,** (13 November 2014), "Sixth Amendment's Speedy Trial Right: Ancient, Worthy and Elusive", See online, http://www.shestokas.com/constitution-educational-series/sixth-amendments-speedy-trial-right-ancient-worthy-and-elusive/, 31.08.2020.

10 **Erdem/Şentürk,** p. 575; **LARSON Aaron,** "What are Speedy Trial Rights", ExpertLaw, Retrieved 28 September 2017, See online, https://www.expertlaw.com/library/criminal-law/what-are-speedy-trial-rights, 31.08.2020.

11 For detailed study on comparative law, see: **Erdem/Şentürk,** p. 576-581.

12 For all these regulations, see: **BUONOMO Giampiero,** 2000, "Equa durata del processo: il risarcimento non risolve il problema", Diritto&Giustizia edizione online–via Questia (subscription required), online, https://www.questia.com/projects#!/visitor, 31.08.2020; **Shestokas**, online, http://www.shestokas.com/constitution-educational-series/sixth-amendments-speedy-trial-right-

In comparative law, it is seen that the standards on Speedy Trial and Timely Resolution of Criminal Cases have three main purposes: (1) to effectuate the right of the accused to a speedy trial; (2) to further the interests of the public, including victims and witnesses, in the fair, accurate, and timely resolution of criminal cases; and (3) to ensure the effective utilization of resources[13].

In a speedy trial of judgment carried out for these purposes; there may be many advantages in terms of both suspect[14] and investigation and prosecution authorities[15]. For example; obtaining a penalty reduction, getting rid of court costs. Again, such as contributing to the judicial economy due to the absence of the hearing and the fact that the decision can only be appealed.

B. THE ACCELERATED TRIAL PROCEDURE IN DOMESTIC LAW

I. The Conditions of Application of The Procedure of Accelerated Trial

1. The Crime Should Not Be Qualified as a Crime Within the Scope of Prepayment and Mediation

According to Article 5/1 of the Regulation, the crimes within the scope of prepayment and mediation are not subject to accelerated trial. It should be understood from this Article that it is not possible to apply for the accelerated trial procedure in any way, if the crime in question is within the scope of these two institutions (i.e. prepayment and mediation). Even if the prepayment and mediation procedure started, but did not yield settlement, the accelerated trial still cannot be applied.

2. The Crime Should Be Within the Ones Listed Under the CPC

The accelerated trial procedure can only be applied for the catalogue crimes listed under Article 250 of the CPC. This list cannot be extended by analogy, as this Article is of exceptional nature. This method can be applied within the scope of criminal investigations initiated against one of the crimes listed below:

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ancient-worthy-and-elusive/, 31.08.2020; online, https://en.wikisource.org/wiki/Constitution_of_the_Philippines_(1987)#Article_III:_Bill_of_Rights, 31.08.2020.

13 See online, https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_speedytrial_blk/, 31.08.2020.

14 For The Speedy Trial Rights see: **GREGORY P.N. Joseph,** Speedy Trial Rights in Application, Fordham Law Review, Volume: 48, Issue: 5, Article 1, 1980, online, https://core.ac.uk/download/pdf/144225107.pdf, 31.08.2020.

15 **Erdem/Şentürk,** p. 575.

a) The following crimes regulated under the Turkish Criminal Code (TCC); **1.** Invasion of a place (Article 154, second and third paragraph); **2.** Endangering public safety intentionally (Article 170), **3.** Endangering traffic safety (Article 179, second and third paragraph), **4.** Causing Noise (Article 183), **5.** Counterfeiting money (Article 197, second and third paragraph), **6.** Destruction of seal (Article 203), **7.** Untrue declaration during issuance of an official document (Article 206), **8.** Arranging a place or facility for gambling (Article 228, first paragraph), **9.** Using other's identity card or ID information (Article 268);

b) The crimes regulated under first, third and fifth paragraph of Article 13 and first, second and third paragraphs of Article 15 of the Code on Firearms, Knives and Other Tools dated 10.07.1953 and numbered 6136;

c) The crime regulated under first paragraph of Article 93 of the Forestry Law dated 31.08.1956 and numbered 6831;

d) The crime regulated under of Article 2 of the Code on Roulette, Pinball, Table Football and Similar Tools and Machines for Games dated 13.12.1968 and numbered 1072;

e) The crime regulated under of subparagraph (1) of the first paragraph of Additional Article 2 of the Code of Cooperatives dated 24.04.1969 and numbered 1163.

The lawmaker preferred to subject predominantly the crimes against public where the victim is not a specific person to accelerated trial. For this reason, it can be concluded that the crimes subject to mediation are not within the scope of this procedure[16].

In the event of committing of more than one crime, each crime is considered independent. Unlike mediation and simple trial procedure, there is no provision which hinders the application of accelerated procedure if the same suspect commits a crime within the scope of the catalogue and another one outside of the scope. Hence, even if a crime within the scope of accelerated trial is committed alongside with a crime outside the scope of this procedure, the procedure of accelerated trial can be applied for the crime within this scope[17].

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16 **KIZILARSLAN** Hakan, 7188 Sayılı Kanun'la Ceza Muhakemesi Hukukuna Getirilen Seri Muhakeme ve Basit Yargılama Usulleri" [Accelerated Trial Procedure and Simple Trial Procedure Introduced with Law numbered 7188 to the Criminal Procedure Law] Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi [Journal of Bahçeşehir University Faculty of Law], Volume: 14, Issue: 183-184, 2019, s. 1923.

17 In the same view: **DEĞİRMENCİ** Olgun, "*Ceza Muhakemesi Hukukunda Seri Muhakeme Usulü*" ["Accelerated Trial Procedure in Criminal Procedure Law], Ankara Batı Adliyesi Dergisi, Year: 2, Issue: 3, January-June 2020, p. 20; **YAVUZ Hakan**, Ceza Muhakemesinde Kovuşturmaya Alternatif Yöntemler [Alternative Methods to Prosecution in Criminal Procedure], Adalet, Ankara, 2020, p. 253.

3. The Collected Evidence Should Constitute Sufficient Suspicion for the Crime

As stated under Article 5/2 of the Regulation, the accelerated trial can be applied after obtaining evidence constituting sufficient suspicion to file an official claim regarding the crimes listed under first paragraph of Article 250 of the CPC. Firstly, the public prosecutor has to initiate an investigation for an enlisted crime and the collected evidence should constitute sufficient suspicion to make an indictment. In accordance with Article 8 of the Regulation, the public prosecutor shall start searching for the factual truth for the purpose of deciding on whether there is a ground for filing an official claim, immediately after learning about the facts giving an impression that a crime subject to accelerated procedure was committed. The fact that the investigated crime is subject to accelerated trial does not eliminate the obligation of the public prosecutor to investigate the factual truth. As stated in the report prepared to demonstrate the grounds of the Code, "the application of this procedure shortens and facilitates the process of traditional procedure, however it does not put an end to the duty of collecting and protecting evidence during the investigation stage"[18]. Collecting the evidence is crucial, as the investigation will be enforced again, in the event of non-application of this procedure for whatsoever reason. Otherwise, there will be a risk of non-collection of evidence or of losing evidence[19].

4. There Should Not Be A Decision on the Postponing of the Filing of the Official Claim

Pursuant to the Article 250/1 of the CPC and Article 8 of the Regulation, the procedure of accelerated trial can be applied as a secondary method when a decision on postponing of the filing of the official claim is not made. Therefore, if there are grounds for public prosecutor to decide on the postponing of the filing of the official claim, then this should be opted as a priority. In the cases where it is not possible to decide on the postponing of the filing of the official claim, the procedure of accelerated trial will be applied. The reason why it cannot be decided on postponing of the filing of the official claim, is not of importance[20]. It is not possible to postpone the filing of official claim, if the suspect was previously sentenced to prison due to committing an intentional crime (Article 171/(3)-a of the CPC). Some scholars are rightfully of the opinion that procedure of accelerated trial should not be applied for repeat offenders[21].

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18 For the report see: Online; https://www.lexpera.com.tr/resmi-gazete/metin/RG801Y2019N30928K7188, 12.02.2020.

19 **Kızılarslan,** p. 1916.

20 **Erdem/Şentürk,** p. 586.

21 **Kızılarslan,** p. 1926; **AYGÖRMEZ-UĞURLUBAY** Gülsün Ayhan/**HAYDAR** Nuran/**KORKMAZ** Mehmet, ""*Seri Muhakeme Usulüne İlişkin Sorunlar*" ["*Problems Regarding*

5. Invitation of the Suspect

For the application of procedure of accelerated trial, the public prosecutor should first invite the suspect to inform him/her about this procedure before the offer. It is not possible to apply the procedure of accelerated trial if the suspect is not present. Pursuant to Article 9 of the Regulation, the public prosecutor immediately invites the suspect to offer him/her the application of procedure of accelerated trial. The invitation can also be made with the use of communication means such as telephone, telegram, fax or e-mail. In accordance with Article 250/13 of the CPC, accelerated trial will not applied if the suspect is not present at the address that was declared by the suspect to the official authorities and that is found at the investigation file; the suspect is abroad or the suspect cannot be reached due to other reasons.

The public prosecutor will prepare a report and continue the investigation according to the general provisions, in the following events: the suspect does not accept the invitation without an excuse, the suspect is not present at the address that was declared to the official authorities, and that was found at the investigation file; the suspect is abroad, or the suspect cannot be reached due to the other reasons. However, it is set forth under Article 10/11 of the Regulation that the public prosecutor conducting the investigation can make the informing and invitation regarding the accelerated trial procedure with the use of means of Sound and Video Information System (SEGBIS) or rogatory, thereby the accelerated trial procedure, which principally aims to save time, became applicable with the use of foretold means. If the public prosecutor is planning to make the informing and invitation through SEGBIS or rogatory, the suspect will not be personally in the presence of the public prosecutor conducting the prosecution. If the public prosecutor is carrying out the actions concerning the procedure of accelerated trial by means of SEGBIS, the public prosecutor will take necessary actions in accordance with Article 39/A.

If the method of rogatory is used, then the Office of Chief Public Prosecutor where the file was sent to, will immediately conduct the necessary process for the invitation in line with the procedure (Regulation 10/3).

6. Informing the Suspect

Pursuant to Article 250/2 of the CPC, the suspect that accepted the invitation should be informed by the public prosecutor or the law enforcement officers about the procedure of accelerated trial. As stated in the report prepared to demonstrate the grounds of the code, information regarding the procedure

Accelerated Trial Procedure"], Ankara Sosyal Bilimler Üniversitesi Hukuk Fakültesi Dergisi [Journal of Law Faculty of Social Sciences University of Ankara], Issue. 2, 2019, p. 265. See for this publication: Online, http://static.dergipark.org.tr/article-download/9f5c/128a/d869/5e09ce9acb658.pdf, 12.02.2020.

of accelerated trial will be given to the suspect by the public prosecutor or upon the instruction of public prosecutor by the law enforcement officers and enlightenment of the suspect about the accelerated trial procedure will be ensured [22]. If the method of SEGBIS or rogatory is used, the Office of Chief Public Prosecutor from which the hearing through SEGBIS is requested or to which the rogatory file was sent, will inform the suspect (Article 10/13 and 11/13 of the Regulation).

The scope and method of the information which should be made before the offer is set forth under the Regulation. Pursuant to Article 10 of the Regulation, the information should include:

a) the alleged acts, the crime concerning the acts, and that the crime is within the scope of accelerated trial procedure,

b) that there is sufficient suspicion to file an official claim,

c) that this procedure will be applied, if he/she accepts it with his/her free will in the presence of the defence council and the principal punishment will be reduced by one-half,

ç) that the court will make a judgment in accordance with the request regarding the sanction offered by the public prosecutor and that a motion of an opposition may be filed against the judgment,

d) that the acceptance of the offer can only be made in the presence of the defence council and if he/she does not choose a defence council, one will be appointed regardless of his/her will,

e) that he/she can renounce the application of accelerated trial procedure at all stages of the procedure, until the judgment of the court,

f) that the decision of the court will be recorded on the criminal registry,

g) that an indictment will be presented, and an official claim will be filed against him/her by in accordance with the general provisions, if he/she does not accept the application of this procedure,

ğ) that his/her declaration regarding acceptance of the accelerated trial procedure and other documents related to the application of this procedure will not be used as evidence during investigation and prosecution, if the general provisions are to be imposed.

We are of the opinion that the regulation should also impose informing the suspect that he/she has a time period, not exceeding a month to evaluate the offer. As a matter of fact, Article 10/4 sets forth that a reasonable time period, not exceeding a month, can be granted to the suspect. It is necessary to inform the suspect about this right, as otherwise it will not be possible for the suspect to exercise it.

[22] Online, https://www.tbmm.gov.tr/sirasayi/donem27/yil01/ss105.pdf, 12.02.2020.

Although there isn't any express provision regulating that the suspect should be informed in the presence of the defence council, we are of the opinion that it is crucial to ensure that information is duly and properly made. It would be better to make a clear regulation in the future in the code and related regulation. The defence council will intervene in the case that the information is deficient and incorrect and thus it will be possible to avoid the obstacles, which would arise later during the application of this procedure. The court should not approve the sanction that the public prosecutor requested, if the information is not duly conducted; since the information is the condition set forth under law for the application of procedure of accelerated trial[23].

7. The Public Prosecutor Will Determine the Punishment

The public prosecutor offering the accelerated trial procedure should firstly determine the punishment to be applied[24]. Pursuant to Article 11/2 of the Regulation, the sanctions which will be applied to the suspect should be explained to him/her when making the offer of procedure of accelerated trial. The suspect should know the punishment, which will be applied to him/her, before accepting the offer. Otherwise, the suspect will renounce his/her rights granted by the procedure with trials without sufficient information. According to the acceptance statement of accelerated trial procedure introduced by the annex of the Regulation, the public prosecutor should first assess and determine the principal punishment by taking into account the principals laid down under the first paragraph of Article 61 of the Turkish Criminal Code and should apply reduction, then the public prosecutor should make the offer.

The suspect should know about the punishment, which will be possibly applied to him/her, before the acceptance. Otherwise, we cannot say that the suspect accepted the offer with his/her free will. According to certain scholars, the public prosecutor will firstly make an offer for the accelerated trial procedure, then the public prosecutor will determine the actual punishment upon the acceptance by the suspect[25]. According to this view, the suspect does not know the severity of the punishment when accepting the offer. We are of the opinion that this view was based on the previous provisions of law, before

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23 **ALDEMIR Hüsnü,** Ceza Yargılamasında Seri Muhakeme ve Basit Yargılama Usulleri, [Accelerated Trial and Simple Trial Procedures in Criminal Trial], Adalet, Ankara, 2019, p. 59-61; **Erdem/Şentürk,** p. 587. See otherwise: **Yavuz,** p. 263.

24 See for similar views: **YILMAZ Zahit/APİŞ Özge**, "*Seri Muhakeme ve Basit Yargılama Düzenlemelerinin Değerlendirilmesi*", [Evaluation of Accelerated Trial and Simple Trial Arrangements], Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi [Marmara University Faculty of Law Journal of Legal Studies], Volume: 26, Issue: 1, 2020, p. 77; **Yavuz,** p. 280 and more.

25 **Erdem/Şentürk,** p. 590; **Değirmenci,** p. 20; **Kızılarslan,** p. 1930; **Aygörmez-Uğurlubay/Haydar/Korkmaz,** p. 267.

the adoption of the Regulation. It is rightfully expressed by the supporters of this view that "the suspect should know which punishment he/she will be subject to, thus it will be proper, if the public prosecutor makes the offer after determining the punishment" [26]. Without any doubt, the suspect has a right to renounce this offer until the approval of the punishment by the court, however this does not constitute a sufficient assurance[27].

a. The Punishment Should Be Determined Between the Maximum Level and the Minimum Level

Pursuant to Article 250/4, the public prosecutor can determine a punishment, which is between the maximum and minimum levels set forth in the legal definition of the crime in accordance with first paragraph of Article 61 of the TCC.

The following factors can be taken into consideration while determining the precise punishment: the manner in which the crime was committed; the means used to commit it; the time and place when and where the crime was committed; the importance and value of the subject of the crime; the gravity of the damage or danger; the degree of fault relating to the intent or recklessness; the object and motives of the perpetrator. Other factors regulated under other paragraphs of Article 61 (probable intent or conscious recklessness, the factors requiring deductions or increases in the punishment, attempt; jointly committed crimes; successive crimes; unjust provocation; minor status; mental disorder) will not play a role when deciding on the punishment. We are of the opinion that an amendment to the code should be adopted which would ensure individualization of the punishment by enabling to apply all the paragraphs of Article 61 of the TCC[28].

The public prosecutor will specify the final punishment and also security measures, if any, after reducing the principal punishment, which is determined to be between the maximum and minimum limits of the punishment set forth under the legal definition of the crime, by one-half (Article 250/4 of the TCC, Article 10/5 of the Regulation). It is not possible for the public prosecutor to offer a punishment other than this one or to reduce or to increase this punishment[29].

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26 **Kızılarslan,** p. 1931.

27 **Erdem/Şentürk,** p. 590.

28 **Kızılarslan,** p. 1932.

29 **ŞAHİN Cumhur/GÖKTÜRK Neslihan**, Ceza Muhakemesi Hukuku [Criminal Procedure Law], Volume: II, 10. Edition, Seçkin, Ankara, 2020, p. 205; **Değirmenci,** p. 20; **Erdem/Şentürk,** p. 591; **Yılmaz/Apiş,** p. 79.

b. Conversion into the Alternative Sanctions, Postponement of the Punishment or Delaying of the Pronouncement of the Judgment

The public prosecutor may also decide on the conversion of punishment into the alternative sanctions, postponement of the punishment or delaying of the pronouncement of the judgment, provided that the conditions are met, in lieu of the determined final punishment after reducing the principal punishment [30]. In accordance with the law, the acceptance of the accused is required for delaying of the pronouncement of the judgment, thus the suspect should be asked for his/her consent on this, when making the offer[31].

8. Offer and Acceptance of the Procedure of Accelerated Trial

a. The Offer

Pursuant to Article 250/3 of the CPC and Article 9 of the Regulation, the public prosecutor offers the application of the accelerated trial procedure to the suspect and this procedure is applied upon the suspect's acceptance in the presence of the defence council. The offer can only be made directly to the suspect, the public prosecutor cannot make an offer to the defence council in lieu of the suspect[32]. According to Article 5/7 of the Regulation, a subpoena or apprehension order cannot be issued with the purpose of making an offer for accelerated trial procedure to the suspect.

Under the Code and the Regulation, a reference to the presence of the defence council is only made for the moment of acceptance of the offer. It is stated in the report prepared to demonstrate the grounds of the Code that "The public prosecutor will offer the application of the procedure to the suspect in the presence of the defence council; this procedure will only be applied if the suspect accepts it; the presence of the defence council during the offer is one of the requirements for the application of this procedure" [33]. We believe that the defence council should be present during the offer, such as during the information, in order to ensure the well-functioning of the procedure[34]. It would

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30 See for the view arguing that the authority to decide on the conversion of punishment into the alternative sanctions, postponement or delaying of the pronouncement of the judgment only belongs to the court, not to the public prosecutor: **YURTCAN Erdener**, Ceza Yargılaması Hukuku [Criminal Procedure Law], 16. Edition, Adalet, Ankara, 2019, p. 716-718. According to this author, "the court can decide on the conversion into the alternative sanctions, postponement of punishment or delaying of the pronouncement of the judgment, in accordance with the specific punishment request of the public prosecutor, provided that conditions are met."

31 **Erdem/Şentürk,** p. 592.

32 **Erdem/Şentürk,** p. 588.

33 Online, https://www.tbmm.gov.tr/sirasayi/donem27/yil01/ss105.pdf, 12.02.2020.

34 For similar view see: **Aygörmez-Uğurlubay/Haydar/Korkmaz,** p. 267; **Yavuz,** p. 282.

be proper to regulate this under the code itself, by making an amendment, rather than regulating this issue under the report demonstrating the grounds of the Code. According to the Article 10/3 of the Regulation, as the presence of the defence council during the acceptance of the offer is required, the Bar Association should appoint a mandatory defence council in the event of the absence of a defence council chosen by the suspect. The defence council should have the authority to review the files and the evidence before acceptance of the offer, in order that she/he could effectively conduct his/her legal assistance[35]. Article 5/5 of the Regulation sets forth that a translator will be appointed, if the suspect does not speak Turkish sufficiently enough to express himself or the suspect is disabled.

The offer can only be made by the public prosecutor. It is not possible for the law enforcement officers to make the offer upon the authorization of the public prosecutor[36]. It is not possible for the law enforcement officers to make the offer, whereas the law enforcement officers can inform the suspect upon the authorization granted by the public prosecutor.

b. Acceptance of the Offer

Pursuant to the Article 10/3 of the Regulation, a reasonable period, not exceeding a month will be granted to the suspect for his/her consideration on the offer upon the request of the suspect. For the application of the accelerated trial procedure, the suspect should accept the offer within the foreseen period. In the event that the suspect, is not present, without an excuse, within the period given or declare that he/she does not accept the offer, the investigation will continue according to the general provisions (Article 10/4). In this case, the public prosecutor issues a report regarding the rejection of the offer and append this report to the investigation file (Article 10/10 of the Regulation).

However, the suspect may request from the public prosecutor for the application of accelerated trial procedure until the indictment is presented. In this case, the public prosecutor will apply the accelerated trial procedure, provided that other conditions are met (Article 5/11 of Regulation).

Pursuant to Article 250/3, the accelerated trial procedure will only apply, if the suspect accepts the offer in the presence of the defence council. In other words, the defence council should be present during the acceptance of the offer. It is possible to state that here another obligation for the appointment of mandatory defense is regulated under this provision. In the event of the absence of a defence council chosen by the suspect, the Office of Chief Public Prosecutor will request from the Bar at the place of the investigation to appoint

35 **Değirmenci,** p. 20.
36 **Erdem/Şentürk**, p. 588.

a defence council, for him/her to be present at the acceptance of the offer (Article 11/2-3 of the Regulation).

The requirement of the presence of the defence council is adopted for the purpose of protecting the suspect's rights and informing the suspect about the consequences. The offer cannot be accepted by the defence council (chosen by the suspect or appointed by the bar) on behalf of the suspect. The suspect should express himself/herself directly about his/her views on the offer, not through the defence council. The defence council can only assist the suspect when the suspect assesses his/her interests. Pursuant to Article 5/3 of the Regulation, the accelerated trial procedure will apply upon the acceptance of the suspect with his/her free will in the presence of the defence council. The offer should be accepted in the presence of the defence council in order to avoid suspect's acceptance under any duress, or fraud which suppresses his/her free will. Upon the acceptance of the suspect, an acceptance document will be issued. In this document, following information will be stated: the alleged acts of the suspect, acceptance declaration of the suspect, the determined final punishment and/or security measures and, if applied, delaying of the pronouncement of the judgment, the conversion of punishment into the alternative sanctions, or postponement of the imprisonment punishment.

The acceptance document will be signed by the public prosecutor, the suspect and the defence council (Article 10/8 of the Regulation). At the same day when the suspect accepts the offer in the presence of the defence council, the suspect will be directed to the court (Article 10/9 of the Regulation). The defence council working during the investigation stage will be primarily appointed also by the court (Article 11/4 of the Regulation).

The suspect can renounce the accelerated trial procedure after his/her acceptance at any stage until the court makes a judgment (Article 10/1-e of the Regulation).

9. The Case Should Not Be Within the Exceptions of the Accelerated Trial Procedure

a. Minors, Mental Illness or Deafness and Muteness

Pursuant to Article 250/12 of the CPC and Article 7 of the Regulation, the procedure of accelerated trial will be not be applied in the following cases regulated under TCC: minors (Article 31), mental illness (Article 32) or deafness and muteness (Article 33), even if the crime is within the scope of accelerated trial procedure. The report demonstrating the grounds of the Code does not include an explanation on the reasons of these expectations. It is stated in the relevant section of the report with respect to Article 251 of the CPC, which regulates a similar provision for the simple trial procedure, that

"This exception is regulated, as it is necessary to discuss the collected evidence during the trials and as the judge should personally interview the parties due to the special condition of the perpetrators." [37]. The lawmaker probably had a similar conclusion on the accelerated trial procedure within this context and probably assessed that it would not be proper due to the special conditions of the suspect (being minors, having mental illness or being deafness and muteness) to make a judgment on the suspect without trials and without judge's personal interviews. We are of the opinion that these exceptions are regulated as according to the Article 250/4 of the CPC, the public prosecutor will determine the final punishment only in light of the criteria set forth under Article 61/1 of the TCC (being minor, having mental illness or being deaf and mute will not play a role when deciding on the final punishment).

b. If One of the Suspects Does Not Accept This Procedure in the Event of Jointly Committed Crimes

All suspects should accept the procedure of accelerated trial in the event of jointly committed offences. This procedure will not be applied, if one of the suspects does not accept the offer (Article 250/11 of the CPC). It is not important whether the suspect, who did not accept the offer, jointly performed the alleged act of crime, or incited another to commit the alleged crime or assisted another with the commission of the alleged crime. If it is understood that the crime is jointly committed and other suspects are detected after the acceptance of the offer by the suspect until finalizing the procedure, the offer should be made to them, as well. However, it is not possible to revoke the judgment for the sole reason of the presence of other suspects if they are detected after rendering of the judgment upon completion of the accelerated trial procedure[38]. Without any doubt, the accelerated trial procedure will not be applied if one of the joint-offenders is minor or has a mental illness or is a deaf-mute (Article 250/11-12) [39].

II. The Application of Accelerated Trial Procedure

1. The Actions Which Will Be Carried Out by Public Prosecutor

a. In General

If the conditions of the accelerated trial procedure are met, its application is mandatory, and the public prosecutor does not have a marge of appreciation on this decision[40]. Indeed, it is stated under Article 250/8 of the CPC that "*The*

[37] **Değirmenci**, p. 19.
[38] **Erdem/Şentürk,** p. 588; **Yılmaz/Apiş,** p. 79.
[39] **Değirmenci,** p. 20.
[40] **Yurtcan**, p. 714; **Kızılarslan**, p. 1914-1915, 1918.

public prosecutor requests in writing for the application of accelerated trial procedure from the competent court". As it can be seen the wording of this Article does not include the formulation "may request" which would have enabled a marge of appreciation.

Additionally, pursuant to Article 5/2 of the Regulation "It is mandatory to apply the accelerated trial procedure in the event that the postponement of filing an official claim is not decided upon the collection of evidence which constitutes sufficient suspicion for the filing of an official claim with respect to the crimes listed under first paragraph of Article 250 of the Code". Considering all these regulations together, we are of the opinion that the public prosecutor has to apply the accelerated trial procedure, provided that these conditions are met[41].

Indeed, pursuant to Article 174/1-c of the CPC and Article 5/10 of the Regulation, filing an indictment, whereas it is clearly understood from the investigation file that the crime is subject to accelerated trial procedure, is one of the reasons of return of the indictment. Having said that, the public prosecutor has also the possibility to conduct the investigation according to the general provisions, provided that he/she anticipates that the legal nature of the act has changed due to the recently collected evidence and the recent legal nature is not within the scope of application of accelerated trial procedure[42]. Therefore, it is possible for the public prosecutor to revise his/her thoughts until the presentation of the written request to the court upon its preparation and by means of this, to conduct the investigation in light of general provisions.

A document named "Written Request" is mentioned under Article 4/1-ç, with the title of definitions and is defined as "*written request document presented by the public prosecutor to the court in accelerated trial procedur*e". It is understood from this provision that the public prosecutor will request from the competent court for the application of accelerated trial procedure regarding the suspect, by means of a written request document, under the name of written request. In principle, it is not required for the public prosecutor to declare his requests in writing. For example, he/she can announce his/her opinion on the merits by writing or orally. However, the lawmaker adopted an exception to this principle by requiring a written document probably considering the characteristics of the system.

Legal dictionary defines the written request as "*request paper, request document, request receipt*" [43]. In the past, first regulation regarding the written

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41 For similar view see: **Aygörmez-Uğurlubay/Haydar/Korkmaz,** p. 63; **Yavuz,** p. 250.

42 **Erdem/Şentürk**, p. 589.

43 **YILMAZ** Ejder, Hukuk Sözlüğü [Legal Dictionary], 5. Edition, Yetkin, Ankara, 1996, p. 779.

request can be found during the period of investigating judges. During that period, the doctrine, shortly, defined it as "document issued in writing by the prosecutors including the request for the opening of the first investigation from the prosecutor" [44]. The lawmaker most likely required the written request for the accelerated trial procedure based on the previous regulations.

b. Issuance of the Written Request

Pursuant to Article 250/8 of the CPC and Article 12 of the Regulation, the public prosecutor will request from the competent court for the application of accelerated trial procedure with a written request upon the acceptance of the accelerated trial procedure by the suspect. The written request should include the following details:

a) the identity of the suspect and the defence council,

b) the identity of the victim or the parties injured due to the crime and, if any, their representatives, or legal representatives,

c) the alleged crime and relevant articles of the code,

ç) the place, the date and the time period of the commission of the alleged crime,

d) the information on whether the suspect is under arrest or not; if the suspect is under arrest the date of his/her taking into custody and detention; and their time period,

e) The summary of the events constituting the crime,

f) The information that the application of this procedure was offered to the suspect and the suspect accepted it in the presence of a defence council,

g) The relevant information regarding the delaying of the pronouncement of the judgment, alternative sanctions to the imprisonment, postponement of the imprisonment sentence in the event that the determined punishment and/or security measures are applied.

2. The Acts Which Will Be Carried Out by The Court

a. Court's Examination of the Written Document

In the accelerated trial procedure, the court will examine the written request and will return it in the case of deficiencies; deny it , if the conditions are not met, otherwise the court will accept the request. Pursuant to Article 13 of the Regulation, the court shall immediately examine the written request on

[44] **EREM Faruk**, Ceza Usulü Hukuku [Criminal Procedure Law], 5. Edition, Sevinç, Ankara, 1978, p. 272 vd; **KUNTER Nurullah,** Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku [Criminal Procedure Law as a Type of Procedure Law], 9. Edition, Beta, İstanbul, 1989, p. 841 vd; **Yılmaz**, p. 779.

the day of its submission. The court will examine the following: primarily whether the written request was prepared properly and without deficiencies (to include the required information); whether there is a material error on the requested sanction; whether the security measure fits the nature of the punishment; whether the relevant conditions set forth under law are met, in case the delaying of the pronouncement of the judgment is requested and whether the objective conditions regarding the postponement and conversion into alternative sanctions are met.

The court will decide on the return of the written request to the Office of Chief Public Prosecutor with the purpose of its completion in the events that there is missing or erroneous information on the written document; there is a material error on the requested sanction; it is understood that the objective conditions regarding the application of Article 231 or Article 50 and 51 of the TCC with respect to the sanction are not met; the written request does not stipulate a security measure which fits the nature of the punishment. The written request will be resent to the court by the public prosecutor, after completing the missing points and correcting the erroneous ones.

The court will assess whether the conditions are met for the application of the accelerated trial procedure and reject the request if the court concludes that the alleged crime is not within the scope of the accelerated trial procedure or the conditions set forth under third paragraph of Article 250 are not met. As the court is not bound with the legal qualification made by the public prosecutor, the court may make a different legal qualification, and if the court assesses that the newly-qualified crime is not subject to accelerated trial procedure, the court may reject the request[45]. In this case, the file will be sent to the Office of Chief Public Prosecutor and the investigation will be finalized in light of general provisions.

As stated in the report demonstrating the grounds of this Article, the court, as the control and final decision authority of the accelerated trial procedure, examines whether the acceptance of the suspect and the legal qualification of the act correspond to the facts reflected in the file. The court does not have the authority for expanding the investigation for the purpose of searching of the factual truth, or for the collection of new evidence and of the hearing of witnesses. If such research is needed to learn about the factual truth, then the request for the application of accelerated trial procedure should be rejected. The court is not bound by the legal qualification of the public prosecutor and can also reject the request, in the event of a different conclusion[46]. These rules limit the court's margin of appreciation on examining the conformity of

45 **Erdem/Şentürk**, p. 596.
46 **Yılmaz/Apiş,** p. 84.

suspect's acceptance with the facts and if the court does not reject the request, it has to decide on the sanction stated in the request. The court does not have the authority to change the sanction[47].

In the doctrine, it is discussed whether the court can or cannot apply this procedure or, at least the suspect may or may not benefit from the reduction of the punishment by half, if it understood at the stage of the prosecution that the crime is within the scope of accelerated trial procedure (the public prosecutor did not start accelerated trial procedure as a result of his/her erroneous assessment, the nature of the crime has changed at the stage of prosecution or the crime has been accepted to be within the scope of accelerated trial procedure following an amendment of law). According to a scholarly view, the court, ruling on the case, should make the suspect benefit from "the reduction of the punishment by half", if the court notices that the public prosecutor did not start the application accelerated trial procedure due to his/her erroneous assessment whereas the acts are within the scope of accelerated trial procedure and that other conditions are met[48]. According to the other view that we concur, the accelerated trial procedure is a method that can be applied at the end of the investigation stage before the start of the prosecution. Application of this procedure at the prosecution stage and the reduction of the punishment by half during the stage of determination of the punishment are both impossible[49].

We are of the opinion that, by regulating this new and alternative procedures, the lawmaker aims to speed up the process of the criminal procedure so that more time and effort can be allocated for more serious crimes, meanwhile the lawmaker awards the suspect in return of his/her revocation of the assurances granted by hearings within standard procedures. The provision regarding the accelerated trial procedure is of an exceptional nature. Therefore, it is not possible to make the suspect benefit from the reduction of the punishment by making an interpretation in a way to create an analogy. Thus, under existing norms, the accelerated trials cannot be applied during the prosecution phase, even if it may seem unfair to deprive the suspect from the reduction of punishment due to the mistake of the public prosecutor, which he/she normally might have benefitted. It can be regulated, similar to the mediation, through an amendment that "in cases where it is understood during the prosecution stage that the public prosecutor did not apply the accelerated trial procedure despite the fact all conditions were met, then the court can make the decision based on the reduction of the punishment regulated for the accelerated trial procedure

47 Online, https://www.tbmm.gov.tr/sirasayi/donem27/yil01/ss105.pdf, 18.02.2020. For the similar view see: **Yavuz**, p. 297. For the opposite wiew see: **Yurtcan,** p. 718.

48 **Erdem/Şentürk**, p. 597.

49 **Kızılarslan,** p. 1939.

without continuing the trials". Until an amendment is adopted, the simple trial procedure can be applied and the punishment can be reduced by one-fourth, provided that the crime subject to prosecution is within the scope of simple trial (where the maximum limit of the punishment is two years or less or the punishment is judicial monetary fine) and all conditions are met[50].

b. Hearing of the Suspect

After confirming that there isn't any missing or erroneous information on the written request upon its examination from a formal perspective and that the requirements of the accelerated trial procedure are met, the court will invite the suspect to be heard with respect to the accelerated trial procedure in the presence of the defence council. A time period regarding the invitation of the suspect and his/her hearing is not regulated by the law. However, it is understood that the hearing should be conducted as soon as possible, considering that this procedure is regulated for the purpose of the prompt resolution of the dispute[51].The hearing of the suspect can be conducted through Sound and Video Information System (SEGBIS) or by means of rogatory.

If the suspect does not appear in the court without an excuse, it is deemed that the suspect has renounced from the application of the accelerated trial procedure (Article 13 of the Regulation). The hearing of the defence council in lieu of the suspect or hearing of the victim or the party injured due to the crime is not possible, as only the hearing of the suspect is regulated in this procedure. As a trial is not conducted, the court will not apply the rules regarding trials and will not conduct research for evidence, hearing of witness, appoint an expert, or organize a viewing or etc. The rules regarding the interview and interrogation related to the hearing of the suspect regulated under Article 147 of the CPC can also be applied by analogy for the hearing of the suspect. The defence council is definitely required to be present during the hearing of the suspect. If the defence council does not appear without an excuse, the court should request from the bar to appoint a defence council (Article 250/9 of the CPC).

c. The Court Will Make a Judgment in Accordance with the Sanction

The court will make a judgment in accordance with sanction stated in the written request, if the court is convinced that the act is within the scope of the accelerated trial procedure, this procedure was offered to the suspect in light of the requirements regulated by the Code and the suspect accepted this offer in the presence of the defence council with his/her free will (Article 250/9 of the

50 See for the opposite view. **Kızılarslan,** p. 1940.
51 Similar view: **Erdem/Şentürk,** p. 595.

CPC, Article 14 of the Regulation). As the court does not have an authority to revise the sanction determined by the public prosecutor, the court is required to accept the sanction in its present condition.

This judgment will be considered as a conviction judgment in the sense of Article 223 of the CPC[52]. The judgment will be served to, if any, the victim, party injured by the crime or the persons who have a right to participate in accordance with the general provisions.

3. The Prohibition of Evidence Assessment

In the accelerated trial procedure, the acceptance of the offer by the suspect is not considered as a confession. Therefore, the lawmaker regulated a prohibition of evidence assessment for the application of this procedure. Pursuant to Article 250/10 of the CPC and Article 5/8 of the Regulation, if the file is sent back to the Office of Chief Public, by the court, due to the non-completion of the accelerated trial procedure for any reason or for the purpose of completion of the investigation in accordance with the general provisions, the declaration of the suspect regarding his/her acceptance of the accelerated trial procedure and other documents regarding the application of this procedure cannot be assessed as evidence during the subsequent investigation and prosecution.

The followings are stated in the relevant section of the report demonstrating the grounds of the Code with respect to this Article. "In the event that the judge rejects the request for the application of the procedure for the reason that the requirements are not met or in the event that the procedure cannot be applied for the reasons caused by the perpetrator, the principle is accepted that the perpetrator's statements for purpose of the application of this procedure cannot be used as evidence in investigations and prosecutions, which will be subsequently conducted " It is stated that "Herewith, it is aimed to encourage the perpetrator who will accept the application of the procedure with the expectation of a moderate reaction from the judicial system"[53].

The prohibition of evidence assessment applies to the evidence collected during the stage which starts upon the suspect's acceptance of accelerated trial method. There is not any prohibition of evidence assessment before the acceptance of the offer, as the investigation is conducted according to the general procedure[54]. It is rightfully stated in the doctrine that "for the purpose to make the evidence assessment prohibition meaningful, the suspect's declaration regarding his/her acceptance of the accelerated trial

52 **Erdem/Şentürk,** p. 597.
53 Online, https://www.tbmm.gov.tr/sirasayi/donem27/yil01/ss105.pdf, 22.02.2020.
54 **Erdem/Şentürk,** p. 584.

procedure and other documents regarding the application of this procedure should be destroyed" [55].

4. Legal Remedies in the Accelerated Trial Procedure

In the accelerated trial procedure, the persons who have a right to apply to the legal remedies against the judgment of the court, can only file a motion of opposition, as the legal remedy (Article 250/14 of the CPC, Article 15 of the Regulation).

In the event that the court makes a judgment in line with the public prosecutor's request, it is not logically possible for the public prosecutor to file a motion of opposition. Because the court is already making a judgment in accordance with the request of the public prosecutor. However, in a theoretically possible, but practically not probable scenario, if if the judgment is set differently than the written request, the public prosecutor can file a motion of opposition against the judgment of the court.

The suspect can, however file a motion of opposition against the judgment if the public prosecutor did not adequately inform the suspect; he/she did not accept the application of this procedure with his/her free will; he/she was not benefited from the assistance of the defence council or if his/her renouncement before the judgment was not taken into consideration[56]. The objection of the victim is not possible, as he/she cannot participate to the procedure as a participant at this stage[57].

There is not any legal remedy against the decision of the return of the file to the Office of Chief Public Prosecutor for the purpose of completing the investigation according to the general provision and the decision of rejection of the request [58].

As we know, filing a motion of opposition means, as a principle, examining materially and legally a decision of a judge with respect to secondary disputes or if regulated explicitly, it includes examining the decision of a court (Article 271 of the CPC) [59]. We are of the view that it was not convenient to recognize filing a motion of opposition against a judgment made in an accelerated trial procedure. Because the judgment made at the end of the accelerated trial is final

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55 **Yurtcan,** p. 718. According to the Kızılarslan "the procedure how the declaration of acceptance and other evidence present in the file will be considered as non-existing during the prosecution stage. They need to be destroyed and removed from the file." See: **Kızılarslan**, p. 1912, 1944.

56 Similar view: **Erdem/Şentürk**, p. 598.

57 **Erdem/Şentürk,** p. 598. For the opposite view see: **Yılmaz/Apiş,** p. 83.

58 **Erdem/Şentürk,** p. 597; **Yavuz**, p. 302.

59 **CENTEL Nur/ZAFER Hamide**, Ceza Muhakemesi Hukuku [Criminal Procedure Law], Beta, İstanbul, 2019, p. 848.

decision with a qualification of resolving the merits of the dispute, even if it is made in line with the request of the public prosecutor. Moreover, the procedure of filing a motion of opposition against a judgment made in an accelerated trial procedure may cause discussions as to whether the merits of the case can be evaluated with respect to the evidence, as in the case of delaying of the pronouncement of the judgment.

In the accelerated trial procedure, as court conducts a very limited examination while rendering the judgment in line with the request of the prosecutor; the authority examining the motion of opposition will also make a more limited examination than the classic motion of opposition examination. Therefore, we are of the opinion that procedure of appeal is needed to be open for the real examination of the lawfulness of the judgment [60]. Moreover, it will not be possible to ensure the unity of practices within the country, as an application to the Court of Cassation process is not open[61]. Thus, in the event that only the filing of motion of opposition is recognized, then it will be convenient that the court, deciding on the motion of opposition, at least, conducts a procedure according to the general provisions and administers trials, as in the simple trial procedure, and it would be convenient to adopt new provisions regulating that the offered reduction will be preserved, if the motion of opposition is filed by persons other than suspect.

In the event that the motion of opposition against the decision given at the end of accelerated procedures is denied, it is possible to apply for reversal in favour of the administration of justice (written order), as an extraordinary legal remedy, against the judgment finalized in this way[62].

III. Advantages and Disadvantages of Accelerated Trial Procedure

It is evident that the accelerated trial procedure, which was introduced with the aim of easing the increased workload of the judicial institutions, will save time and financial resources needed for the more complex and serious crimes. Its application in a short time has also demonstrated that many criminal

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60 **Aygörmez-Uğurlubay/Haydar/Korkmaz,** p. 275; **Yavuz**, p. 307.

61 See for the same view **Erdem/Şentürk,** p. 599.

62 See for the same view **Yavuz**, p. 297. In the judgment given by the General Assembly of Criminal Chambers of the Court of Cassation with respect to the delaying of the pronouncement of a judgment, it has been concluded that it is possible to apply for the reversal in favour of the administration of justice as the extraordinary legal remedy against the judgments which are finalized without an examination of appeal or cassation procedures, for the purpose to ensure the unity of practice of law within the country and to eliminate the lawfulness which has reached critical thresholds for the legal benefit of the society and individuals. (General Assembly of Criminal Chambers of the Court of Cassation. 10.04.2018, 2014/14-487, 2018/151; Online, www.kararara.com), 15.02.2020.

disputes were able to be promptly resolved without trials[63]. As an official claim about the suspect will not be initiated and a procedure open to the public will not be conducted, the suspect will not be defamed. Considering that the application of this procedure depends on the acceptance of the suspect and that the suspect is able to renounce the application of the accelerated trial procedure at every stage until the judgment is made by the court, it can be concluded that this procedure is regulated in line with the principle of equality of arms. Herewith, negative conditions of the prisons will not affect the suspect, and the prisons will be allocated to more serious criminals, as the opportunities of the reduction of punishment by half; conversion of punishment into the alternative sanctions; delaying of the pronouncement of the judgment and postponement of the punishment are provided to the suspect.

However, the victim is not able in any way to make an intervention to this procedure, before or after, his/her views are not taken into consideration and he/she cannot apply to the legal remedies. Even if the crimes subject to the application of this procedure are generally the crimes where the victim is not a specific person, there are also crimes where the victim is a specific person and aforementioned drawbacks are present for such cases[64].

This new procedure, named accelerated trial procedure, may damage society's trust in justice, as this procedure unfortunately ignores the general principles achieved through the application of criminal procedure for hundreds of years, considering that the judgment is made only according to the evaluation made by the public prosecutor in line with the evidence that he/she collected during the investigation; instead of reaching the factual truth by evaluating the evidence freely in accordance with the judge's conscientious opinion, established as a result of his/her direct contact with the evidence, conducting evidence research, upon request or by office in a procedure open to the public[65].

The practice over time will demonstrate us its advantages and disadvantages and enable us to make a healthier assessment in this regard.

CONCLUSION

Although the accelerated trial procedure was introduced with aim of saving time which will be allocated to more serious and critical crimes and with the view that this would be beneficial to the criminal procedure; we are of the view that this procedure, in its present state, disregards the general principles of

63 Online,https://www.milliyet.com.tr/gundem/seri-muhakeme-ile-bin-dosya-sonuclandi-6157871, 15.02.2020.

64 **Erdem/Şentürk,** p. 583.

65 **Erdem/Şentürk,** p. 581-583.

criminal procedure, which are deemed to be the guarantees of right to fair trial of the suspect and the accused.

Even if the rapidness of the procedure is important and needed, it is not possible to sacrifice the principles and possible guarantees such as the principle of searching for the factual truth, the presumption of innocence, contradictory procedure and procedure open to the public, equality of arms, evidence without intermediary. Despite the fact that the Regulation aimed to eliminate certain uncertainties in the Code, some uncertainties continue to exist.

Certain amendments are probably aimed to be adopted in accordance with the problems which will be encountered in the practice, as in the mediation and other alternative resolution methods. However, it is necessary to adopt such amendments of law, as soon as possible, in order to eliminate the aforementioned drawbacks of this procedure.

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A NON-TRADITIONAL WAY TO PROTECT VIDEO GAMES: SNIPER ELITE 4 EXAMPLE

Video Oyunlarının Korunmasında Geleneksel Olmayan Bir Yol: Sniper Elite 4 Örneği

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Research Article

Abstract

With the development of technology, video games have become widespread among the consumers and this has enabled the video gaming industry to grow. Video games have become big business with total worldwide hardware and software sales exceeding $100 billion and growth is predicted in just about every video game market in the world over the next several years. The fact that the video games became big business has increased the importance of protecting them. In this article, after explaining how video games are protected in general, a new means of protection, i. e. registering video games as multimedia trade marks, will be evaluated. In this context, whether the sequences of a video game is capable of being registered as a multimedia trade mark will be discussed through the video game named *Sniper Elite 4*, which is the first and only example of a multimedia trade mark application that includes sequences from the video game itself.

Keywords: Non-Traditional Trade Marks, New Trade Mark Types, Video Games, *Sniper Elite 4.*

Özet

Teknolojideki gelişim, video oyunlarının tüketiciler nezdinde hızla yayılmasını sağlamış, bu durum da oyun sektörünün her geçen gün büyümesine yol açmıştır. Gerçekten, bugün için video oyun sektörü yaklaşık 100 milyar Amerika Doları'nı aşan bir pazar payına ulaşmış olup önümüzdeki yıllarda bu payın giderek artacağı tahmin edilmektedir. Video oyunlarının ulaştığı bu pazar payı, onların hukukî bakımdan korunmalarının önemini artırmıştır. Çalışmamızda, öncelikle video oyunlarının genel olarak ne şekilde korunduğu açıklanacak, daha sonra *Sniper Elite 4* oyununa ilişkin Avrupa Birliği marka başvurusu üzerinden video oyunlarının marka olarak tescil edilip edilemeyeceği değerlendirilecektir. Bu çerçevede, bir video oyununun kesitlerinden oluşan görsellerin (oyuna ilişkin görsel-işitsel ögelerin) yeni bir marka türü olan multimedya markası olarak tescile elverişliliği tartışılacaktır.

Anahtar Kelimeler: Geleneksel Olmayan Markalar, Yeni Marka Türleri, Video Oyunları, *Sniper Elite 4.*

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INTRODUCTION

A video game is a game which we play with an audio-visual apparatus and which can be based on a story[1]. Accordingly, the video game is an electronic game in which players control images on a video screen[2]. This screen can be a computer screen, a smartphone screen or television screen. The main issue here is that the story of the game is directed by the user through a program.

The video games, whose first generation is accepted to be "Tennis for Two" released in October 1958, are in the seventh generation with Nintendo Xbox game consoles that can be controlled by virtual reality method[3]. With the development of technology, video games have become widespread among the consumers and this has enabled the video gaming industry to grow. The size of video gaming industry; the popularity of video games; video games as an example of human-computer interaction are the most important reasons of why video games demand to be treated seriously[4]. Video games have become big business with total worldwide hardware and software sales in 2015 exceeding $91 billion and growth is predicted in just about every video game market in the world over the next several years[5].

The fact that the video games have become big business has increased the importance of protecting video games. Before explaining how video games can be protected, it is useful to understand the complex nature of these games. Video games are complex works of authorship, which contain multiple art forms, such as music, scripts, plots, video, paintings and characters, that involve human interaction while executing the game with a computer program on specific hardware[6]. As a result, video games are not created as single, simple works, but are combination of individual elements that can each individually be protected by copyright (i. e. the characters in a given video game, its soundtrack, settings, audio-visual parts, etc) if they achieve a certain level of originality and creativity[7]. There are several possibilities for these elements to be protected. In this context, copyright, patent, design protections are the first protection possibilities to be considered. For instance, a game console is able to be patented, the graphic elements of the game is eligible to be the subject of

1 Nicolas Esposito, "A Short and Simple Definition of What a Videogame Is" <https://www.utc.fr/~nesposit/publications/esposito2005definition.pdf> accessed 6 May 2020.

2 <https://www.merriam-webster.com/dictionary/video%20game> accessed 6 May 2020.

3 Brian J. Wardyga, *The Video Games Text Book (History, Business, Technology)* (CRC 2019) 2, 317.

4 James Newman, *Videogames* (Routledge 2004) 3.

5 Wardyga (n 3) 230.

6 Andy Ramos and others, "The Legal Status of Video Games" (2013) WIPO <https://www.wipo.int/export/sites/www/copyright/en/creative_industries/pdf/video_games.pdf> accessed 5 May 2020, 7 para. 2.

7 Ramos and others (n 6) 7 para. 2.

graphic design protection and some elements of the game might be the subject of copyright protection. Copyright protection is the most common of these protections. Copyright in games generally covers software/coding, images, musics (sound), text (plot) and gameplay (the images played onscreen as the gamer progresses through the game)[8]. Each of these components of video games is able to be subject to independent intellectual property protection[9], but until recently it has not been possible to talk about the protection of video games as a whole and it generally does not extend to protecting underlying ideas or mechanics[10]. Similarly, design protection generally provides a protection only for visual appearance of a product or an element, as opposed to how it works[11].

In this article, it shall be evaluated whether this new opportunity, multimedia trade marks, is suitable for protecting video games as a whole, instead of protecting each of the components it contains separately[12]. Within this scope, we will make our explanations based on the video game, which is developed and published by Rebellion, *Sniper Elite 4* that is the first and only example of an application of a video game as a multimedia trade mark at the European Union Intellectual Property Office (EUIPO). Although it was filed on 1 October 2017, the application is still under examination, unlike other multimedia trade mark application[13] was filed on the same day. In this article, some ideas will be discussed about why the evaluation process is still going on and what will happen in the near future.

I. A NEW NON-TRADITIONAL: MULTIMEDIA TRADE MARK

A. Terminology

Multimedia is a computer platform, communications network, or a software tool, which incorporates the interactive use of at least one of the following types

8 Simon Sellars and Paul Bicknell, <https://uk.practicallaw.thomsonreuters.com/2-598-3565?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 1 May 2020, 2; also see: Ramos and others (n 6) 8 para. 7.

9 Intellectual property protection provided for video games is not uniform and differs for each country, Ramos, and others (n 6) 11 para. 14.

10 Kostyantyn Lobov, "How Multimedia Trade Marks Could Kill Cloned Games" <https://www.gamesindustry.biz/articles/2018-02-19-multimedia-trademarks-kill-cloners> accessed 10 May 2020.

11 Lobov (n 10).

12 There are several trade marks have been previously registered as EUTM for video games [ie, Minecraft (011709482) as a word trade mark and Sims (013896808)]. However, since these brands are far from providing customers with sufficient information about that game, they have been unable to protect the games against cloning.

13 This application belongs the IFORI Intellectual Property & ICT Law (017279704) and it is the first registered EU multimedia trade mark at EUIPO.

of information: audio, image, animation, video, text, and graphics[14]. Multimedia presentations can be live or recorded. The live category allows interaction with the presenter/performer, while the recorded category only permits interaction via a navigation system[15]. What makes this media "multiple" is the coexistence of static (fixed) elements such as text or image and variable (temporal) elements such as audio or video. In other words, multimedia consists of at least one static and one temporal element[16]. Unlike traditional media, multimedia is a computer-based interactive platform and it is possible to say that, currently, it is used more common than the traditional media for today. This phenomenon also had an impact on trade mark law and the number of new non-traditional trade mark types started to increase rapidly[17].

The Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (EUTMR)[18] and the Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (EUTMD)[19] changed one of the classical registration conditions for trade marks. Namely, the graphical representation of the trade marks was replaced by the possibility to represent trade marks in a manner that enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor (EUTMR art. 4 and EUTMD art. 3). This change enabled a more appropriate and easier representation for non-traditional trade marks such as, sound marks, motion marks and holograms and, more important, made it possible to register a new type of non-traditional trade marks: The multimedia trade marks[20]. Although multimedia trade marks are not defined in the afore-mentioned Regulation and Directive, the term "multimedia trade mark" is used to first time in the art. 3(3)(i) of the Commission Implementing Regulation (EU) 2018/626 of 5 March 2018 laying down detailed rules for implementing certain provisions of Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark, and repealing Implementing Regulation (EU) 2017/1431[21]. According to this article "in the case of a trade mark consisting of, or extending

14 Sreeparna Banerjee, *Elements of Multimedia* (CRC 2019) 2.
15 Banerjee (n 14) 3.
16 Banerjee (n 14) 3.
17 Lisa P. Lukose, "Non-Traditional Trademarks: A Critique" [2015] 57/2 Journal of the Indian Law Institute 211.
18 OJ L 154, 16.6.2017.
19 OJ L 336, 23.12.2015.
20 George-Mihai Irimescu, "New Types of Trademarks-Protection of Multimedia Trademarks" *Challenges of the Knowledge Society* (Nicolae Titulescu University Publishing House 2019) 895.
21 OJ L 104, 24.4.2018.

to, the combination of image and sound (*multimedia mark*), the mark shall be represented by submitting an audio-visual file containing the combination of the image and the sound". Thus it may be said that multimedia trade marks consist the use of sound and image together. In other words, multimedia trade marks may be characterized as "motion trade marks with sound[22]" or "sound trade marks with motion". From this point of view, multimedia trade marks are mixed or combined trade marks that consist of using more than one trade mark type together[23]. As it can be seen, at least two elements are required for a multimedia trade mark: Sound and image. However, multimedia trade marks may also include other elements such as words, colours, figurative elements, labels, etc., in addition to the sound and image[24].

B. Representation

Previously, graphical representation was one of the imperative conditions for trade mark application. At that time, motion marks were generally represented with images of sequences which consist of the motion or a depiction of the motion and sound marks were represented with notes which consist of the sound or a depiction of the sound[25]. Especially in terms of sound trade marks, the difficulty of representing the sound graphically has been criticized[26] and it is maintained that the representation with electronic means such as cassette, floppy disk, CD, etc. will be more suitable than graphical representation of a sound[27]. As a result of these debates, EUTMR art. 4 and EUTMD art. 3 renounces to the phrase signs capable of being represented graphically, stating that trade marks should be represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor. Principles of the representation of the non-traditional trade marks are explained in the EUIPO trade mark guidelines. According to these guidelines, a sound mark must be represented by submitting either an audio file reproducing the sound

22 Karl-Heinz Fezer, *Markenrecht* [Trade Mark Law] (C. H. Beck 2009) § 3 para. 628.

23 Fezer (n 22) § 3 Rn. 636; Lukose (n 17) 211.

24 EUIPO Trade Mark Guidelines, B, 2, 9.3.9 < https://euipo01app.sdlproducts.com/1803468/1790422/trade-mark-guidelines/9-9----------9-3-9-multimedia-marks> accessed 7 May 2020.

25 For the details about the representation of a sound trade mark also see case C-283/01 *Shield Mark BV v Joost Kist* [2003] ECR I-14313.

26 Megan Bartkowski, "New Technolohies, New Trademarks: A Review Essay" [2010] 19 The Journal of Contemporary Legal Issues 434; Sevilay Eroğlu, "Soyut Renk, Ses ve Üç Boyutlu İşaretlerin Marka Olarak Tescili" [Representation of Abstract Colour, Sound and Three Dimensional Signs as Trade Mark] [2003] 5/1 Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi 127.

27 Eroğlu (n 26) 127; Bartkowski (n 26) 437.

or an accurate representation of the sound in musical notation[28]. The audio file must be in MP3[29] format and its size cannot exceed two megabytes[30]. EUIPO requirements do not allow the sound to stream or loop[31]. A motion mark must be represented by submitting either a video file or a series of still sequential images showing the movement or change of position[32]. The video file must be in MP4 format and may not exceed 8 000 Kbps (kilobytes per second) and 20 MB[33]. A hologram mark must be represented by submitting either a video file or a graphic or photographic reproduction containing the views necessary for sufficiently identifying the holographic effect in its entirety[34]. The video file must be in MP4 format and may not exceed 8 000 Kbps (kilobytes per second) and 20 MB[35]. However, a multimedia mark can *only* be represented by submitting an audio-visual file containing both the image and the sound and can therefore *only* be filed via e-filing[36]. The Office will not accept an audio-visual file separately from the application[37]. The audio-visual file must be in MP4 format and may not exceed 8 000 Kbps (kilobytes per second) and 20 MB[38]. Since 1 MB corresponds to 1024 KB, it is possible to say that the size of this file is at most 20480 (1024 X 20) MB, which corresponds to at least 2.56 (20480/8000) seconds when the highest resolution video is preferred[39]. When a lower video resolution is preferred, it is likely that the video will be longer than 2.56 seconds as the number of KBs that can be displayed in one second will decrease. The quality of the video may vary depending on the length of the message that the applicant wants to give with the trade mark[40]. In other words, it is possible to extend the duration of this video by keeping the quality of the video lower if the applicant wants to give a longer message. Indeed, the maximum duration of the video that may be consist of multimedia trade mark is not stipulated in the Guidelines. However, the duration of the video is of

28 EUIPO Trade Mark Guidelines (n 24) B, 2, 9.3.7.

29 MP3 files can only be used for audio, whereas MP4 files can store audio, video, still images, subtitles, and text. In technical terms, MP3 is an "audio coding" format while MP4 is a "digital multimedia container" format, Dan Price, What is MP4? The Difference Between MP3 and MP4, <https://www.makeuseof.com/tag/technology-explained-what-is-the-difference-between-mp3-mp4> accessed 7 May 2020.

30 EUIPO Trade Mark Guidelines (n 24) B, 2, 9.3.7.

31 EUIPO Trade Mark Guidelines (n 24) B, 2, 9.3.7.

32 EUIPO Trade Mark Guidelines (n 24) B, 2, 9.3.8.

33 EUIPO Trade Mark Guidelines (n 24) B, 2, 9.3.8.

34 EUIPO Trade Mark Guidelines (n 24) B, 2, 9.3.10.

35 EUIPO Trade Mark Guidelines (n 24) B, 2, 9.3.10.

36 EUIPO Trade Mark Guidelines (n 24) B, 2, 9.3.9.

37 EUIPO Trade Mark Guidelines (n 24) B, 2, 9.3.9.

38 EUIPO Trade Mark Guidelines (n 24) B, 2, 9.3.9.

39 Ufuk Tekin, "Multimedya Markaları" [Multimedia Trade Marks] [2020] 36/2 Banka ve Ticaret Hukuku Dergisi, 203.

40 Tekin (n 39) 203-204.

great importance, especially in terms of the distinctiveness of a trade mark. Because, as the video gets longer, it will be difficult to keep it in mind and to understand the message that is intended to be given to the customers with that trade mark[41].

II. THOUGHTS ON THE KILL CAM OF *SNIPER ELITE 4* AS A MULTIMEDIA TRADE MARK

The subject of our article is the application of Rebellion company, dated October 1, 2017 and contains sequences consisting of 26-seconds from the video game of this company, *Sniper Elite 4*. This is an application to register a 26-second video depicting the "kill cam" mechanic from the *Sniper Elite* series. The application covers various goods and services in Classes 9, 28, 41, including a broad list of game types in class 9 and "entertainment" services in Class 41.

In fact, another multimedia trade mark application, which does not contain sequences from the game, has already been filed for the game industry and this trade mark has been already registered[42]. However, with kill cam of *Sniper Elite 4*, it is the first time that a trade mark application consists of the sequences of a video game and it is possible to say that this is an innovative step for video game protection. The fact that the application is still not registered and under examination, raises some questions.

A. Public Policy Considerations

The first of these questions is whether the violent elements in the aforementioned video prevent the registration. Indeed, it is possible to say that the video contains more violence than a normal video game, especially considering the close-up and slow-motion bloody images. In this video clip, the track of projectiles coming out of what appears to be a sniper's weapon and the way they reach their human targets may be seen. When the projectiles reach the target, an x-ray view of the shot organs of the target is seen in slow-motion and these sequences may be considered brutal and very bloody for some of the players. Even if it may be thought that these violent sequences are contrary to public policy and therefore constitutes an absolute ground for refusal [art. 7(1)

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41 Irimescu (n 20) 895. A trade mark should be clear enough to be understood by the target customers, Case C-273/00 *Ralf Sieckmann v Deutsches Patent- und Markenamt* [2002] ECR I-11737 para. 31; also see: <https://www.osborneclarke.com/insights/making-a-move-with-multimedia-marks-new-types-of-trade-mark-provide-greater-scope-for-ip-protection/> accessed 9 May 2020.

42 The trade mark numbered 017411315 consists of a topper that falls from a ball in the shape of a dice, a topper that has attached some paper bills, all this movement being accompanied by a drum sound, like the one who creates suspense before a draw.

(f) of Regulation and art. 4(1)(f) of Directive] *at first glance*, in our opinion, it is possible to say that these violent elements can be tolerated by the target audience of video games[43].

B. Technical Suitability for Registration: Distinctiveness

The second question about the afore-mentioned application is about whether the sequences of a video game are suitable for registration as a trade mark. That is to say, is this video clip, which contains *only* sequences from the game, capable of distinguishing the goods or services of one undertaking from those of another undertakings? According to the EUIPO trade mark guidelines, in the absence of relevant case-law, the general criteria for the assessment of distinctiveness will apply to these marks. The mark will be distinctive within the meaning of Article 7(1)(b) EUTMR if the sign can serve to identify the product and/or services applied for registration, as originating from a particular undertaking, and thus to distinguish that product/service from those of other undertakings. This distinctiveness will be assessed by reference, first, to the goods or services for which registration is sought and, second, to the relevant public's perception of that sign. These marks will not necessarily be perceived by the relevant public in the same way as a word or figurative mark[44].

In this context, when the video in the trade mark registration application is analysed, unlike other video games based on killing, the shooting of the target in slow motion, and the x-ray images of the organ at the time of shooting, makes this game different and distinctive from others. Apart from that, the video does not contain any information about the name of the game or the undertaking of that game. Normally, customers see the trade mark and prefer the goods or services on which that trade mark is used. However, the players here play that game first and then understand which trade mark the game belongs to. In terms of the afore-mentioned application, this issue has been criticized because of not containing any information about the name of the game or the undertaking (developer or owner) of that game and it has been claimed that the trade mark is not meant to indicate a commercial origin[45]. In our opinion, although this situation weakens the function of indicating the commercial origin of a trade mark[46], the subject should be evaluated by considering the features of the video game industry. Namely, in many cases, the public promotion of a video game with a trade mark will be carried out digitally through an online marketing

43 Irimescu (n 20) 898; Tekin (n 39) 208.

44 EUIPO Trade Mark Guidelines, B, 4, 3.15, < https://guidelines.euipo.europa.eu/1803468/1788990/trade-mark-guidelines/16----------15-motion--multimedia-and-hologram-marks> accessed 10 May 2020.

45 Irimescu (n 20) 899.

46 Tekin (n 39) 208-209.

campaign, through YouTube, or Twitch[47]. Therefore, when the target audience is watching the video that is the subject of the multimedia trade mark, they already have information about which game the sequences in the video belong to via digital launch campaigns so it is difficult to say that it does not have the function of indicating the commercial origin of the trade mark only for this reason. Moreover, many multimedia trade mark applications without any sign of the undertakings have been registered by EUIPO. Multimedia trade marks, including only an iconic heart shape that beats (017868267), two robotic hands clinking glasses (018151790) and a topper that falls from a ball in the shape of a dice (017411315) are a few of them. Namely, this means that this issue is not considered as an obstacle to registration solely by EUIPO. In other words, it may be said that in the absence of any sign that shows the undertaking which the game belongs to does not mean that these signs are not distinctive.

Registering video game sequences as a trade mark has many advantages. Firstly, trade marks are relatively quick and cheap to register, easier to enforce than unregistered rights, provide a protection not only against identical but also confusingly similar marks, and can potentially last forever if properly maintained[48]. Namely, according to EUTMR art. 52 and EUTMD art. 48, EU trade marks shall be registered for a period of 10 years from the date of filing of the application and registration may be renewed for further periods of 10 years. As mentioned before, it is possible to protect the video game as a whole with registering it as a multimedia trade mark, instead of protecting the components of a game separately. Thus, that game will be protected as a whole, directly and absolutely. Because, in this video, it is clearly stated what the trade mark is protecting. The most important consequence of this protection is that it provides protection against cloning, which is the most important danger in the game industry. For example, the famous video game, *Street Fighter*, is registered as an EU trade mark (006979371), but what this game is about and what it protects is not clearly included in the trade mark application. However, if this trade mark was registered as a multimedia trade mark by including sequences from the video game itself, the scope of the protection would be better determined and the game could be protected against cloning much better. In the absence of multimedia trade mark protection, the pictures of the fighters in the video game could be protected according to the regulations about protection of the images, and the plot of the game could be protected as literary or cinematographic work etc., however the game still would be vulnerable against the cloning as a whole. As a result, traditional trade mark protection may not be enough to protect the game itself

47 <https://www.osborneclarke.com/insights/making-a-move-with-multimedia-marks-new-types-of-trade-mark-provide-greater-scope-for-ip-protection/> accessed 9 May 2020.

48 Lobov (n 10).

from infringements. This situation proves that multimedia trade marks are an appropriate and perhaps the most suitable protection mechanism to protect video games[49]. In fact, it is possible to say that protecting video games with registering them as multimedia trade marks may be the sui generis protection mentioned in a study[50] conducted with the contributions of WIPO and with the help of multimedia trade mark protection, a uniform protection is able to be provided in all EU member countries in the near future.

CONCLUSION

Graphical representation of the trade marks was replaced by the possibility to represent trade marks in a manner that enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor (EUTMR art. 4 and EUTMD art. 3). This change enabled a much more appropriate and easier representation for non-traditional trade marks such as, sound marks, motion marks and holograms. More importantly, this amendment made it possible to register a new type of non-traditional trade mark: The multimedia trade mark. Multimedia trade marks consist of sound and image together. In other words, multimedia trade marks are able to be characterized as "motion trade marks with sound" or "sound trade marks with motion".

With kill cam of *Sniper Elite 4*, it is the first time that a trade mark application consists of the sequences of a video game and it is possible to say that this is an innovative step for the intellectual property protection for video games. The fact that this application is still not registered and under examination raises some questions. The first of these questions is whether the violent elements in the afore-mentioned video prevent the registration. Even it is thought that these violent sequences are contrary to public policy and therefore an absolute ground for refusal [art. 7(1)(f) of Regulation and art. 4(1)(f) of Directive] *at first glance*, in our opinion, it is possible to say that these violent elements can be tolerated by the target audience of video games. The second question about the afore-mentioned application is about whether the sequences of a video game are suitable for registration as a trade mark. That is to say, is this video clip, which contains *only* sequences from the game, capable of distinguishing the goods or services of one undertaking from those of other undertakings? In our opinion, when the video in the trade mark registration application is analysed, unlike other video games based on killing, the shooting of the target in slow motion, and the x-ray images of the organ at the time of shooting, makes this game different and distinctive from others.

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49 Lobov (n 10).

50 Ramos and others (n 6) 94 para. 296.

Registering video game sequences as a trade mark has many advantages. Firstly, trade marks are relatively quick and cheap to register, easier to enforce than unregistered rights, provide a protection not only against identical but also confusingly similar marks, and can potentially last forever if properly maintained. Because it is clearly stated what the trade mark is protecting with the help of multimedia trade mark protection, the game will be protected as a whole, directly and absolutely. Also the most important consequence of this protection is that it provides protection against cloning, which is the most important threat in the game industry. In the absence of such protection, the pictures used in a video game could be protected according to the regulations on the protection of the images, and the plot of the game could be protected as a literary or cinematographic work etc., however such protection would be insufficient to protect the video games against cloning as a whole. As a result, traditional trade mark protection may not be enough to protect the game itself from infringements. This situation proves that multimedia trade marks are an appropriate and perhaps the most suitable protection mechanism to protect video games. Finally, it is possible to say that with the help of multimedia trade mark protection, a uniform and sui generis protection may be provided in all EU member countries in the near future.

AN ANALYSIS OF THE EUROPEAN COURT OF HUMAN RIGHTS JUDGMENT IN THE CASE OF N.D. AND N.T. V. SPAIN

Avrupa İnsan Hakları Mahkemesi'nin N.D. Ve N.T./İspanya Kararına Dair Bir Değerlendirme

Dr. Meltem İNELİ CİĞER*

Research Article

Abstract

Article 4 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (hereinafter Protocol No. 4) provides: "Collective expulsion of aliens is prohibited." In the case of *N.D. and N.T. v. Spain* the Grand Chamber, for the first time, addressed the issue of the applicability of Article 4 of Protocol No. 4 to the immediate and forcible return of aliens from a land border, following an attempt by a large number of migrants to cross that border in an unauthorised manner and en masse. This article focuses on the Grand Chamber's decision in the case of *N.D. and N.T. v. Spain* delivered on 13 February 2020. The aim of this article is to provide an analysis of the *N.D. and N.T. v. Spain* judgment and explore the extent to which the *N.D. and N.T. v. Spain* judgment has changed the Court's jurisprudence on collective expulsion. In doing so, the article also examines whether this judgment allows states to pursue hot expulsion or pushback at the land borders. The article also briefly discusses possible implications for this judgment for Turkey in the conclusion.

Keywords: European Convention on Human Rights- collective expulsion- Article 4 of Protocol No. 4 -irregular migrants- border fence- right to effective remedy

Özet

Avrupa İnsan Hakları Sözleşmesi'ne Ek 4 Numaralı Protokol m. 4 "Yabancıların topluca sınırdışı edilmeleri yasaktır." hükmünü içermektedir. Büyük Daire 20 Şubat 2020 tarihinde verdiği *N.D. ve N.T./İspanya* kararında, tarihinde ilk defa düzensiz şekilde bir ülkenin kara sınırlarından ülkeye güç kullanarak giriş yapmaya yeltenen çok sayıda göçmenin sınır dışı edilmesinin Ek 4 Numaralı Protokol m. 4'e uygunluğuna dair bir değerlendirme yapmıştır. Bu çalışmada Avrupa İnsan Hakları Mahkemesi'nin *N.D. ve N.T./İspanya* kararı özetlenecek, analiz edilecek ve bu güncel karar ile Avrupa İnsan Hakları Mahkemesi'nin toplu sınır dışı yasağına ilişkin içtihadının ne ölçüde değiştiği ve Ek 4 Numaralı Protokol m. 4'ün kara sınırlarında yakalanan düzensiz göçmenlerin bireysel başvuruları incelenmeksizin doğrudan sınır dışı edilmesine izin verip vermediği tartışılacaktır. Ayrıca söz konusu kararın Türkiye için olası sonuçları da kısaca sonuç kısmında ele alınacaktır

Anahtar Kelimeler: Avrupa İnsan Hakları Sözleşmesi- toplu sınır dışı yasağı- Avrupa İnsan Hakları Sözleşmesi'ne Ek 4 Numaralı Protokol- göçmen- sınır duvarı- etkili başvuru hakkı

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INTRODUCTION

Article 4 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (hereinafter Protocol No. 4) provides: "Collective expulsion of aliens is prohibited." Protocol No 4 was the first international treaty to address collective expulsion when it was drafted in 1963.[1] The objective of Article 4 of Protocol No. 4 can be identified as "to prevent States from being able to remove a certain number of aliens without examining their personal circumstances".[2] In the case of *N.D. and N.T. v. Spain,* the Grand Chamber, for the first time, addressed the issue of the applicability of Article 4 of Protocol No. 4 to the immediate and forcible return of aliens from a land border, following an attempt by a large number of migrants to cross that border in an unauthorised manner and *en masse*.[3]

The applications in *N.D. and N.T. v. Spain* were lodged by a national of Mali and a national of Côte d'Ivoire on 12 February 2015. The applicants, who attempted to enter Spanish territory in an unauthorised manner by climbing the fences surrounding the autonomous Spanish city of Melilla on the North African coast on 13 August 2014, alleged that their immediate return to Morocco amounted to a collective expulsion without an individual assessment of their circumstances and in the absence of any procedure or legal assistance.[4] The applicants also submitted that they did not have any opportunity to be identified, to explain their individual circumstances or to challenge their return by means of a remedy with suspensive effect.[5] In a judgment of 3 October 2017, a Chamber of the Third Section of the Court unanimously held that there had been a violation of Article 4 of Protocol No. 4 and of Article 13 of the Convention read in conjunction with Article 4 of Protocol No. 4.[6] The Spanish Government requested the referral of the case to the Grand Chamber on 14

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1 European Court of Human Rights, Guide on Article 4 of Protocol No. 4 – Prohibition of collective expulsion of aliens, Last updated 20 April 2020, https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf accessed on 26 July 2020.

2 *Hirsi Jamaa and Others v. Italy* [GC] App no 27765/09 (ECHR, 23 February 2012) para 174.

3 *N.D. and N.T. v. Spain* [GC] App no 8675/15 and 8697/15 (ECHR, 13 February 2020) para 166.

4 ibid, para 3.

5 ibid, para 3.

6 ibid, para 8; See also D. Moya, 'Judgement ND and NT v Spain: on the legality of police "push-backs" at the borders and, again, on the prohibition of collective expulsions' Strasbourg Observers, 16 October 2017, < https://strasbourgobservers.com/2017/10/16/judgement-nd-and-nt-v-spain-on-the-legality-of-police-push-backs-at-the-borders-and-again-on-the-prohibition-of-collective-expulsions/> accessed 26 July 2020.

December 2017 and the Grand Chamber delivered its judgment on 13 February 2020. Surprisingly, the Grand Chamber did not find a violation of Article 4 of Protocol No. 4 or Article 13 of the Convention read in conjunction with Article 4 of Protocol No. 4. This lead the Court's approach in the case of *N.D. and N.T. v. Spain* to be criticised severely by many scholars.[7]

This article focuses on the Grand Chamber's decision in the case of *N.D. and N.T. v. Spain.* The aim of this article is twofold. The first objective is to provide a summary of the Grand Chamber judgment in the case of *N.D. and N.T. v. Spain* and explain how the Court has concluded that there was no violation of Article 4 of Protocol No. 4. The second aim of the article is to offer an analysis of the judgment by discussing the extent to which the *N.D. and N.T. v. Spain* judgment has changed the Court's jurisprudence on collective expulsion and whether the decision allows states to pursue hot expulsion or pushback at the land borders. The chapter consists of three sections. While the first section provides a brief overview of the Court's case law on Article 4 of Protocol No. 4, the second section summarises the *N.D. and N.T. v. Spain* judgment. Building on these, the third section offers an analysis of the *N.D. and N.T. v. Spain* decision whereas, the potential consequences of this judgment for Turkey is also evaluated briefly in the conclusion.

I. OVERVIEW OF CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON COLLECTIVE EXPULSION

Article 4 of Protocol No. 4 prohibits collective expulsion of non-nationals but not individual expulsion.[8] The drafting works of this provision shows the inability to agree on a more extensive protection from expulsion for non-

[7] Carrera noted, "the N.D. and N.T v Spain judgement is, however, fraught with legal inconsistencies and factual inaccuracies. It denies justice to voiceless victims of human rights violations." See S. Carrera, The Strasbourg Court Judgement N.D. and N.T. v Spain A Carte Blanche to Push Backs at EU External Borders?, EUI Working Paper RSCAS 2020/2, 2020, <https://cadmus.eui.eu/bitstream/handle/1814/66629/RSCAS%202020_21.pdf?sequence=1&isAllowed=y> accessed 26 July 2020; Whereas, according to Filippo "the real 'poison pill' of this judgment lays in its configuration of a brand new 'bad behaviour' exception". See M. Di Filippo, Walking the (barbed) wire of the prohibition of collective expulsion: An assessment of the Strasbourg case law (2020) 15(2) Diritti umani e diritto internazionale, 479-509; Maximilian Pichl and Dana Schmalz, "Unlawful" may not mean rightless: The shocking ECtHR Grand Chamber judgment in case N.D. and N.T., VerfBlog, 2020/2/14, <https://verfassungsblog.de/unlawful-may-not-mean-rightless/> accessed 26 July 2020.

[8] Article 3 of Protocol No. 4 prohibits individual and collective expulsion of nationals. Different from Article 3 of Protocol No. 4, Article 4 of Protocol No. 4 deals with aliens not nationals and it does not prohibit individual expulsion but prohibits collective expulsion of aliens.

nationals.[9] It should be mentioned that Article 1 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, introduces certain procedural safeguards relating to expulsion of lawfully resident in the territory of a State, it does not restrict the sovereign right to expel aliens.[10]

The Court interprets collective expulsion as "any measure compelling aliens, as a group, to leave the country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group".[11] Article 4 of Protocol No. 4 protects aliens from collective expulsion regardless of whether the person has entered the state party regularly or remains there lawfully.[12] Thus, the protection afforded by this article applies to all foreigners including asylum seekers, refugees, irregular migrants and stateless persons.[13]

The Court has found a violation of Article 4 of Protocol No. 4 only in seven cases, as of 26 July 2020: five of these cases concerned expulsion of persons with the same origin. Deportation of Slovakian nationals of Romany origin from Belgium was the case in *Conka v. Belgium*[14] whereas three cases concerned expulsion of Georgian nationals from Russia.[15] A recent case decided in July 2020 was *M.K. and Others v. Poland*[16] which concerned expulsion of thirteen Russian nationals from Poland. The rest of the cases namely, *Hirsi Jamaa and Others v. Italy* and *Sharifi and Others v. Italy and Greece* concerned removal of migrants and asylum-seekers with different nationalities without verifying their individual identities.[17] In *Hirsi* case, the Court considered applications

9 W. A. Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 1075.

10 P. Van Dijk, 'Protection of integrated aliens against expulsion under the European Convention on Human Rights' (1999) 1 EJML 293.

11 *Khlaifia and Others v. Italy* [GC] App no 16483/12 (ECHR, 15 December 2016) para 237; *Hirsi Jamaa and Others v. Italy*, para 167.

12 D. Harris, M. O'Boyle, E. Bates and C. Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 744.

13 ibid 744.

14 *Conka v. Belgium* App no 51564/99 (ECHR, 5 February 2002).

15 9 Georgian nationals were subjected to expulsion in *Berdzenishvili and Others v. Russia* App no 14594/07, 14597/07, 14976/07, 14978/07,15221/07, 16369/07 and 16706/07 (ECHR, 20 December 2016). A Georgian family residing in Russia were subjected to expulsion in *Shioshvili and Others v. Russia* App no 19356/07 (ECHR, 20 December 2016) whilst, expulsion of hundreds of Georgian nationals from Russia was the case in *Georgia v. Russia* [GC] App no 13255/07 (ECHR, 3 July 2014).

16 *M.K. v. Poland* App no 40503/17, 42902/17 and 43643/17 (ECHR, 23 July 2020).

17 European Court of Human Rights, Guide on Article 4 of Protocol No. 4, para 10.

of a number of Eritreans and Somalians who had tried to reach Italy by boats but were interdicted by Italian Customs and Coast Guard vessels on the high seas and forcibly sent back to Libya in 2009.[18] The applicants claimed that they had been exposed to the risk of torture or inhuman or degrading treatment in Libya and in their respective countries of origin, namely Eritrea and Somalia, as a result of having been returned and claimed that Italy violated Article 3 of the ECHR. Moreover, the applicants stated that they had been the subject of a collective expulsion having no basis in law and argued that Article 4 of Protocol No. 4 has been violated. In *Hirsi Jamaa and Others v. Italy*, the Grand Chamber noted that if Article 4 of Protocol No. 4 were to apply only to collective expulsions from the national territory of the states, a significant component of contemporary migratory patterns would not fall within the ambit of that provision. [19] Following this reasoning the Court noted

> [t]he removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention which engages the responsibility of the State in question under Article 4 of Protocol No. 4.[20]

With this judgment, the Court has established that Article 4 of Protocol No. 4 applies extraterritorially.[21] Having established this principle the Court ruled that Italy violated Article 4 of Protocol No. 4 mainly because the applicants were not subjected to any identification procedure by the Italian authorities and the personnel aboard the military were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers.[22] Similarly in *Sharifi and Others v. Italy,* the Grand Chamber decided that the migrants intercepted in Adriatic ports, had been subjected to automatic returns to Greece and had been deprived of any effective possibility of seeking asylum thus, a collective expulsion has occurred. [23] In various cases, the Court has taken into account the following criteria to determine the existence of collective expulsion: the fact that the removal decisions made no reference to the applicants' asylum request; the actions aimed at the return of foreigners took place in conditions that made it very difficult for the applicants to contact a

18 *Hirsi Jamaa and Others v. Italy*, para 9-15.
19 ibid para 177.
20 ibid para 180.
21 ibid para 182, 186.
22 ibid para 185.
23 *Sharifi and Others v. Italy and Greece,* para 214-225.

lawyer and the government declarations that people with certain nationalities will be deported as a group. [24]

Aliens receiving similar removal decisions does not automatically mean that there is a collective expulsion when each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis.[25] The Court's jurisprudence suggests that if there is an individual examination of their personal circumstances and aliens had a genuine and effective possibility of submitting arguments against their expulsion then there is no violation of Article 4 of Protocol No. 4.[26] Moreover, the Court rejects that Article 4 of Protocol No. 4 is violated in cases where the lack of an expulsion decision made on an individual basis is the consequence of an applicant's own culpable conduct; for instance, the Court has accepted refusing to show identity papers to the police and not receiving an expulsion order in his/her own name as a result[27] and pursuing a joint asylum procedure and receiving a single common decision as a result[28] as the applicant's own culpable conduct.

Before analysing the *N.D.* and *N.T. v. Spain* judgment, it might be useful also to mention the link between Article 4 of Protocol No. 4 and Article 3 of the ECHR which provides "No one shall be subjected to torture or to Inhuman or degrading treatment or punishment". Article 3 of the ECHR does not mention the term 'expulsion' *per se* nevertheless, it is quite relevant in cases relating to expulsion of aliens. Article 3 enshrines one of the most fundamental values of democratic society.[29] The prohibition provided under Article 3 is absolute.[30] Article 3 of the ECHR does not contain an express provision prohibiting expulsion or removal to face torture.[31] In various judgments, the ECtHR has noted that: "Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens."[32] *Soering*

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24 *M.K. and Others v. Poland*, para 202.

25 *Sultani v. France* App no 45223/05, ECHR 2007-IV (extracts) para 81; European Court of Human Rights, Guide on Article 4 of Protocol No. 4, para 3.

26 *Khlaifia and Others v. Italy* [GC], App no16483/12, 15 December 2016; *Hirsi Jamaa and Others v. Italy,* para 167; Harris et al. 744, 745; Schabas 1077.

27 *Dritsas and Others v. Italy* App no2344/02 (ECHR, 1 February 2011).

28 *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia* App no 18670/03, ECHR 2005-VIII (extracts).

29 *Soering v United Kingdom* (1989) 11 EHRR 439, para 88; *Chahal v UK* (1997) 23 EHRR 413, para 204.

30 See Article 15 of the ECHR; *Chahal v UK*, para 80.

31 C. Costello, *The Human Rights of Migrants in European Law* (OUP 2016) 180.

32 *Chahal v UK* (1997) 23 EHRR 413, para 73*; Vilvarajah and Others v. UK* App no 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 30 October 1991, para 102; *Hirsi Jamaa and Others v. Italy*, para 113.

v. UK[33] was the first case where the *non-refoulement* character of Article 3 of the ECHR was established.[34] The ECtHR noted in *Soering* that

> the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.[35]

This principle established in *Soering* is extended to other acts of removal including deportation and expulsion of aliens in *Cruz Varas v. Sweden*[36] and *Vilvarajah and Others v. UK*.[37] In *Hirsi and Others v. Italy* the Court noted that interception of potential asylum seekers on the high seas and their return to states where they would be in a risk of torture or inhuman or degrading treatment or punishment violates Article 3. The *Hirsi* judgment also clearly affirmed that states need to evaluate the situation in the state that the person is to be returned following an interception practice in light of Article 3.[38] Such an assessment must be made *proprio motu*[39] thus, states are expected to consider consequences of their removal or pushback practices before engaging in any act that has the potential to constitute breaches of the ECHR including the possibility of indirect *refoulement*.[40] Over the years, Article 3 of the ECHR has become a very important protection basis for aliens who, if removed, would be in risk of torture or inhuman or degrading treatment or punishment.[41]

Both Article 3 of the ECHR and Article 4 of Protocol No. 4 apply to any situation coming within the jurisdiction of a contracting state, including to situations or points in time where the authorities of the state had not yet

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33 *Soering v. UK (1989) 11 EHRR 439.*

34 E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement' in E. Feller, V. Türk, and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 78, 155.

35 *Soering v. UK*, para 91.

36 *Cruz Varas v Sweden* (1991) 14 EHRR 1, para 70; A. Mowbray*, Cases, Materials, and Commentary on the European Convention on Human Rights* (3rd edn, OUP 2012) 202.

37 Harvey, 171, 174.

38 V. Moreno-Lax, 'Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12(3) Human Rights Law Review 574, 583.

39 ibid, 583.

40 ibid, 585.

41 See also for an analysis on Article 3 of the ECHR and the principle of non-refoulement C. Harvey, 'The International Protection of Refugees and Asylum Seekers: the Role of Article 3 of the European Convention on Human Rights' in A. Abass and F. Ippolito (edn), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Routledge 2016) 171-191.

examined the existence of grounds entitling the persons concerned to claim protection under these provisions.[42] In terms of protection from *refoulement,* the protection afforded to aliens by Article 3 of the ECHR is much broader than Article 4 of Protocol No. 4. For instance, Article 3 cannot be derogated in time of war or any other emergency and there are no exceptions to the prohibition of torture and inhuman or degrading treatment or punishment.[43] Whereas, derogation in time of war or any other emergency is possible from Article 4 of Protocol No. 4.[44] Whilst, Article 4 of Protocol No. 4 protects non-nationals from collective but not individual expulsion, for article 3 of the ECHR to be violated the act of removal does not need to be collective. As mentioned previously, if the applicant has a culpable conduct this leads to no violation of Article 4 of Protocol No. 4 whereas, states must observe Article 3 in exercising their right to expel aliens, irrespective of the victim's conduct, however undesirable or dangerous.[45] According to the Court, Article 3 of the ECHR requires state parties not to return an alien to a state where substantial grounds have been shown for believing that the person concerned, if removed, would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving state. Whereas, Article 4 of Protocol No. 4 simply requires states to give aliens a genuine and effective possibility of submitting arguments against their expulsion. Besides, as noted by Carrera, Article 4 of Protocol No. 4 introduces a duty for states to conduct individual assessment of persons and not just take into account asylum claims and claims related to Article 3 of the ECHR but also those relating to special circumstances of a person e.g. being a human trafficking victim etc.[46] In view of this analysis one can conclude that, both articles though can be invoked, in some circumstances, to protect aliens from expulsion in fact they serve different purposes and offer considerably different levels of protection to aliens.

II. SUMMARY OF THE N.D. AND N.T. V. SPAIN JUDGMENT

A. Background

Melilla is an autonomous Spanish city of 12 sq. km located on the north coast of Africa and the border between Melilla and Morocco is an external

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42 *N.D. and N.T. v. Spain*, para 166-168.

43 D. Harris, M. O'Boyle, E. Bates and C. Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd edn, OUP 2014); A. Mowbray*, Cases, Materials, and Commentary on the European Convention on Human Rights* (3rd edn, Oxford, OUP 2012) 235.

44 B. Rainey, E. Wicks and C. Ovey, *Jacobs, White and Ovey: the European convention on human rights* (OUP 2014) 31; İ. Göçmen, *Avrupa insan hakları sözleşmesi ışığında Avrupa Birliği ve Türkiye göç hukuku* (Seçkin 2015) 252.

45 *Salah Sheek v. the Netherlands* App no *1948/04* (ECHR, 11 January 2007) para 135.

46 Carrera, 5.

border of the Schengen area and thus the EU.[47] The Spanish authorities have built a six-metre-high barrier along the 13 km border separating Melilla from Morocco, which the aim of preventing irregular migrants from accessing Spanish territory. There are four land border-crossing points between Morocco and Spain, located along the fence. Between these crossings, on the Spanish side, the Guardia Civil has the task of patrolling the land border and the coast to prevent illegal entry.[48] Mass attempts to breach the border fences are organised on a regular basis whereas groups generally comprising several hundred aliens, many of them from sub-Saharan Africa, attempt to enter Spanish territory by storming the fences.[49] Those migrants who do not manage to evade the Guardia Civil, and whom the officials succeed in persuading to come down of their own accord using ladders, are taken back immediately to Morocco and handed over to the Moroccan authorities, unless they are in need of medical treatment. [50]

On 13 August 2014 two attempted crossings took place, organised by smuggling networks: one at 4.42 a.m. involving 600 people, and another at 6.25 a.m. involving 30 people. The applicants stated that they had taken part in the first of these.[51] The first and second applicant had managed to climb the top of the inner fence and had remained there until the afternoon. [52] In the afternoon the first and second applicants reportedly climbed down from the fence with the help of Spanish law-enforcement officials who provided them with ladders.[53] As soon as they reached the ground, they were allegedly apprehended by Guardia Civil officials who handcuffed them, took them back to Morocco and handed them over to the Moroccan authorities. [54] The applicants claimed that they had not undergone any identification procedure and had no opportunity to explain their personal circumstances or to be assisted by lawyers or interpreters.[55]

On 2 December and 23 October 2014 respectively, in the context of further attempts to storm the fences, the first and second applicants succeeded in climbing over the fences and entering Melilla. Two sets of proceedings were instituted against them. The applicants were subsequently issued with expulsion orders. [56] The first applicant having received an expulsion order was sent to the temporary detention centre for aliens (CETI) in Melilla before being transferred

47 *N.D. and N.T. v. Spain*, para 15.
48 ibid, para 17.
49 ibid, para 17.
50 ibid, para 18.
51 ibid, para 24.
52 ibid, para 25.
53 ibid, para 25.
54 ibid, para 25.
55 ibid, para 25.
56 ibid, para 28.

to the Barcelona CETI in March 2015.[57] He filed an administrative appeal against the expulsion order and applied for asylum. His asylum application was rejected on 23 March 2015 on the grounds that it was unfounded and that the applicant was not at risk, as the UNHCR office had issued an opinion on 20 March 2015 finding that the first applicant's circumstances did not justify granting him international protection. A request for review lodged by the applicant was too rejected.[58] As to the second applicant, an expulsion order was issued on 7 November 2014 and was upheld on 23 February 2015 following the dismissal of his administrative appeal.[59] He was accommodated in the Melilla temporary detention centre for aliens and in November 2014 was transferred to the Spanish mainland. The second applicant did not apply for international protection and following his release of from detention has been staying unlawfully in Spain.[60]

B. The Court's assessment

The Court began its analysis with the issue of jurisdiction. The Grand Chamber established that existence of a fence located some distance from the border does not authorise a State to unilaterally exclude, alter or limit its territorial jurisdiction, which begins at the line forming the border.[61] The Court has also affirmed once again that the ECHR cannot be selectively restricted to only parts of the territory of a state by means of an artificial reduction in the scope of its territorial jurisdiction. The Court determined that the events giving rise to the alleged violations fall within Spain's jurisdiction within the meaning of Article 1 of the Convention.[62]

The applicants argued that they had been subjected to a collective expulsion without an individual assessment of their circumstances and in the absence of any procedure or legal assistance.[63] They argued that this situation reflected a systematic policy of removing migrants without prior identification, which had been devoid of legal basis.[64] The Chamber decided that Spain has violated Article 4 of Protocol No. 4 whereas, the Grand Chamber took a different view.

First of all, the Court reiterated the right of states to control the entry, residence and removal of aliens and to establish their own immigration policies, potentially in the context of bilateral cooperation.[65] The Court then stressed

57 ibid, para 28.
58 ibid, para 28.
59 ibid, para 30, 31.
60 ibid, para 30, 31.
61 ibid, para 109.
62 ibid, para 110, 111.
63 ibid, para 123.
64 ibid, para 123.
65 ibid, para 167.

the importance of managing and protecting borders and of the role played in that regard for those states concerned by the Schengen Borders Code and acknowledged the challenges facing European States in terms of immigration control as a result of the economic crisis and recent social and political changes in Africa and the Middle East.[66] Furthermore, the Court has stressed that the problems which States may encounter in managing migratory flows or in the reception of asylum-seekers cannot justify recourse to practices which are not compatible with the ECHR or the Protocols. Moreover, the Court noted that domestic rules governing border controls may not render inoperative or ineffective the rights guaranteed by the ECHR and the Protocols, and in particular by Article 3 of the Convention and Article 4 of Protocol No. 4. [67]

The Court also considered 'whether the concept of 'expulsion' as used in Article 4 of Protocol No. 4 also covers the non-admission of aliens at a State border or – in respect of States belonging to the Schengen area – at an external border of that area.[68] While confirming that the term 'expulsion' in Article 4 of Protocol No. 4 covers non-admission of aliens at a state border, the Court ruled that there was an 'expulsion' within the meaning of Article 4 of Protocol No. 4 in the case since the applicants were removed from Spanish territory and forcibly returned to Morocco, against their will and in handcuffs, by members of the Guardia Civil.

According to the Court's long-standing case-law, the number of persons affected by a given measure is irrelevant in determining whether or not there has been a violation of Article 4 of Protocol No. 4 furthermore, the decisive criterion in order for an expulsion to be characterised as collective is the absence of a reasonable and objective examination of the particular case of each individual alien of the group.[69] Applying this principle to this case, the Court noted that the applicants were part of a large group of aliens acting simultaneously and that they were subjected to the same treatment as the other members of the group. However, to determine whether this amounts to collective expulsion the Court examined the applicant's conduct.

The Court's previous judgments suggest[70] that states are dispensed from an individualised procedure and decision on expulsion if the lack of such a measure can be attributed to the applicant's own conduct.[71] The Grand Chamber was of the opinion that the same principle must also apply to situations in which the conduct of persons who cross a land border in an unauthorised

66 ibid, para 168, 169.
67 ibid, para 168 and 169.
68 ibid, para 173.
69 ibid, para 203.
70 *Khlaifia and Others v. Italy*, para 240; *Hirsi Jamaa and Others v. Italy*, para 184.
71 *N.D. and N.T. v. Spain*, para 31, 200.

manner, deliberately take advantage of their large numbers and use force, is such as to create a clearly disruptive situation which is difficult to control and endangers public safety.[72] In relation to this, the Spanish government claimed that the applicants had engaged in culpable conduct by circumventing the legal procedures that existed for entry into Spain.[73] To examine this claim, the Court addressed three main questions:

a) whether legal procedures for entry into Spain existed at the material time,

b) whether these procedures afforded the applicants a genuine and effective opportunity of submitting reasons – assuming that such reasons existed – against their handover to the Moroccan authorities,

c) If the answer of (b) is yes, whether the applicants made use of them.[74] While addressing the outlined questions, the Court noted

"With regard to *Contracting States like Spain whose borders coincide*, at least partly, *with external borders of the Schengen area, the effectiveness of Convention rights requires that these States make available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border.* Those means should allow all persons who face persecution to submit an application for protection, based in particular on Article 3 of the Convention, under conditions which ensure that the application is processed in a manner consistent with the international norms, including the Convention." [75]

The Court added that when legal procedures for entry into Spain exist and secure the right to request protection under the Convention, and in particular Article 3, in a genuine and effective manner, the Convention does not prevent States from requiring applications for such protection to be submitted at the existing border crossing points.[76] The Court ruled that applicants had several possible means of seeking admission to Spain either by applying for a visa or by applying for international protection at the Beni Enzar border crossing point, but also at Spain's diplomatic and consular representations in their countries of origin or transit or else in Morocco.[77] While reaching this decision, the Court has relied on the Spanish government's statement that twenty one asylum applications had been lodged between 1 January and 31 August 2014 in Melilla, including six asylum applications lodged at the Beni Enzar border crossing point. [78] The Court moreover noted that the fact that only very few

[72] ibid, para 201.
[73] ibid, para 208.
[74] ibid, para 208.
[75] Emphasis added. ibid, para 209.
[76] ibid, para 210.
[77] ibid, para 212.
[78] ibid, para 212.

asylum requests were submitted at Beni Enzar prior to 1 September 2014 does not lead to the conclusion that Spain did not provide genuine and effective access to this border crossing point.[79]

Having established genuine and effective access to means of legal entry to Spain were available to the applicants, the Court examined whether the applicants had cogent reasons for not using the border procedures at the Beni Enzar border crossing point and noted that the applicants did not make use of the official entry procedures existing for that purpose. In view of these, the Court concluded that there was no violation of Article 4 of Protocol No. 4 since not making use of genuine and effective access to means of legal entry to Spain was a consequence of the applicant's own conduct.[80]

Unlike the Chamber, the Grand Chamber also found no violation of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4. The Court reasoned that the lack of an individualised procedure for their removal was the consequence of the applicants' own conduct in attempting to gain unauthorised entry at Melilla and it cannot hold the respondent State responsible for not making available there a legal remedy against that same removal.[81]

III. ANALYSIS OF THE *N.D. AND N.T. V. SPAIN* JUDGMENT

A. What is new about the *N.D. and N.T. v. Spain* judgment?

The Court has already noted in previous judgments that there will be no violation of Article 4 of Protocol No. 4 if the lack of an expulsion decision made on an individual basis is the consequence of an applicant's own culpable conduct. With the *N.D. and N.T. v. Spain* decision, the Court accepted that 'members of a group comprising numerous individuals attempting to cross a land border in an unauthorised manner, taking advantage of their large numbers and using force' constitutes a culpable conduct.[82] In a nutshell, the Court established for the first time that persons crossing a land border in an unauthorised manner deliberately taking advantage of their large numbers and use force should be taken into account when deciding whether Article 4 of Protocol No. 4 is violated. With regard to this Filippo asserts that this newly established culpable conduct is unconvincing from the viewpoint of the abstract legal reasoning and "rendering the scope of a human right dependent on a variable such as the 'bad behaviour' of individuals sounds rather disquieting for an institution like the Court".[83]

79 ibid, para 217.
80 ibid, para 231.
81 ibid, para 242, 243.
82 See *N.D. and N.T. v. Spain*, para 206 and 211; Pichl and Schmalz.
83 Filippo, 21, 34.

The Court established, in previous judgments[84] that state authorities need to ensure that each of the aliens concerned has a genuine and effective possibility of submitting arguments against his or her expulsion.[85] Going one step further, the Court has established in the case of *N.D. and N.T. v. Spain* that signatories to Protocol No. 4 whose borders coincide, at least partly, with external borders of the Schengen area, should make available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border. This is indeed a migrant friendly interpretation of Article 4 of Protocol No. 4 and in a sense, the Court has introduced a new obligation for the contracting parties namely; to make available genuine and effective access to means of legal entry to their territories in particular border procedures for those who have arrived at the border.[86] Furthermore, Carrera noted that the Grand Chamber for the first time also required the contracting states guarantee a sufficient number of border crossing points where persons can lodge their asylum applications but he added it is unclear what constitutes a sufficient number of crossing points in practice.[87]

Many authors concur that the Court failed to apply this newly introduced principle properly to the present case.[88] Although the Court asserted that applicants had several possible means of seeking admission to Spain either by applying for a visa or by applying for international protection at the Beni Enzar border crossing point as well as at Spain's diplomatic and consular representations in their countries of origin or transit or else in Morocco, it is widely known that these means are not available to most asylum seekers and migrants who originate from African countries. Relating to this point, Carrera posits, "no serious consideration was given to the qualitative information showing the practical impossibility in accessing all these legal entry tools and points."[89] Whilst Wissing notes, third party interventions by the Commissioner for Human Rights or UNHCR definitely sketch a less positive image of the practical accessibility of the border crossing point at Beni Enzar for those

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84 See *Hirsi Jamaa and Others v. Italy*, para 177; *Sharifi and Others v. Italy and Greece*, para 210; *Khlaifia and Others v. Italy*, para 238, 248.

85 *N.D. and N.T. v. Spain*, para 194-198.

86 See also Carrera, 6.

87 ibid, 6.

88 C. Hruschka, Hot returns remain contrary to the ECHR: ND & NT before the ECHR, 28 Friday 2020 < http://eumigrationlawblog.eu/hot-returns-remain-contrary-to-the-echr-nd-nt-before-the-echr/#comments> accessed 26 July 2020; D. Thym, A Restrictionist Revolution? A Counter-Intuitive Reading of the ECtHR's N.D. & N.T.-Judgment on 'Hot Expulsions', EU Migration and Asylum Law and Policy Blog, 17 February 2020, < http://eumigrationlawblog.eu/a-restrictionist-revolution-a-counter-intuitive-reading-of-the-ecthrs-n-d-n-t-judgment-on-hot-expulsions/> accessed 26 July 2020.

89 Carrera, 11.

coming from sub-Saharans.[90] Due to this particular aspect, the Judgment has received a lot of criticism: while Pichl and Schmalz noted "with this judgment, in turn, the Court lost credibility as an effective defender of human rights in times of crisis." Criticising the Court's approach here, Thym for instance, opinied "Judges lose credibility if their generous language on legal pathways degenerates into humanitarian window-dressing."[91] It is expressed by many authors that the Grand Chamber erred in concluding the applicants could have used legal venues to reach to the Spanish territory and hence, Schengen area.[92] Agreeing with the mentioned views, the present author is in the opinion that the Court has concluded that genuine and effective access to means of legal entry to Spain were available for the applicants without a serious and in depth analysis on whether the applicants had a realistic individual opportunity to access to these means.

B. The reasoning and the principles that the Court applied in the *N.D. and N.T. v. Spain* judgment

While reaching the decision on whether Spain has violated Article 4 of Protocol No. 4, the Court has addressed the following questions:

- Did the Spanish authorities subject the applicants to an 'expulsion' within the meaning of Article 4 of Protocol No. 4?
- Was the expulsion 'collective' within the meaning of Article 4 Protocol No. 4?
- Have the applicants engaged in 'culpable conduct'?
- Has Spain made available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border?
- Did the applicants make use of these procedures? If not, did they have cogent reasons for not using these border procedures at the border crossing points?

The Grand Chamber has identified the following principles relating to the prohibition of collective expulsion and border controls: First, the existence of a fence located some distance from the border does not authorise a state to unilaterally exclude, alter or limit its territorial jurisdiction. Second, the ECHR

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90 R. Wising, Push backs of "badly behaving" migrants at Spanish border are not collective expulsions (but might still be illegal refoulements), Strasbourg Observers, 25 February 2020, <https://strasbourgobservers.com/2020/02/25/push-backs-of-badly-behaving-migrants-at-spanish-border-are-not-collective-expulsions-but-might-still-be-illegal-refoulements/#more-4523> accessed 26 July 2020.

91 Thym.

92 See Hrushka; Thym; Wissing.

cannot be selectively restricted to only parts of the territory of a State by means of an artificial reduction in the scope of its territorial jurisdiction. Third, border controls must not render inoperative or ineffective the rights guaranteed by the Convention and the Protocols thereto, and in particular by Article 3 of the ECHR and Article 4 of Protocol No. 4.

The Court has also established the following principles relating to the scope of Article 4 of Protocol No. 4. First, the term 'expulsion' in Article 4 of Protocol No. 4 includes any means resulting removal of aliens at the border. Second, removing irregular migrants and forcibly returning them to another state against their will and in handcuffs by a state's security forces constitutes an 'expulsion' within the meaning of Article 4 of Protocol No. 4. Third, an expulsion can be accepted as 'collective' for the purposes of Article 4 of Protocol No. 4 if it compels aliens, as a group, to leave a country except where such a measure is taken on the basis of a reasonable and objective individual examination. Fourth, the number of persons affected by a given measure is irrelevant in determining whether or not there has been a collective expulsion and a violation of Article 4 of Protocol No. 4.

The Court has also invoked the following principles with regard to prohibition of collective expulsion. First, Article 4 of Protocol No. 4 does not guarantee the right to an individual interview in all circumstances, as the requirements of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments are examined in an appropriate manner by the authorities of the state. Second, Article 4 of Protocol No. 4 requires the state authorities to ensure that each of the aliens concerned has a genuine and effective possibility of submitting arguments against his or her expulsion. Third, in assessing conformity with Article 4 of Protocol No. 4, whether the state provided genuine and effective access to means of legal entry, in particular border procedures should be taken into account. Fourth, there is no violation of Article 4 of Protocol No. 4 if the lack of an individual expulsion decision can be attributed to the applicant's own conduct. Fifth, members of a group comprising numerous individuals attempting to cross a land border in an unauthorised manner, taking advantage of their large numbers and using force' constitutes a culpable conduct.

C. What did remain unchanged in the Court's case law?

It is possible to count at least three things which remain unchanged in the Court's approach to interception of irregular migrants at the borders. Firstly, the Court in *N.D. and N.T. v. Spain* followed its determination in *Hirsi Jamaa and Others v. Italy* that the concept of 'expulsion', which is a key concept under Article 4 of the Additional Protocol 4, applies in cases of non-admission

at the border.[93] In *Hirsi Jamaa and Others v. Italy* the Court has established neither the text nor the *travaux préparatoires* of the Convention precluded the extraterritorial application of Article 4 of Protocol No. 4[94] and concluded that Article 4 of Protocol No. 4 applies to persons who were intercepted on the high seas while trying to reach the territory of a respondent State and were stopped and returned to the originating State. The Grand Chamber in *N.D. and N.T. v. Spain* has once again confirmed that expulsion as used in Article 4 of Protocol No. 4 also covers the non-admission of aliens at a state border and concluded that Article 4 of Protocol No. 4 protects persons who were apprehended in an attempt to cross a national border by land and were immediately removed from a State's territory by border guards.[95]

Second, the fact that States must not disregard their obligations under the ECHR in relation to their border control activities especially Article 3 of the ECHR remain unchanged.[96] Although the Court acknowledged the obligation and necessity for the Contracting States to protect their borders, border control activities should comply with the Convention guarantees, and in particular with the obligation of nonrefoulement.[97] Thus, Article 3 of the ECHR still remains absolute and hot expulsion (the act of immediately returning all persons intercepted at the borders without undertaking individual status determination) is still prohibited under the ECHR.[98]

Third, the Court in *N.D. and N.T. v. Spain* decision did not provide a blank check for states to pursue hot expulsion or pushback at the land borders.[99] Rather, the Court has taken into account that applicants came from Morocco where there was no risk of ill-treatment under Article 3 of the ECHR and no risk of chain refoulement when deciding on the case. Similarly, many authors concur that the Grand Chamber has taken into consideration that both applicants were not refugees or asylum seekers with valid international protection claims.[100] Thus, if the applicants were refugees or asylum seekers with valid international protection claims and/or if Morocco was not a country which is generally accepted as safe, the Court might have found that Spain violated Article 3 of the ECHR as well as Article 4 of Protocol No. 4.[101]

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93 Thym.

94 European Court of Human Rights, Guide on Article 4 of Protocol No. 4, para 5, 6.

95 See *M.K. and Others v. Poland*, para 200.

96 See N.*D. and N.T. v. Spain*, para 232.

97 Emphasis added. *N.D. and N.T. v. Spain*, para 232.

98 Hrushka.

99 Thym; S. Papageorgopoulos, N.D. and N.T. v. Spain: do hot returns require cold decision-making?, EDAL Website, 28 February 2020 < https://www.asylumlawdatabase.eu/en/journal/nd-and-nt-v-spain-do-hot-returns-require-cold-decision-making> accessed 26 July 2020.

100 Hruschka.

101 ibid.

IV. CONCLUSIONS AND POSSIBLE IMPLICATIONS OF THE *N.D. AND N.T. V. SPAIN* JUDGMENT FOR TURKEY

Article 4 of Protocol No. 4 requires the state authorities to ensure that each alien has a genuine and effective possibility of submitting arguments against his or her expulsion.[102] With the *N.D. and N.T. v. Spain* judgment, the Court established for the first time that contracting states, whose borders coincide with external borders of the Schengen area, should make available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border. Although this might seem revolutionary, it is widely accepted that the Court failed to apply this principle as it should be in the case of *N.D. and N.T. v. Spain*. This is because the Grand Chamber failed to take into account that migrants from African countries like Mali and Côte d'Ivoire can hardly, in reality, make use of the legal venues to reach Spain as well as the Schengen zone. Ignoring this reality means ignoring the reasons that each year thousands of migrants and asylum seekers risk their lives and undertake perilous journeys to reach Europe.[103] In 2020 alone, 381 persons have died while attempting to reach Europe irregularly whereas this number was 1,319 in 2019.[104] The present author believes that by dismissing this reality, the Court has missed a chance to establish clear safeguards against collective expulsion for aliens intercepted at the land borders.

As for potential implications of this judgment for Turkey, Turkey has signed the Protocol No. 4 on 19 October 1992 but has not ratified it.[105] Moreover, Turkish Constitution or the Turkish Law on Foreigners and International Protection[106] does not include a provision prohibiting collective expulsion.[107] As a result, a claim relating to Article 4 of Protocol No 4 cannot be lodged against Turkey before the Court. It is claimed by some authors that a number of European states might use *N.D. and N.T. v. Spain* judgment as an excuse to justify their arbitrary acts at the borders especially their hot return/collective expulsion practices.[108] However, as clear from the analysis in Section III, hot expulsion

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102 *N.D. and N.T. v. Spain*, para 194-8; *Hirsi Jamaa and Others v. Italy*, para 177; *Sharifi and Others v. Italy*, App no 16643/09 (ECHR, 21 October 2014) para 210; *Khlaifia and Others v. Italy,* para 238 and 248.

103 See UNCHR Operational Portal Refugee Situations, Mediterrenean Situation (2020) <https://data2.unhcr.org/en/situations/mediterranean> accessed 28 July 2020.

104 This is as of 28 July 2010 See UNCHR Operational Portal Refugee Situations,

105 Council of Europe Website, Chart of signatures and ratifications of Treaty 046, <coe.int/en/web/conventions/full-list/-/conventions/treaty/046/signatures?p_auth=9cFxdIz7> accessed 26 July 2020.

106 Turkey: Law No. 6458 of 2013 on Foreigners and International Protection, 29 October 2016, <https://www.refworld.org/docid/5a1d828f4.html> accessed 26 July 2020.

107 Göçmen, 260.

108 See Papageorgopoulos.

(the act of immediately returning all persons intercepted at the borders without undertaking individual status determination) and push back practices are still prohibited under the ECHR in particular Article 3 and Article 13 of the ECHR if not under Article 4 of the Protocol No. 4. Since hot expulsion and push back practices still are prohibited under the ECHR, this judgment may not have a direct bearing on Turkey. Nevertheless, some conclusions reached by the Court in this judgment applies to states irrespective of being a party to the Protocol No. 4.

The Grand Chamber in *N.D. and N.T. v. Spain* while affirming states' legitimate right to protect their borders reminded that they must comply with the ECHR guarantees, and in particular with the obligation of *non-refoulement*. Furthermore, the Court in *N.D. and N.T. v. Spain* has made clear that border controls especially those at the land borders must not render inoperative or ineffective the rights guaranteed by the Convention and the Protocols thereto and in particular by Article 3 of the ECHR. These obligations apply to states including Turkey and its neighbours that are party to the ECHR irrespective of being a party to Protocol No. 4. In sum, the Court still requires that the principle of *non-refoulement* is respected by the Turkish authorities and persons intercepted at the Turkish borders are given genuine and effective possibility of submitting arguments against deportation orders.

The situation at the Turkey-Greek border which occurred in late February and March 2020 can also be mentioned here. Turkey's neighbour Greece has not signed or ratified Protocol No. 4.[109] Nevertheless, Greece is bound by the Charter of Fundamental Rights of the European Union and its article 19 which notes *"Collective expulsions are prohibited."* Moreover, as rightly noted by Filippo, the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection[110] obliges EU Members to register and examine asylum applications lodged anywhere in the territory of Member States, including at the border.[111] This means hot returns are not only prohibited by Article 3 of the ECHR and Article 4 of the Protocol No. 4 but also by the EU *acquis*. Nevertheless, if Greece had ratified the Protocol No. 4, one could have argued that Greece's recent push back practices at the Turkey-Greece border violate Article 4 of Protocol No. 4 in addition to Article 2[112] and Article 3 of the

109 Council of Europe Website, Chart of signatures and ratifications of Treaty 046, <coe.int/en/web/conventions/full-list/-/conventions/treaty/046/signatures?p_auth=9cFxdIz7> accessed 26 July 2020.

110 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013.

111 Filippo, 22.

112 For serious allegations that Greek police shot a migrant the border see A. Rettman,

ECHR[113]. This is because unlike the Court's finding in *N.D. and N.T. v. Spain* for those who attempted to cross from Turkey to Greece following Turkey's decision to open its borders on 28 February 2020, no genuine and effective access to means of legal entry to Greece existed. However, since Greece has not signed Protocol No. 4, one cannot bring a claim against Greece under Article 4 of the Protocol No. 4. Although in relation to the events which took place in March 2020 at the Turkey-Greece border the author is in the opinion that an application against Greece can be lodged under Articles 2, 3 and 13 of the ECHR.[114] Having said that, *N.D. and N.T. v. Spain* judgment is unlikely to change the *status quo* at the Turkey-Greece border in the near future.

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113 For serious allegations that Greek police ill-treated migrants See B. Eski, 'Bullets don't deter migrants at Turkish-Greek border' Eupolitico, 3 May 2020, < https://www.politico.eu/article/bullets-dont-deter-migrants-at-turkish-greek-border/> accessed 26 July 2020.

114 In a similar manner see European Parliament, Priority question for written answer to the Commission on the situation on the Turkey-EU border , 4 March 2020 <https://www.europarl.europa.eu/doceo/document/P-9-2020-001313_EN.html> accessed 26 July 2020.

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INTELLECTUAL PROPERTY RIGHTS of GAMERS in ESPORTS

Esporda Oyuncuların Fikri Mülkiyet Hakları

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Research Article

Abstract

Esports has become more and more popular with increasing number of players and spectators such growth has brought with it problems related to various legal issues. Esports includes issues related to different branches of law such as unfair competition law, labour law, contract law, criminal law and sports law. Although there are many legal problems that may come up within esports activities, probably the biggest of these issues are related to intellectual property law. Game developers, players, competition organizers, and broadcasters of the games, all of these actors in esports ecosystem in short might have various intellectual property rights. The game itself is the subject of copyright as well. However this study is about the intellectual property rights of the players in esports. There are various intellectual property rights of players in both amateur and professional sports activities. The intellectual property rights of the players which might be on their names, images, movements, dances, tattoos, performances, broadcasts, overlays, avatars, costumes used by the players in the game, their improvements on the game equipment, and the improvements in the program code were examined in this study. In addition, in the last part, an evaluation has been made about esports from a futuristic perspective.

Keywords: Esports, Gamer, Multimedia Works, Video Games

Özet

Espor, artan oyuncu ve seyirci sayısı ile giderek daha popüler hale gelmiş ve bu büyüme, çeşitli hukuki konularla ilgili sorunları da beraberinde getirmiştir. Espor, haksız rekabet hukuku, iş hukuku, sözleşme hukuku, ceza hukuku ve spor hukuku gibi farklı hukuk dallarıyla ilgili sorunları içermektedir. Espor faaliyetlerinde ortaya çıkabilecek birçok hukuki sorun olsa da, muhtemelen bu sorunlar arasında en büyük yer tutanı fikri mülkiyet hukuku ile ilgili olanlardır. Oyun geliştiriciler, oyuncular, müsabaka organizatörleri ve oyunları yayınlayanlar, kısaca espor ekosistemindeki aktörlerin tümü çeşitli fikri mülkiyet haklarına sahip olabilir. Oyunun kendisi de telif korumasına dâhildir. Ancak bu çalışma espor oyuncularının fikri mülkiyet hakları ile ilgilidir. Hem amatör hem de profesyonel spor aktivitelerinde oyuncuların çeşitli fikri mülkiyet hakları vardır. Bu çalışmada oyuncuların isimleri, görüntüleri, hareketleri, dansları, dövmeleri, performansları, yayınları, yayın çerçeveleri, avatarları, oyunda kullandıkları kostümler, oyun ekipmanları üzerindeki iyileştirmeleri ve program kodundaki iyileştirmeleri üzerinde söz konusu olabilecek fikri mülkiyet hakları incelenmiştir. Ayrıca son bölümde, esporlarla ilgili fütüristik bir bakış açısıyla bir değerlendirme yapılmıştır.

Anahtar Kelimeler: Esports, Gamer, Multimedia Works, Video Games

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INTRODUCTION

Electronic sports or esports for short is an area which draws a lot of attention with high numbers of spectators and has a high monetary value of the esports market. Moreover more time has been spent at home recently because of the pandemic. So it is possible to say that Covid 19 has had a booster effect on esports. Thereby it is possible to say that Covid-19 had a supporting effect to esports. Also some universities have opened bachelor's degree programs related to esports and esports management.[1]

Esports has different aspects which have connections to different branches of law. For example, players' contracts, sponsor contracts, working hours of the players, intellectual property rights of the actors in esports ecosystem (game publishers, tournament organizers, clubs, players, regulatory bodies like federations, fans), doping, cheating software used in games, loot boxes involve many legal problems related to labour law, criminal law, sports law, debt law, unfair competition law, illegal gambling and sports law. Each of these can be a subject of a separate article. However in this article we will try to explain only the legal issues related to the gamers' intellectual property rights during their esports activities.

1. The Term and Short History of Esports

The word sport is spoken in English as sport or sports. It is expressed as sport as a name and as sports when used as an adjective.[2] Therefore, if it is going to be used as a name it will be said as "sport" like electronic sport. However, if it is to be used as an adjective, it will be used as "sports". For example sports night or sports law. It was determined in 2017 that the writing of e-sports will be in the form of esports (without hyphen) in the Associated Press Style Book of the American news agency Associated Press.[3] For this reason although it is a plural word we preferred to use the term sports as is accepted by the Associated Press Style Book.

The first esports match/competition was held on 19 October 1972 at Stanford University for the game Spacewar. Many matches have taken place since that day. Later, the game named Starcade was played in the game/arcade halls between 1982 and 1984. Computer games were also positively affected by the increase in internet connection in the 1990s. These are the years when the real-time strategy game StarCraft: Broodwar was released.[4]

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1 Murat Yeşildere, 'E-Spor Oynaya Oynaya Gelin Çocuklar' (2020) 22 August Platin, 14

2 <https://www.merriam-webster.com/dictionary/sport> accessed 18 July 2019

3 Kieran Darcy, 'Why the Associated Press Style Book went with esports not eSports?' (06 July2017) <https://www.espn.co.uk/esports/story/_/id/19860473/why-associated-press-stylebook-went-esports-not-esports> accessed 28 April 2020

4 Team Spawnly, 'Actors to Know on the eSports Market' <http://spawnly.fr/actors-know-esports-market/> accessed 16 June 2019

With the 2000s, esports gained today's status with popular tournaments and games. Launched in 2009, League of Legends (LOL) is stated to be the most played game in the world.[5]

Although there are discussions about whether esports is a sport or not, it is seen that more and more people are interested in esports both as players and viewers. Since esports creates a constantly growing market, companies operating in technology and media are investing in esports. It can be said that esports has created its own economic dynamics in this sense.[6]

For young[7] gamers, esports creates an attractive area due to the salaries, high prize[8] money awards in tournaments, income from sponsors and scholarships for students who are in sports activities.[9]

2. Definition of Esports, Esports in General and In Turkey

Before defining esports it might be useful to define the term sports. Sports is defined in the dictionary as 'all the movements that are carried out according to some rules, either personally or collectively, in order to develop the body or mind.'[10] As can be seen, physical movement is mentioned in the definition. As such, it is discussed whether activities that do not involve physical activity, for example chess is sports.[11] Physical movement-free activities such as chess and bridge are among the international sports federations that are not olympic but recognized by the International Olympic Committee (IOC).[12]

Esports is about matches/competitions on electronic systems. One of the definitions is as follows: 'It is a digital activity that is participated in both

5 Ibid

6 The revenue generated in the global esports market has reached 1.1 billion USD as of 2019. 82% of this income in the esports market consists of broadcast rights, advertising and sponsor revenues. The esports market is constantly developing. Globally, the number of esports viewers has increased by 15% in a year, reaching 453.8 million people. For detailed information and the global esports market report see < https://newzoo.com/insights/articles/newzoo-global-esports-economy-will-top-1-billion-for-the-first-time-in-2019/> accessed 18 July 2019

7 For example, the total income of the KuroKy nicknamed gamer from the tournaments exceeds US $ 4 million. The highest income generating age group from the tournaments worldwide is 22. For a list of the tournament winners' ages and earnings, see <https://www.esportsearnings.com/players> accessed 18 July 2019

8 For example, in the 2018 Dota 2 international tournament, the prize amount is 25 million 532 thousand 177 USD. To review the amount of prize pool in esports, see <https://www.esportsearnings.com/tournaments> accessed 18 July 2019

9 Team Spawnly (n.4)

10 <http://www.tdk.gov.tr/index.php?option=com_gts&arama=gts&guid=TDK.GTS.5cbf294a83b748.55032072> accessed 23 April 2019

11 <https://www.chess.com/article/view/is-chess-a-sport accessed> accessed 23 April 2019

12 <http://olimpiyatkomitesi.org.tr/Detay/Olimpiyatlar/Olimpik-Spor-Dallari/49/1> accessed 12 July 2019

individually and as a team through electronic devices or platforms, online or offline, and includes a competitive element.'[13] Another definition is like this: 'a form of sports where the primary aspects of the sport are facilitated by electronic systems; the input of players and teams as well as the output of the eSports system are mediated by human-computer interfaces.'[14] There are other definitions as well. However we agree with the first definition since it covers all the aspects of the activity.

In esports, physical movements of the players are not in the form of using the big muscles of the body. However, it is necessary to use hand-eye coordination and wrist and finger manoeuvres in less than a second. Esports players expend physical effort to use their fingers, hands, wrists, and to sit in the same position for a long time during their long-term and daily training that they do before the competitions. High concentration, power and a proper nutrition programme are required for performance to be successful.[15]

The International Olympic Committee stated that competitive video games involve physical activity however more work is needed to qualify electronic sports and electronic games as sports. In the 2022 Asian Games, esports will take place as one of the medal awarded fields.[16]

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[13] Definition given at the Esports and Law Summit by Emin Özkurt, 'Türkiye Espor Federasyonu Yapılanması, Regülasyonlar, Güncel Gelişmeler ve Kulüplere Etkisi' (Espor ve Hukuk Zirvesi, Istanbul Bar Informatics Law Commission, 1 March 2019) <https://www.facebook.com/ibbhk/videos/476430792894962/?__tn__=%2Cd%2CP-R&eid=ARBgvJrA66aTA-NYNPMfpDMioGpnHCqaRrUP9V_fs14JYIsmnu-GXgfgNQLWiJWm17mw-wWknpXREa08> accessed 14August 2020

[14] Juho Hamari and Max Sjöblom, 'What is eSports and Why do People Watch It' Internet Research (2017) 27(2), 211

[15] Aurangzeb A. Durrani, 'How Esports Competitors Prepare Mentally and Physically' (28 September 2017) <https://venturebeat.com/2017/09/28/how-esports-competitors-prepare-mentally-and-physically/>accessed 20 September 2019; Gamers stay at the gaming houses with their team. There might be a staff member for the proper nutrition program, a staff member for cleaning and a psychologist for supporting the gamers' psyhologically. In this way gamers do not have to come and go to their home for training. <https://www.eslgaming.com/article/team-houses-and-why-they-matter-1676> accessed 20 July 2019; Esports gamers/players train for long hours –sometimes up to fifteen hours a day- and some of this time is in the form of playing a game, while the remaining part is mentally preparing with a psychologist, developing tactics, and watching old matches. The diets and sleep patterns of the players are monitored in the playhouses. It is also thought that the fact that the players are in the same house while playing can create synergy. StartupLaw, 'Startup Hukuku|EsporNedir?' (23 November 2017) <https://www.youtube.com/watch?v=JAuN4vOSBC4> accessed 26 August 2020; Tuomas Kari and Veli-Matti Karhulahti, 'Do E-Athletes Move? A Study on Training and Physical Exercise in Elite E-Sports' (2016) 8 October International Journal of Gaming and Computer-Mediated Simulations 53

[16] <https://www.bbc.com/sport/olympics/46495396> (08 December 2018) accessed 23 April 2019; For the supporting opinions related to esports is a sport see <https://www.ces.tech/

Although there are opinions in favour of accepting esports as a sport,[17] there are also criticisms. South Korea became the first nation to officially classify esports as a sport. Japan, Brazil, the USA and France have followed. Denmark and Poland are currently reviewing its status.[18] Germany is on the way to accept esports as sports.[19]

According to Parry, esports is not a sport because it is inadequately human; it lacks direct physicality; it fails to employ decisive whole-body control and whole-body skills, and cannot contribute to the development of the whole human. Parry, also states that esports patterns of creation, production, ownership and promotion place serious constraints on the emergence of the kind of stable and persisting institutions characteristic of sports governance. Parry does not qualify esports as sports. According to the author, competitive computer games no matter what 'resemblances' may be claimed are just that—games.[20]

According to us the size of the movement should not be the determinative factor in considering if esports is a sport. This critic can be completely eliminated with the widespread use of augmented reality technology in esports. As is known, in augmented reality, players see real-world images and sounds, and they also see computer-generated sounds and images.[21] To give an example, in the game released by a game company, players try to shoot the opponents by throwing the balls they see with the special glasses they wear virtually and at the same time try to escape the balls that the opponent throws. Points are earned when the ball hits an opponent player. Players can virtually create a wall in front of them to avoid the balls thrown by the opponent.[22] This and such

Articles/2019/Is-Esports-a-Sport.aspx> (16 December 2019) accessed 22 June 2020

17 Consumer Technology Association, 'Is Esports a Sport?' <https://www.ces.tech/Articles/2019/Is-Esports-a-Sport.aspx> accessed 23 June 2020

18 DW, 'Esports is not a Real Sport – or is It?' (28 August 2019) <https://www.dw.com/en/esports-is-not-a-real-sport-or-is-it/a-50187845> accessed 26 July 2020

19 Janet Speight, 'Germany to Recognize eSports as an Official Sport', (8 February 2018) <https://www.dw.com/en/germany-to-recognize-esports-as-an-official-sport/a-42509285#:~:text=Germany%20follows%20in%20footsteps%20of,Africa%20in%20recognising%20eSports%20officially> accessed 26 July 2020

20 Jim Parry, 'Esports are Not Sports' (2018) Sports, Ethics and Philosophy, Taylor&Francis UK 1 < https://www.tandfonline.com/doi/abs/10.1080/17511321.2018.1489419> accessed 04 September 2020

21 In augmented reality technology, the image created by the computer is added to the reality. In this way, a composite image consisting of real and virtual images is obtained. In this technology, the user sees different images onto the real world, the sound and texts shared on computers. Virtual reality is different from augmented reality. In virtual reality, there is an environment that is generated by the computer. In augmented reality computer contributes to the reality. Armağan Ebru Bozkurt-Yüksel, *Yapay Zeka, Endüstri 4.0 ve Robot Üreticiler* (Aristo 2019) 40-41

22 Hado, 'AR x Sports' (21 September 2018) <https://www.youtube.com/watch?v=REBPX-

augmented reality options will allow gamers to play not just by sitting before the screen and play with eye, hand, wrist, finger movements, and thinking, but let them stand up and use big muscles as well as in other sports. With the help of the augmented reality the critics of esports that it is not a sport because it does not have physical activity might end.

In Turkey, the Turkish Esports Federation was founded in 2018. The National sports federations in Turkey are in three groups. These are: Olympic sports federations, Sports and Federations of the 2020 Tokyo Olympic Games Program and Other Sports Federations. Esports Federation is in the group of Other Sports Federations.[23] In Turkey there are several esports clubs.[24] Turkey is among the founder countries of the European Esports Federation.[25] However there is not a special legal act in Turkey for esports -like the Act in France.[26] But in Turkey there are Esports Federation Athlete, License, Registration, Visa and Transfer Directive[27], Esports Federation Referee Directive[28], Private Esports Halls and Qualification Certificate Directive.[29]

3. Actors in Esports Ecosystem and Their Intellectual Property Rights in Esports Generally

There are different actors who might have intellectual property rights in esports ecosystem. One of them is the publisher of these games. Game publisher publishes video games. The games can be developed either by the publisher

wx24kA> accessed 21 July 2019

23 National Olimpic Committee of Turkey, <https://www.olimpiyatkomitesi.org.tr/Detay/TMOK/Spor-Federasyonlari/26/1> accessed 29 July 2020

24 In Turkey, Dark Passage Esports Club founded in 2003, Beşiktaş Esports team founded in 2015, Fenerbahçe and Galatasaray Esports team founded in 2016, Papara SuperMassive team founded in 2016, Galakticos team founded in 2016. Ege Durak, 'Türkiye'de Espor Takımları' (29 May 2020) <https://technotoday.com.tr/turkiyede-espor-takimlari/>accessed 29 July 29 2020

25 <https://esportseurope.org/> accessed 29 July 2020

26 'In France, the organisation of video game competitions previously fell within the general prohibition of lotteries. However today, video game competitions are allowed and regulated under articles 101 and 102 of the French Digital Republic Act of 7 October 2016. To implement this new law, the French Prime Minister made two decrees on 10 May 2017: one regulating the organisation of video game competitions ("Decree 871"), the other regulating the status of salaried professional players of competitive video games ("Decree 872").' Margaux Mermin and Mag Urim Bajrami, 'The Pioneering French Regulation on Esports' (2 January 2019) <https://www.svlaw.at/en/the-pioneering-french-regulation-on-esports> accessed 29 July 2020

27 <http://tesfed.gov.tr/PublicFederasyon/Edit/images/FEDERASYON/105/E-SPOR_FED._TALIMATI-2.pdf> accessed 29July 29 2020

28 <http://tesfed.gov.tr/PublicFederasyon/Edit/images/FEDERASYON/105/Hakem%20Talimat%C4%B1.pdf > accessed 29 July 2020

29 <https://shgm.gsb.gov.tr/Public/images/SGM/Federasyon/37751scan0048.pdf> accessed 29 July 2020

or by an external video game developer. Game developer is the creator of the game. Riot Games Company is an example for both game publisher and game developer. The company also organizes tournaments. Riot Games Company provides the essentials to host competitions for the League of Legends game and Valve Company for the Dota 2 game. Game developers may license games to be used by other league organizers or online streaming platforms.[30] Since the game played in esports is a computer program, the creators of these games have copyright on these computer programs. Actually videogames are a compound of individual elements that can each be individually copyrighted. It can be said that intellectual property (IP) is a vital element in the videogame industry. The source code, characters, choreographies, buildings, maps, conceptual art, box design, soundtrack and sound effects, script, dialogue and the storyline may be protected by copyright individually if they are considered as an expression under a work category and if they have originality in a video game. Since copyright protects the expression of ideas, not the ideas themselves, similar ideas expressed in different ways are not going be considered as copyright infringement.[31]

Modern video games consist of two main parts. These are, audiovisual elements (including pictures, video recordings and sounds) and software. As it is stated in the WIPO Report, the debate is about the classification of the work as a whole – whether it is a multimedia[32] work, an audiovisual work or, primarily, a computer program.[33] As is mentioned in the WIPO Report,

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30 The Sports Observer, 'An Introduction to the Esports Ecosystem' <https://esportsobserver.com/the-esports-eco-system/> accessed 22 July 2019

31 European IP Helpdesk, 'IP in Videogames' <http://www.iprhelpdesk.eu/blog/ip-videogames> accessed 25 0July 25 2020; Richard Flaggert and Calvin Mohammadi, 'Copyright in Esports: A Top-Heavy Power Structure, But is it Legally Sound?' (2018) 39 Q3 Intellectual Property and Technology News, <https://www.dlapiper.com/~/media/files/insights/publications/2018/09/mrs000110933-ipt-news-q3-2018_v14ey.pdf> accessed 15 July 2020; Stephen Townley and Annie Townley, 'eSport: everything to play for' (2018) February WIPO Magazine <https://www.wipo.int/wipo_magazine/en/2018/01/article_0004.html> accessed 17 April 2018

32 Multimedia is defined as transmission by variable media. In another way multimedia is a technique related to the production, processing, shaping and transmission of information and data with the support of computer programs. Ünal Tekinalp, *Fikri Mülkiyet Hukuku* (5th edn, Vedat Kitapçılık, 2012) 130

33 'Video games include traditional works of authorship such as pictorial and literary works, sounds and images) and software, which in this sector is known as a game engine. A game engine is a technical instrument used both for the development of the video game and to drive the game in the console, smartphone or computer. Given the nature of game engines, they are also frequently known in this industry as middleware, because they provide intermediary solutions so that game developers do not need to start a game from scratch but can use the tools and resources created by middleware providers. In the 1980s and 1990s, video game companies commonly developed their own game engines, and only

'some scholars suggest that video games are essentially multimedia works that belong in the category of audiovisual works, affirming that these works are fundamentally a series of related images, following the most common definition of an audiovisual work provided in legislation around the world. However, one must take into consideration that these regulations also affirm that such images are intrinsically intended to be shown, which is not the final purpose of video games. On the contrary, video games are meant to be played and run using a computer program, with (inter)active implications for users, while audiovisual works, as currently defined, imply mostly passive viewer participation.'[34]

The authors who take a different opinion suggest it is not easy to place video games in the category of audiovisual works. The reasons for this opinion as stated in the WIPO Report are, firstly, all the co-authors of these works like the scriptwriters, the director and composer of the original soundtrack are not necessarily the same persons as in a particular video game who work with character and setting designers, animation designers, video testers, audio engineers.[35] Secondly, the rights requested by developers of video games and audiovisual works do not always coincide; and thirdly audiovisual works involve certain neighbouring rights that are not always present in video games.[36]

rarely were video games developed with third-party tools. Currently, given the significant time and cost savings, video games are commonly created using third-party tools, and only a small percentage of the code included in a given video game is customized for that specific project. The consequence of this modus operandi is that many video games now share source code (provided by the middleware), and the true, primarily distinctive elements of a game are the small amount of tailor-made code (that is not original per se) and all the audiovisual components of the game.' Andy Ramos and others, 'The Legal Status of Video Games: Comparative Analysis in National Approaches' (2013) World Intellectual Property Organization <https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative_analysis_on_video_games.pdf> accessed 03 August 2020, 10-11; There are some different arguments about the copyright on the video games. One of them is evaluating the video games as multimedia works. According to this idea video games are a compound of different independent copyrightable elements. Mete Tevetoğlu, 'Dijital Oyunlarda Bir Başkasının Marka veya Tasarımının Kullanılması Hakkında Güncel Bir Mahkeme Kararının Analizi!' (06 December 2017) <https://www.hubogi.com/bir-baskasinin-marka-veya-tasariminin-kullanilmasi/> accessed 16 September 2020

34 Ramos and others (n.33) 10

35 The computer game contains many unique arrangements. The games can be formed by combining the creations created by experts from different fields. Computer games cannot be considered just as computer programs. However this does not mean that the program in the computer game will not be protected. Taylan Kılıç, 'Bilgisayar Oyunlarının Eser Niteliği' (Master's Thesis, İstanbul Bilgi University 2018) 90, 92

36 Ramos and others (n.33) 10; Job titles that game designers have: junior game designer, level designer, game designer, lead designer, content designer, creative director, user interface designer, writer, scriptwriter. Jill Duffy, 'Game Design, An Introduction' (20 August 2007) <https://www.gamecareerguide.com/features/411/game_design_an_introduction.php> accessed 03 August 2020

In Turkey, Law Numbered 5846 on Intellectual and Artistic Works does not have a special category for video games. However in doctrine there are different approaches. One of them is protecting video games in the category of computer programs which is a work category in the Law. The other one is protecting video games as cinema work which is another work category mentioned in the Law.[37] The State Council's Decision related to this is as follows:

> '…As a result, within the scope of Article 2/1 of the Law Numbered 5846 on Intellectual and Artistic Works; Computer games that contain a set of commands that enable the computer to reproduce moving and sound images in a particular scene or scenario; It is within the scope of the Law Numbered 3257 on Cinema, Video and Music Works, with the expression recorded on cassettes, discs and similar moving images and sound carriers or transmitters.'[38]

Both of these thoughts are considerable and offer solutions to the current situation. Nevertheless since video games are more than just their computer codes and their interactivity; when considering new age video games with augmented reality technology, we believe that video games need a sui generis protection. For this reason we agree with the thoughts of authors *Kaynak-Koç/ Tevetoğlu* about the video games that they should be protected as multimedia works. According to the authors, the term multimedia work is used to describe digital works that contain more than one category of work within themselves. Multimedia works mostly form a whole, independent of the individual works it contains. Video/computer games are the most typical examples of these works. In this sense, multimedia works are technically a new type of work. It is not possible to consider multimedia works as a work category with the current status of the Law Numbered 5846. Due to its unique structure and dynamics, as well as its economic and social dimensions, evaluating multimedia works as

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37 Cahit Suluk and Ali Orhan, *Uygulamalı Fikri* Mülkiyet Hukuku *Genel Esaslar* (Arıkan 2005) 253

38 State Council Decision Merit No.1992/4550 Decree No. 1994/1856 of 27 September 1994 <http://emsal.danistay.uyap.gov.tr/BilgiBankasiIstemciWeb/DokumanGosterServlet?dokumanId=6dQp1E3JJN2TqHn5HwZgd7pMO1SCD0Le%2BRwsNJGzcYM%2Fa%2B-6gU8dOQaq%2FfBdKB2ercKYL7N%2Fd0%2B1ElTm4viZC2hG87JiYTNcXyLw3B5-Fm6IqLL7KsqfIZIddUnqbn6AQIYFa8DSVbD%2BBtgbkGMvW4QQ%3D%3D&aranan=&dokumanTuru=DANISTAYKARAR> accessed 20 August 2020; There is also another opinion which considers video games under films and argues that an idea and productions that are the performance of works of art, video games, daily images of events, determinations of football matches, etc. products, can be protected under article 80 of Law numbered 5846 on Intellectual and Artistic Works. Mustafa Ateş, 'Fikir ve Sanat Hukukunda Sinema Eseri ve Eser Sahipliği' in Tekin Memiş (ed), Fikri Mülkiyet Hukuku Yıllığı (XII Levha Yayınları 2009) 59, 66; Kılıç, 191

a separate category and providing special protection to products falling under this category would eliminate the legal complexity.[39]

Another actor is the gamer/player. Gamers are real people playing computer games, either amateur or professionally. The age to start esports is usually 10-13 years old. Due to the varying legal regulations becoming a professional gamer is generally between the ages of 17-25. Gamers usually retire around at the age of 25-30 years, as esports requires high concentration and very fast reflexes[40]. There is a distinction between a gamer and a player. An esports player is the person who earns wages on her/his efforts whereas a gamer is the person who plays without wage expectation. A player has responsibilities to those who pay her/his wages. A gamer plays for her/his own pleasure[41]. A player is a professional esports athlete. In this study we used the term gamer as a general term which includes both the professionals and the amateur who might have intellectual property rights.

There might be various issues that are related to intellectual property rights during gamers' esports activities. These can be stated as the rights on the nicknames/tags used by the gamers, the images of the gamers, the performances of the gamers, the video content frames (twitch overlays), the changes in the coding of the game program, the improvements made in the game console or the apparatus used and the gamers' avatars[42] used in the games.

Federations are the actors in esports ecosystem to which clubs are affiliated. In 2018 with the aim of developing Turkish esports, Turkey Esports Federation (TESFED) has been established in the body of Republic of Turkey Ministry of Youth and Sports.[43] Federations might own their logos or names.

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39 Selva Kaynak-Koç and Mete Tevetoğlu, 'Bilgisayar Oyunlarının Telif Korumasından Yararlanması' (2012) 8 Legal Fikri ve Sınai Haklar Dergisi 55; Same opinion Güney Yılmaz, 'FSEK Bakımından Video Oyunlarının Eser Niteliği' (Master's Thesis, Yaşar University 2020) 131; Tekinalp has the opposite thought. The author argues that multimedia works do not form a new type of work. According to the author, computer aided works should be considered as works under article 1/B(a) of Intellectual and Artistic Works Law numbered 5846 of Turkey. Tekinalp (n.32) 132; In the same opinion Derya Doğan and Umut Özocak, 'Dijital Oyunlar, Multimedya Yaratımlar ve Güncel Hukuki Problemler' <http://www.ozocak.com/Dosyalar/88cd5f.pdf> accessed 21.08.2020 6

40 <https://www.npd.com/wps/portal/npd/us/news/press-releases/37-percent-of-us-population-age-9-and-older-currently-plays-pc-games/> accessed 22 July 2019; Caroline Knorr, 'Everything Parents Need to Know About Esports' (15 October 2018) <https://www.washingtonpost.com/lifestyle/2018/10/12/everything-parents-need-know-about-esports/?noredirect=on&utm_term=.72b8a8699ed0> accessed 22 July 2019

41 Orhan Efe Özenç and İbrahim Yörük, *Her Yönüyle E-Spor* (Benim Kitap, 2019) 183

42 '…an avatar is the embodiment of a person or idea. However, in the computer world, an avatar specifically refers to a character that represents an online user. Avatars are commonly used in multiplayer gaming, online communities, and web forums.' <https://techterms.com/definition/avatar> accessed 23 June 23 2020

43 <http://www.hurriyet.com.tr/sporarena/turkiye-espor-federasyonu-1-yasinda-41193844>

Another actor in esports ecosystem is the sports club that gamers are affiliated to. As of 11 April 2019 there are 546 licensed gamers and 55 registered clubs in Turkey.[44]

As another actor a sports club might have intellectual property rights. Sports clubs can have intellectual property right on the team name. If the team name is a registered trademark this is going to be the trademark right. If the team has any logo or brand image, it may be registered as a trademark or a design as well. The club will have the trademark right or design right on the logo or brand image.

Another actor in esports ecosystem can be specified as organizer of tournaments. The last of the actors is the broadcasters of the competitions in esports. There might be neighbouring rights granted for the broadcasters related to broadcasting the tournaments.

In the future the gamers might compete against artificial intelligence or artificial intelligence softwares start to create esports games. Then we will have the legal issue of who is going to own the intellectual property rights on the video games and the intellectual property rights of the artificially intelligent software gamers.[45]

4. Matters Over Which Players Might Have Intellectual Property Rights

4.1.Gamer's Nickname/Tag, Slogan and Motion

In esports gamers might use their own names or nicknames or gamer tags. In terms of the effect desired to be created in esports generally gamers prefer to use the nicknames of their own choice.[46]

Gamers might have a nickname or a tag (gamer tag), slogan (catch phrase) or a motion of the gamer integrated with him/her which distinguishes him/her in esports activities. Personal branding is important to distinguish the gamer among the other gamers. Personal branding highlights the gamer on both social media and on an internet venue. To give an example, basketball player Michael Jordan has the nickname Airjordan. This nickname is a registered trademark

(25 April 2019) accessed 01 August 2019

44 <https://www.haberturk.com/turkiye-espor-federasyonu-son-rakamlari-paylasti-2438341-teknoloji> accessed 24 June 2020

45 Armağan Ebru Bozkurt-Yüksel, 'Yapay Zekânın Buluşlarının Patentlenmesi' (2018)11 Uyuşmazlık Mahkemesi Dergisi 585

46 TheScore Esports, 'What is Gamertag? The Strange Evolution of Gamers' Chosen Identities' (24 February 2019) <https://www.youtube.com/watch?v=Aw1gWoV1AAE> accessed16.06.2019

of Nike Incorporation in the clothing, footwear, headgear international class.[47] Nike Incorporation also has the rights for the Air Jordan jumpman logo. This logo is the silhouette of the athlete in his rebound movement.[48] Michael Jordan did not register Airjordan nickname and rebound silhouette (jumpman) personally. Instead he signed a contract with Nike Incorporation and gave permission for the use of the logo and the expression Airjordan.[49] If a gamer's name or a nickname that he/she uses all the time, a catch phrase which distincts him/her needs to be registered as a trademark, this can be done by him/her or the authorized person/the legal entity. We strongly recommend gamers to register their gamer tags or nicknames as a trademark by themselves at the beginning of their careers.

Another example is the lightning/light movement design of Usain Bolt, who has the title of the fastest running person in the world, which is registered in the USA both as a trademark and as a design in its own silhouette. The trademark is registered in clothing, bags, hand-held materials related to electronic games, books, calendars classes[50].

A gamers' typical movement during the game might be registered as a motion trademark. An example of a motion trademark would be the way in which Turkish chef Nusret Gökçe sprinkles salt by letting salt fall down on his forearm then spread on the meat. This three seconds motion has been registered in 25th and 30th class and partially 43rd class as an EU Trademark.[51]

In creating a gamer identity, it is necessary to take care not to use a tag, expression, material and motion that belongs to or distinguishes another person. Likewise, someone else should also not use another person's registered trademarks or designs. We recommend registration of elements that will provide personal branding and distinctiveness of the gamer for a strong legal protection.

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47 <https://trademarks.justia.com/777/53/air-77753704.html> accessed 24 June 2020

48 Matt Halfhill, 'History of the Air Jordan Jumpman Logo' (1 October 2014) <https://www.nicekicks.com/history-behind-jordan-jumpman-logo/> accessed 24 June 2020

49 Sneaker News, 'Michael Jordan Signed His Nike Contract On This Day 32 Years Ago' (26 October 2016) <https://sneakernews.com/2016/10/26/michael-jordan-signed-nike-contract-32-years-ago/ accessed> 24 June 2020

50 Tiana Towns, 'Strike a Pose and Say Trademark' (13 September 2016) <https://thetmca.com/strike-a-pose-and-say-trademark/> accessed 25 June 2020; After a race, the audience cheered Usain Bolt as lighting and then he started to be called with this word. Fastest Man, 'Usain Bolt – I became the Lightning Bolt' (30 July 2012) <https://www.youtube.com/watch?v=0oSu1ZJyspc> accessed 16 September 2019

51 John-Paul Tettmar-Saleh, 'Salt Bae's Sprinkle Given EU Trade Mark Protection' (18 November 2018) <https://ipharbour.com/blog/ip/salt-baes-sprinkle-given-eu-trade-mark-protection/> accessed 25 June 2020

4.2.Gamer's Image

The gamer has the right on his/her image. Image rights are related to the expression of a personality in the public.[52] According to the Turkish Supreme Court any person has the personal right on his/her appearance. A picture/ photo is someone's exterior surface that reflects his/her appearance and makes him/her recognized. For this reason a person has the personal right on his/ her picture. As a rule, without his consent publication of someone's picture is considered to be illegal.[53]

Law on Intellectual and Artistic Works numbered 5846 article 86 states:

> Even if they do not qualify as works, pictures and portraits may not be exhibited or disclosed to the public in any other way without the consent of the person depicted in such picture or portrait or, in case of his death, without the consent of the persons referred to in the first paragraph of Article 19, unless 10 years have elapsed after the death of the person depicted.[54]
>
> Code of Civil Law article 24 states:
>
> ...the one whose personal right has been unlawfully attacked can ask protection from judge against attackers to be protected.

Since every real person has personal right on his/her image, any image which reveals that person's face can only used with his/her permission.[55] A gamer has a personal right on his/her image. A gamer's image cannot be used in a game without his/her permission. For example The District Court of Amsterdam held, in its 9 August 2017 decision that video game company Riot Games infringed the image rights of soccer player Edgar Davids in its game League of Legends. In its online League of Legends game, Riot Games introduced a striker looking very similar to Edgar Davids, the retired soccer player. Thereupon Edgar Davids claimed infringement of his image rights under Dutch copyright law. The court held in its award on 11 August 2017 that the elements used in the video games, the dreadlocks, goggles, dark skin

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52 <http://ipo.guernseyregistry.com/article/103037/What-are-Image-Rights> accessed 22 July 2020

53 Supreme Court 2nd Civil Department, No.9403/625 of 29 January 1976; Supreme Court 4th Civil Department, No.1985/ 9517 – 958 of 11 January 1985; Supreme Court 4th Civil Department No.6227/9120 01 of November 1988 <https://www.hukuki.net/ictihat/904-275_hgk.asp> accessed 31 January 2020

54 English version of the Law numbered 5846 can be found here <https://web.archive.org/web/20081002004207/http://www.euromedaudiovisuel.net/Files/2007/05/10/1178834218365.pdf> accessed 26 June 2020

55 Armağan Ebru Bozkurt-Yüksel, 'Sokak Fotoğrafçılığı ve Kişisel Verilerin Korunması' (2020)42 Türkiye Adalet Akademisi Dergisi 525

colour, sporty posture, aggressive play style, and football uniform caused the public to identify the avatar 'Striker Lucian' as Edgar Davids.[56]

Dance figures that are used in the video games without permission might cause legal issues. A rapper called 2 Milly, whose real name is Terrance Ferguson alleged that Epic Games used his signature dance as emote in Fortnite game. Emotes are dances that allow users/gamers to express themselves uniquely on the battlefield[57]. Ferguson criticized Epic Games for not asking his permission or providing him any compensation. Then a second lawsuit came from actor Alfonso Ribeiro. His signature dance, known colloquially as "The Carlton," was used in Fortnite as emote too. Thirdly Russell Horning brought a lawsuit against Epic Games for using his floss dance. All three petitioners allege copyright infringement and violations of the right of publicity. Copyrightability of dance moves is controversial. If we put it aside, right of publicity -the personal rights that govern how an individual can control and profit off the use of their own likeness, name, and other identifiable traits[58]- should definitely be addressed here according to us.

An athlete might have a tattoo on himself/herself. Even when he/she gave permission for his/her image to be used in the video game; there is a discussion if the game developers can also use the tattoos of them on their digital images. The athletes are advised to secure licensing agreements before they get tattooed. Video game developers like to use the tattoos of the real players' on their avatars to emphasize realism. It is possible to say that there is an implied license of tattoo artists allow people to freely display their tattoos in public. However digitally recreated tattoos on avatars in video games cause concern with copyright infringement. There are three lawsuits that have been filed against Take-Two Interactive, a game developer and publisher, and a subsidiary, 2K Games.[59] According to us it is not possible to say tattoos are per se copyrightable works. To consider a tattoo a copyrightable work it should be

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56 Rogier De Vrey and Tim Wilms, **'**Esports and Image Rights' (17 August 2017) <https://cms.law/en/nld/publication/esports-and-image-rights> accessed 26 June 2020; For the full text of the court decision <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2017:5415> accessed 06 September 2020

57 <https://fortniteskins.net/emotes/> accessed 15 September 2020

58 Nick Statt, 'Fortnite Keeps Stealing Dances-and No one Knows Is It's Legal' (20 December 2018) The Verge <https://www.theverge.com/2018/12/20/18149869/fortnite-dance-emote-lawsuit-milly-rock-floss-carlton> accessed 15 September 2020

59 Tess Adamakos, 'Video Games are Under Copyright Heat Because Athletes Don't Own Their Tattoos' <https://www.inkedmag.com/sports-2/sports-video-games-under-copyright-laws> accessed 16 September 2020; Solid Oak Sketches, LLC v. 2K Games, Inc., No. 16-CV-724-LTS-SDA, United States District Court Southern District of New York, Decided Mar 30, 2018 <file:///C:/Users/Armagan%20Bozkurt/Desktop/Solid%20Oak%20Sketches,%20LLC%20v.%202K%20Games,%20Inc.pdf> accessed 12 November 2020

examined whether it meets the conditions to be considered a work of art under the law. If it meets the conditions then we can speak about the copyright of the tattoo artist. Moreover using tattoos on the avatars might be considered as an exception as it is a necessity of perception of reality.[60]

4.3.Gamer's Performances

Whether the style of esports gamers' performances during the game will be subject to intellectual property right is another issue. To speak of a copyright there should be an individual interpretation of the work. Different from music or drama performances, performance style in esports is not considered as a work that constitutes the subject of copyright. The reason for this is because there is not a scenario or any predetermined setup. This is valid especially for the classic ego-shooter games. These games require a certain degree of dexterity and responsiveness. However strategy games require gamers to develop comprehensive strategies to be successful. There is a thought that the strategy might be considered sufficient for granting ancillary copyright.[61] Ancillary copyright is a kind of neighbouring right like performance right[62]. However, it is difficult to set a boundary between the games and types of performances. Also as it is stated in TRIPS Agreement article 9(2) that copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. Likewise, in a strategy game like chess the movements are not copyrightable. US District Court Southern District of New York ruled that robust reporting of chess moves during play is in the public interest in *World Chess US Inc and World Chess Events Ltd. v. Chessgames Services LLC, E-learning Ltd., and Logical Thinking Ltd.* case. The court ruling explains the grounds of denial of the plaintiff's request to stop broadcasting the moves of the Carlsen-Karjakin World Chess Championship. There is a long-established understanding in the chess world that chess moves can't be copyrighted.[63] Game annotations might be copyrightable however;

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60 On October 20, 2017, the 9th Chamber of the American Court of Appeals ruled that Sony's positioning of the Italian company Virag's trademark in the Gran Turismo game would not be a violation of the trademark right, as it was a requirement of the spatial reality perception. Virag, S.R.L. v. Sony Computer Entm't AM., No. 16-15137 (9th Cir. 2017) United States Court of Appeals for the Ninth Circuit No.16-15137 D.C. No. 3:15-cv-01729-LB <https://law.justia.com/cases/federal/appellate-courts/ca9/16-15137/16-15137-2017-10-20.html> accessed 16 September 2020; Tevetoğlu (n.33)

61 European IP Helpdesk, 'IP and eSports' <www.iprhelpdesk.eu/blog/ip-and-esports> accessed 27 June 2020

62 Meghan Sali, 'What the Heck is Ancillary Copyright and Why Do We Call It the Link Tax?' (5 May 2016) Open Media https://openmedia.org/article/item/what-heck-ancillary-copyright-and-why-do-we-call-it-link-tax accessed 14 November 2020

63 United States District Court Southern District of New York [2016] 16 Civ. 8629 (VM) <https://cdn.chess24.com/4B2ctaoyRr2OdkJD15lgqg/original/court-decision.pdf>

performance styles should not be copyrightable. According to us it will not be practical to copyright the style of gamers' performances.

To add as a note a description of sports performance, such as a photograph, raises intellectual property rights. Licensing of the content is needed to use this description. This can be achieved through contracts with gamers, media company, commercial partners, the press and viewers.[64]

4.4.Gamer's Streaming/Broadcast

There is an increasing demand to watch other people play video games live. Video game streaming allows spectators to get closer to the gamer and the action. It also brings extra income to the professional gamers. 'Streaming is where someone will record their game or show by broadcasting it via streaming platforms live over the internet.'[65]

Gamers as streamers can add custom graphics to their stream. They can interact with viewers via a chat room; they can educate and entertain their viewers. Gamers who are also streamers can save certain recordings or clips, and upload these for viewing at any time on YouTube or another video platform[66] like for example Twitch.[67] Twitch is a leading streaming platform for gamers. People can watch or gamers can broadcast live streaming or pre-recorded videos of their performances.[68]

A standard video gaming stream has the video game itself, player's oral commentary, background music, player's name and his/her image streamed through a webcam. The commentary, name and image either cannot be protected by copyright or are automatically assigned to the player. The game itself and the background music can be evaluated from the perspective of intellectual property rights. Game developers as the creators of the game own the copyright of the game. The code of the video game is protected as a literary work. The artwork and the sound of the game can be protected as well. Developers of the games usually allow the gamers to use these copyrighted elements who stream on the platforms like twitch.tv for advertising reasons.[69] To give an example,

accessed 27 June 2020; Chess24, 'US Judge Agrees With Chess24 on Chess Moves' (23 November 2016) <https://chess24.com/en/read/news/us-judge-agrees-with-chess24-on-chess-moves> accessed 27 June 2020

64 Townley and Townley (n.31)

65 British Esports Association, 'What is Streaming?' <https://britishesports.org/news/what-is-streaming/> accessed 14 July 2020

66 Ibid

67 <https://www.twitch.tv/> accessed 15 July 2020

68 Bernadette Johnson, **'**What does Twitch have to offer and who can use it?' <https://electronics.howstuffworks.com/twitch1.htm> accessed 14 July 2020

69 Matt Bogdan, **'**A Copyright Monopoly: Live Streaming Esports' (15 April 2015) <http://www.keepcalmtalklaw.co.uk/a-copyright-monopoly-live-streaming-esports/> accessed 14

according to the game developer company Riot Games' legal terms of service the individual players are permitted to promote their projects on websites, streams, or videos and passively generate revenue through appropriate advertisements, including pre-roll ads, ad breaks, and sponsor ad overlays. Riot Games also permit individual players to solicit personal donations or offer subscription-based content while live-streaming games, so long as non-subscribers can still watch the games concurrently.[70]

Who has the intellectual property rights of the streaming of a gamer/player is an important issue. A case related to this issue had taken place. A twitch.tv channel called SpectateFaker broadcasted games of a highly popular professional player Lee Faker Sang-hyeok. Azubu which is another streaming platform had an agreement with Sang-hyeok to act as his exclusive streaming platform. Azubu alleged that the SpectateFaker channel was infringing on IP rights assigned to them and filed a complaint under the US Digital Millenium Copyright Act (DMCA) to take down the stream. Under the US and EU copyright law internet service providers have to act expeditiously to remove or disable access to the infringing information when such is brought to its attention. For this reason Twitch has removed SpectateFaker's content after notice. In this situation the IP rights related to the game played by Sang-hyeok were owned by Riot Games. However, Sang-hyeok himself issued a statement condemning the channel and then Riot Games filed their own complaint against SpectateFaker thereby shutting the channel down.[71]

As a result, game developers have the copyright of the games' codes. However, they tend to give permission to the gamers/players in their terms of use to stream or broadcast their performances. In a case like the one above the game developer company is the one to sue in a situation like copyright infringement. Video game program codes can be protected as computer programs according to Law Numbered 5846 on Intellectual and Artistic Works. However, there is not a special category for audio visual works or video games in the Law.

4.5.Gamer's Overlays in Streaming/Broadcasting

The overlays that gamers/players use while they broadcast might be a subject of intellectual property rights. An overlay is a design consisting of a variety

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70 <https://www.riotgames.com/en/legal> accessed 14 July 2020

71 For the critics about Riot Games'approach in this case see Bogdan (n.69); Colbert Hung, 'Streaming League of Legends and Spectate Faker – Would Arbitrary Game Licensing Rules Curtail Free Speech Like the Digital Millennium Copyright Act?' (15 July 2016) <https://innovatus.com.tw/streaming-league-of-legends-and-spectatefaker-would-arbitrary-game-licensing-rules-curtail-free-speech-like-the-digital-millennium-copyright-act/?lang=en> accessed 15 July 2020; Flaggert and Mohammadi (n.31)

of graphics that appear along with the gamer's gameplay footage during a stream. Most commonly, these graphics are positioned around the edges of the screen, so that the centre of the screen remains unobstructed to showcase the gameplay. However, the exact positioning will always depend on your stream's particular layout and the game you are playing. A unique overlay would attract the viewers. The virtual presentation of the gamer's broadcast is a reason for a viewers preference. An overlay could include a unique colour scheme, mascot logo, or stream information (such as recent subscriber, top donators, current music track, etc). A personalized overlay can become familiar to the gamer audience and that will serve as a part of what brings them back. An overlay is an extension of gamer's personality.[72]

These overlays might contain designs in it. If these graphic designs in the overlay can be considered as a work and created by the gamer himself/herself then he/she will own the copyright. If these designs can be considered as designs under the Industrial Property Code numbered 6769 then they can be protected under the design right. It might be difficult to register these designs or due to the rapid changes in technologic products it might not be practical to register these designs. Another option might be unregistered design protection in favour of the gamer. However if the gamer uses the design elements of the platform that he/she broadcasts the platform owner might indicate as a term in the contracts that the intellectual property rights of the design will belong to the platform owner. If the gamer prepared the overlay with his/her own facilities and broadcast then he/she will own the intellectual property rights.

4.6.Gamer's Avatar

An avatar is the personalized graphical illustration that represents the gamer or gamer's character in the video game. It can be either in three-dimensional form like in games or in two-dimensional form as an icon in Internet forums and virtual worlds.[73]

If the avatar is made from the choices by the gamer from the game developers' programme like the choosing of the hair colour, body shape, eye colour, height, costumes the intellectual property right will be belong to the game developer. Already game developers state this point in the user terms. For example game developer Riot Games Company states, in the user terms of service article 3.2 which was updated on 15 January 2020, that they 'reserve all rights, title and interest in and to the Riot Services, and all data and content posted, generated, provided or otherwise made available in or through the Riot Services, including, user accounts, computer code, titles, objects, artifacts,

[72] <https://visualsbyimpulse.com/blog/your-twitch-overlay-is-your-brand> accessed 16 July 2020
[73] <https://www.techopedia.com/definition/4624/avatar> accessed 16 July 2020

characters, character names, chat logs, game recordings and broadcasts, locations, location names, stories, dialog, catch phrases, artwork, graphics, structural or landscape designs, animations, sounds, musical compositions and recordings, virtual goods, in-game currency, audio-visual effects, character likenesses, methods of operation and gameplay (collectively Game content).'[74]

There is another possibility that the avatar can be generated by the gamer/user. The game developer can allow the users to create their own avatars.[75] There are also web sites that allow users to upload photos from which avatars will be designed.[76] As Zenor states some new systems are also connected to the internet, which allow users to download other user created players and in this situation the ownership right of these characters are usually transferred to the game developer when the consumer agrees to the end-user license agreement.[77]

There might be different approaches from copyright law to the user created avatars. The options of authorship for the user created avatars such as joint work, derivative work, employee work, and collective work. However, we agree with the opinion that each avatar should itself be considered a joint work between the game developer and the user, and that each avatar should also be considered a contribution to a collective work which is the game as a whole. We agree with the Ochoa's opinion that this solution would be the best balance between game developer and player interests.[78]

Another point is that if a real person's image is going to be used as an avatar; in this case the real person's permission is needed. For example, if the game developer company likes to use a celebrity's image as an avatar they need to get the permission of that person. If the gamer/user would like to generate an avatar by using another person's image than he/she has to receive

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74 <https://www.riotgames.com/en/terms-of-service#section7> accessed 16 July 2020

75 The online game Second Life has an extensive capacity for customization. Second Life doesn't just foster user-generated content, it depends upon it. Users have practically limitless number of avatar customization options. Jonathan Strickland and Dave Roos, 'How Second Life Works', <https://computer.howstuffworks.com/internet/social-networking/networks/second-life2.htm> accessed 17 July 2020

76 <https://www.zmoji.me/5-steps-to-easily-create-stunning-avatar-from-photo/> accessed 17 July 2020

77 See Zenor for this and further explanation Jason Zenor, 'If It's in the Game: Is There Liability for User-Generated Characters That Appropriate a Player's Likeness?'(2017)16 The John Marshall Review of Intellectual Property Law 291, 294; See Lastowka about legal problems related to user generated content Greg Lastowka, 'User-Generated Content & Virtual Worlds', (2008) 10(4) Vanderbilt Journal of Entertainment and Technology Law 893

78 See Ochoa for this opinion and the critics of the other arguments related to different approaches Tyler T. Ochoa, 'Who Owns An Avatar? Copyright, Creativity, and Virtual Worlds' (14)4 Vanderbilt Journal of Entertainment and Technology Law 959, 991

permission, otherwise personal rights would be violated and the personal data of that person would be used without his/her permission.[79]

4.7.Gamer's Costumes

In the professional tournaments gamers wear the club's kit. If there is a team with more than one gamer then they all have the same kit to ensure team unity.[80] The club's official sports kit might have special colour or designs on it.[81] The club might have a designer to design their kit. In this case the club would hold the design rights for the kit. However, if the gamer always for example wears a costume or a helmet or glasses which he/she designed himself/herself than he /she will have the ownership of this design and will have design right. The gamer might want to wear the same costume that his/her avatar wears in the game during the tournament. For example he/she might like to put little wing figures on the shoulders on the costume. This will attract the attention of the viewers. In this case the right about the avatar which was mentioned above might determine the design rights on the costume.

4.8.Gamer's Improvements on the Console and Other Equipments

The equipment which gamers use in esports is important. The key components are usually the mouse, mouse pad, keyboard, headset and controller. The precision of the equipment is important for the gamer's performance. A good quality headset would help the gamer to hear the footsteps in the game, a developed mouse and keyboard would help the gamer to make the manoeuvres.[82]

There might be intellectual property rights on the equipment. For example, if a game developer company designs a headset which is physically comfortable for all day wearing and has a different design then the company might have a design right on this headset. The company might sell them or might give them to the gamers at the tournaments. The sports clubs might give the equipment to the gamers. Another alternative is the sponsor of the gamer might provide this equipment. However, the gamers can also design their own equipment. For

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79 Bozkurt-Yüksel (n.55)

80 Cam Wolf, 'What Should a Professional Gamer Wear? The Answer Could Be Worth Millions' (30 April 2019) <https://www.gq.com/story/esports-apparel-boom> accessed 19 July 2020

81 See the case about kit designs between two clothing manufacturers. Star Athletica, LLC v. Varsity Brands, Inc.Supreme Court of the United States, Docketed: January 7, 2016 Lower Ct: United States Court of Appeals for the Sixth Circuit Case Nos.: (14-5237) Decision Date: August 19, 2015 Rehearing Denied: October 7, 2015, <https://www.supremecourt.gov/search.aspx?FileName=/docketfiles/15-866.htm> accessed 15 September 2020

82 Eric Van Ellen, 'Tools of the Trade: The Importance of Quality Esports Equipment' (20 May 2016) <https://www.espn.com/esports/story/_/id/15616253/importance-quality-esports-equipment> accessed 20 July 2020

example, a special cover on the mouse pad might help the mouse to sway better or a special design of the keyboard might help the gamer to press the keys faster or help the gamer's wrists or fingers protect against the countless presses during the game. In this case the gamer might register his/her own design right. However what will happen if the gamer thinks about these upgrades and tells his/her idea to the company? In this case once the tournament organizer or the club whichever provides this equipment might use the idea. For this reason in our opinion if a gamer would have any idea about the upgrade for the equipment he/she should not straightforwardly go and tell the equipment provider. At first we recommend him/her to make a nondisclosure agreement that if the idea is a notable one the provider would not use it without the permission of the gamer and not to share or use the idea even the provider would not benefit from the idea.

4.9.Gamer's Improvements on the Game Program Codes

If a gamer writes a patch program or finds the software kind coding failure (bug) and repairs it with a program then we will have the issue of who is going to own the copyright on this improvement. An improvement on the game program for example, writing a code as a patch for the program, should be evaluated.

Adaptations are intellectual and artistic works created from a work that is not independent compared to this work. There is a noticeable link between the work and the adaptation.[83] As Hirsch states, products that cannot be brought into being by everyone, in other words, that have characteristics are worthy of protection and work qualification can only be attributed to them.[84] According to article 6/10 of the Law numbered 5846 titled 'Adaptations', the application, arrangement and change of computer programs are counted as works. Those who do adaptations can hold copyright if permission is given from the owner of the first program on which was adapted. Undoubtedly, the condition of bearing the characteristics of the owner must be sought in the work that is the result of the adaptation.[85]

In the light of this information and the Law any improvements on the program codes should be evaluated if it has the characteristics of its owner, if it is ordinary or worthy of protection and if there is a permission from the owner the program.

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83 Cahit Suluk and others, *Fikri Mülkiyet Hukuku* (4th edn, Seçkin Yayıncılık 2020) 70

84 Ernst E. Hirsch, *Hukuki Bakımdan Fikri Say,* vol 2 (İktisadi Yürüyüş Matbaası ve Neşriyat Yurdu 1943) 12

85 Ayşe Saadet Arıkan, 'Bilgisayar Programlarının Korunması AB ve Türkiye' (1996) 4 Türkiye Barolar Birliği Dergisi 469, 476

In practice for example, game Publisher Riot Games do not want the improving ideas from the gamers as a principle. But if the gamers still submit the ideas, the Company states that they will have the absolute right to use it forever.[86] Riot Games' Terms of Service Article 6.1. is as follows: 'Unsolicited Idea Submission Policy - Can I submit ideas for improving the Game to Riot? (Please don't. If you do anyways, we'll have the absolute right to use it forever.) We value your feedback on the Riot Services, but please don't submit any creative ideas, suggestions or materials to us (collectively, "Unsolicited Ideas"). We may freely use any Unsolicited Ideas you provide. This policy is aimed at avoiding potential misunderstandings or disputes when the Riot Services might seem similar to Unsolicited Ideas that people submit……In legal terms, this means that if you submit Unsolicited Ideas to us, then you grant us a worldwide, perpetual, irrevocable, sublicenseable, transferable, assignable, non-exclusive, and royalty-free right and license to use, reproduce, distribute, adapt, modify, translate, create derivative works based upon, publicly perform, publicly display, digitally perform, make, have made, sell, offer for sale, and import your Unsolicited Ideas, including all copyrights, trademarks, trade secrets, patents, designs, industrial rights, and all other intellectual and proprietary rights related to them, in any media now known or in the future developed, for any purpose whatsoever, commercial or otherwise, including giving the Unsolicited Ideas to others, without any compensation to you. To the extent necessary, you agree that you undertake to execute and deliver any and all documents and perform any and all actions necessary or desirable to ensure that the rights to use the Unsolicited Ideas granted to us as specified above are valid, effective, and enforceable and you waive and agree never to assert those rights to the maximum extent permitted by the laws of your jurisdiction.'

A gamer might have technical knowledge and can make improvements in the game code. This code might be so good that it can be assessed as a work that can be subject of copyright all by itself. However if the user terms are as above we can say that it would be not beneficial for the gamer to reveal this improvement to the game developer straightforwardly. As we mentioned above here again we recommend the gamer to make a nondisclosure agreement that if the idea is a notable one the game developer would not use it without the permission of the gamer and not share or use the idea even if the developer would not benefit from the idea.

[86] This can be considered as where the user is deemed to be the owner of the work, simultaneously a transfer of financial rights contract. Doğan and Özocak (n.39)

5. The Future of Esports with Artificial Intelligence, Competitive Coding, Virtual Reality and Augmented Reality

5.1.Esports with Artificial Intelligence and Competitive Coding

The future of esports has a connection with artificial intelligence (AI in short).[87] Artificial intelligence will transform esports as well. Artificial intelligence programs can be used to play video games. The real gamers may compete against the artificial intelligence programs. For example Elon Musk's Open AI Five Team AI powered Dota 2 bot has beaten the world's top single player Dota 2 players. Google's AI-powered bot named AlphaStar beat two of Team Liquid's best players in a whitewash at Blizzard's StarCraft II in December 2018. The point is AI programs do not make more clicks than the real players but they play more strategically and efficiently in their clicks.[88]

Artificial intelligence programs may also be used for training the gamers. If an AI program is fed by millions of hours of professional play and allowed to play the games, the AI programs will be able to create new breakthrough gaming strategies. Professional gamers could learn from strategies and adapt them to their playing styles.[89]

Watching other gamers inspires people and also watching coder programmes live and listening to their comments on their strategy is an important source of inspiration for the people who want to learn more about programming.[90] Coding streaming is already popular on platforms.[91]

In time esports might be pulled in unforeseen directions, taking into consideration the evolution of technology. Programming would enter the field. Programming brings the opportunity for the gamers to make the game whatever they want it to be. And this could lead to more exciting and entertaining

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87 Artificial intelligence is about the machines that have the ability to solve problems that humans naturally solve with intelligence. Armağan Ebru Bozkurt-Yüksel, 'Buluşçu Yapay Zekaların Geleceği' (31 August 2020) https://fikrimulkiyet.com/buluscu-yapay-zekalarin-gelecegi/> accessed 04 September 2020; For detailed explanation about artificial intelligence, robot and bot difference see Armağan Ebru Bozkurt-Yüksel, 'Robot Hukuku' (2017) 29 Türkiye Adalet Akademisi Dergisi 85

88 Mark O'sullivan, **'**How Artificial Intelligence is Revolutionising Esports' (17 April 2019) <https://home.kpmg/mt/en/home/insights/2019/04/how-artificial-intelligence-is-revolutionising-esports.html> accessed 22 July 2020

89 Charles Fuster, 'How Can Artificial Intelligence Impact Esports?' (07 April 2020) https://www.esportznetwork.com/why-artificial-intelligence-should-be-the-primary-focus-of-esport/ accessed 22 July 2020

90 Thibaud Jobert, 'Competitive Programming: Towards a New Era of Esports?' (13 October 2016) <https://www.codingame.com/blog/competitive-programming-towards-new-era/> accessed 23 July 2020

91 <https://www.education-ecosystem.com/> accessed 23 July 2020

competitions. In the future the gamers will not only need strategy but also coding skills. They will need to have technical knowledge of programming languages and algorithms. In time esports might turn out to be competitive programming and gamers might start to compete against not just other gamers but also artificial intelligence programs by coding.[92]

5.2.Esports with Virtual Reality and Augmented Reality

Virtual reality (VR) is built on ideas that go as far back as the 1800s. However, the term was first used in the 1930s by Jaron Lanier. Today virtual reality has gained attraction especially for Industry 4.0.[93] The gaming industry is the leading industry for using virtual reality and augmented reality (AR) and products that leverage the potential of AR and VR technology has already created for gaming.[94]

Virtual reality can be defined as 'the term used to describe a three-dimensional, computer generated environment which can be explored and interacted with by a person. That person becomes part of this virtual world or is immersed within this environment and whilst there, is able to manipulate objects or perform a series of actions.'[95]

Augmented reality is the technology to superimpose information -sounds, images and text- on the world we see.[96]

Augmented reality combines the virtual and physical worlds. Augmented reality is easier to access via mobile or tablet than virtual reality. In 2017 augmented reality became very popular with the release of Pokemon Go and augmented reality development kits by Apple and Google.[97]

There are a number of companies that are investing in augmented reality in esports. Ares is a company that specializes in an immersive stadium experience for eSport competitions utilizing virtual reality and augmented reality. This company hopes to overcome the challenges of limited seating and travelling to events by joining events virtually.[98]

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92 Thibaud (n.90)

93 Hilmi Yüksel, *Endüstri 4.0 Dönüşüm Rehberi* (Aristo 2019)

94 Capsl, 'Virtual Reality, Augmented Reality and the Growth of Esports' (22 March 2019) <https://capsl.cc/virtual-reality-augmented-reality-and-the-growth-of-esports/> accessed 24 July 2020

95 Virtual Reality Society, **'**What is Virtual Reality?' <https://www.vrs.org.uk/virtual-reality/what-is-virtual-reality.html> accessed 24 July 2020

96 Jesse Emspak, 'What is Augmented Reality?' (01 June 2018) <https://www.livescience.com/34843-augmented-reality.html> accessed 22 August 2020

97 Capsl (n.94)

98 Terrell Gray, 'Augmented Reality Esports' <https://www.f6s.com/augmentedrealityesports> accessed 24 July 2020

Virtual reality and augmented reality will open new opportunities to the gamer-athletes who are specialists in both gaming athletic sports. For example a Japanese firm Hado hosts an annual VR/AR competition.[99]

Conclusion

Esports is an area of entertainment, sports and it is also a huge market. People, especially young people, are getting more and more interested in esports. Esports has a lot of elements which are the subject of intellectual property rights. However, gamers should be aware of their own intellectual property rights. Gamers make the greatest effort in this ecosystem. In our opinion gamers', especially the teenage ones' legal rights need to be protected. If the gamers are amateurs they should read the user terms of the game platforms, stream platforms very carefully and might get help to understand the legal conditions. If they are professional they should examine the contract clauses carefully.

Professional gamers usually get retired around the age of twenty five because of the weakening reflexes.[100] Being a good gamer might be a way of making financial gain at the tournaments however, protecting intellectual property rights will identify the gamer and will be another earning source even after retirement.

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AN ANALYSIS OF LEVERAGED BUYOUTS UNDER FINANCIAL AID PROHIBITION OF THE TURKISH COMMERCIAL CODE

Türk Ticaret Kanunu'nda Düzenlenen Finansal Yardım Yasağı Kapsamında Kaldıraçlı Devralmalara İlişkin Hukuki Bir Analiz

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Research Article

Abstract

"Leveraged buyout" (LBO) is one of the most preferred methods in company acquisitions. This method basically has three main legal aspects: The buyer (private equity) acquires controlling shares of the (target) company; S/he finances the acquisition price largely through loans from third parties and the loans used are ultimately either fully or largely secured by the target company's assets.

One of the main principles of joint stock company law is the principle of protecting the capital. In LBO models, since the final source of collateral is the capital or assets of the target company, different laws have forbidden this process, and in Turkish Law, this kind of financing is considered invalid to the extent that it is associated with the financial assistance prohibition.

Financial aid prohibition regulated in the Turkish Commercial Code No. 6102 (TCC), which has entered into force in 2012, is subject to significant criticism in doctrine, especially in terms of the amendment (2006/68/EC) in the Second Directive of the European Union in 2006, which enables financial assistance to third parties under certain conditions. In order to harmonize the amendment made in the Second Directive, we suggest amending Article 380 of the TCC in order to alleviate the financial assistance prohibition under certain conditions as in the Second Directive, not completely abolishing it.

Keywords: Business Law, Leveraged buy-outs (LBO), Financial aid prohibition.

Özet

"Kaldıraçlı Devralma" (LBO) şirket satın alma işlemlerinde kullanılan bir tür finansman yöntemidir. Bu yöntemde esas olan üç önemli unsur bulunmaktadır. Bunlar: Yatırımcının bir şirketin kontrolünü ele geçirecek şekilde pay iktisap etmesi; yatırımcının satış bedelini büyük ölçüde üçüncü kişilerden sağladığı kredi işlemleri ile finanse etmesi ve kullanılan kredilerin ise nihai olarak ya tamamen ya da büyük oranda hedef şirketin malvarlığı ile teminat altına alınmış olması.

Anonim şirketler hukukunun temel ilkelerinde birisi de sermayenin korunmasıdır. Kaldıraçlı devralma modellerinde nihai kaynağın hedef şirketin sermayesi ya da malvarlığı unsurları olması nedeniyle farklı hukuklar bu işlemi yasaklamış, Türk Hukuku'nda ise finansal yardım yasağı ile ilişkilendirildiği ölçüde bu işlemler geçersiz sayılmıştır.

Doktrinde, özellikle Avrupa Birliği'nin Şirketler Hukukuna ilişkin İkinci Yönergesi'nin 2006 yılında 2006/68/AT sayılı Yönerge ile değiştirilerek belirli koşulların gerçekleşmesi halinde üçüncü kişilere finansal yardıma olanak sağlanmış olmasına rağmen, 2012 yılında yürürlüğe giren 6102 sayılı Türk Ticaret Kanunu'nda (TTK) bir şekilde düzenlenen mali yardım yasağı eleştirilmektedir. Bu çalışmada, TTK'da katı bir biçimde düzenlenen finansal yardım yasağının tamamen kaldırılmasa dahi, AB mevzuatındaki gibi belirli şartlar çerçevesinde hafifletilmesi amacıyla TTK'nın 380 inci maddesinin değiştirilmesi önerilmektedir.

Anahtar Kelimeler: Ticaret hukuku, Kaldıraçlı devralma, Finansal yardım yasağı.

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INTRODUCTION

"Leveraged buy-outs" (LBO) is one of the most preferred financing methods in company acquisitions, due to its various financial advantages. In LBO method, basically a private group of investors comes together and borrows money heavily to purchase the control of another company, which is called "Target Company" in practice. In this acquisition method, the cash flows or assets of the target company are used to secure and repay the debt. So, if more loan money is put in the target company instead of capital, income as well as profitability of the target company will increase and the less money is spent by investors. This effect is called as the "leverage effect" in finance literature. In practice investors establish a company, which is called "Special Purpose Vehicle" (SPV), solely for LBO execution[1].

This financing method was freely applied in Turkey without any legal restriction until 1 July 2012, which is the date of the Turkish Commercial Code No. 6102 (TCC) entry into force. TCC stipulates that "*legal transactions involving advance payments, provision of loans or security, which are carried out by a company with another person for the purpose of acquisition of the company's shares, shall be null and void …*".

LBO method, which was quite common before the entry into force of the TCC, is considered as subject to the financial aid prohibition provided in Article 380 of the TCC. In essence, financial assistance prohibition consists of restricting or prohibiting the acquisition of a controlling share of a target company with the target company's "credit card". Thus, the financial aid prohibition is subject to significant criticism in terms of its effects on the LBO method and it is still not possible to state that there are specific solutions that may apply to the explained matter.

This paper consists of two main parts: In the first part, we will examine definition, history, cons and pros of LBOs. In the second part, we will examine the provisions relevant to financial aid prohibitions of TCC and European Union Regulations. After all the discussions concerning financial aid prohibitions are explained in our paper, our main goal is to figure out whether LBO system can work legally in spite of the presence of the provisions in the TCC Article 380.

I. LEVERAGED BUYOUT

A. Terminology and Overview

Leveraged buyouts (LBO) and funds under management by private equity firms have become common and increased substantially in size over the last

[1] **Mäntysaari,** Petri: The Law of Corporate Finance: General Principles and EU Law: Volume III: Funding, Exit, Takeovers, Berlin, 2010, p. 550.

25 years[2]. LBO is not a legal concept, but a method or technique of purchasing and financing used to acquire the majority of company shares in financial literacy[3]. What is expressed by the "buyout" is the acquisition of the control of a company, or ideally all of the company shares. Thus, it is possible to use the company's assets to pay the debts borrowed by the new shareholder[4].

According to Patrick Gaughan, an LBO is a financing technique used by a variety of entities, including the management of a corporation, or outside groups, such as other corporations, partnerships, individuals or investment groups[5]. Particularly, it is the use of debt to purchase the shares of a corporation and it generally includes the process to take a public company to private. In broad terms, an LBO can be defined as an operation involving the acquisition, friendly or hostile[6], of a firm using a significant amount of borrowed funds (bonds or loans) to meet the cost of the takeover[7].

There are a number of authors who have studied this subject in the field of corporate finance[8]. Any acquisition can be structured as an LBO, although quite often, the LBO transaction will take the form of an asset purchase. The LBO is designed to allow the financial buyer to purchase the greatest amount of income-producing assets with the least amount of equity investment on the part of the financial buyer[9]. By borrowing against the assets of the target company, the typical LBO firm can invest a small amount of its own money, like 10 percent to 20 percent of the purchase prices and borrow the balance

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2 **Kaplan,** Steven N. / **Strömberg,** Per: "*Leveraged Buyouts and Private Equity*", Journal of Economic Perspectives 23, 2009, p. 123.; **Tripathi,** Pooja: "*Leveraged Buyout Analysis*", Journal of Law and Conflict Resolution Vol. 4(6), December, 2012, p. 85, Available online at http://www.academicjournals.org/JLCR (Last Access Date: 11.11.2020); **Loos,** Nicolaus: Value Creation in Leveraged Buyouts: Analysis of Factors Driving Private Equity Investment Performance, 2006, p.1-2.

3 **Loos,** p. 26.

4 **Tasma,** Martin: Leveraged Buyout und Glaubigerschutz, 2012, p. 11-12.

5 **Gaughan,** Patrick A.: Mergers, Acquisitions and Corporate Restructurings, 4th ed. 2007, p. 285.

6 An acquisition is termed as "hostile" if it is opposed by the management team of the target company. In this case, the acquirer can attempt to take control of the target by buying a majority of the target's voting shares in the open market, usually through a tender offer.

7 ECB, Financial Stability Review: Accounting for Rising Leveraged Buyout Activity, 2007, p. 172. https://www.ecb.europa.eu/pub/pdf/fsr/art/ecb.fsrart200706_05.en.pdf?720e1eb09c729d2f9ba93ec2f36a387f (Last Access Date: 11.11.2020)

8 See, e.g., **Thompson,** Steve/ **Wright,** Mike: "*Corporate Governance: The Role of Restructuring Transactions*", Economic Journal 105, 1995, p. 699. ; **Nikoskelainen,** Erkki/ **Wright,** Mike: "*The Impact of Corporate Governance Mechanisms on Value Increase in Leveraged Buyouts*", Journal of Corporate Finance, 2007, p. 512.

9 **Maynard,** Therese H.: Mergers and Acquisitions Cases, Materials, and Problems, 3rd ed., 2013, p. 72.

of the purchase price, earning a substantial return on its invested equity after paying the carrying cost of the debt.

In this context, we can conclude that in LBO method, investors use other people's money in order to purchase a company and then use the assets of that company in order to pay back the debts. Financial buyers hope that they can get a higher return than the interest rate of the loan. Therefore, the purpose of this structure is to make much more money with other people's money.

In order to make it clear, we can give an example: Buyer (B) (maybe an LBO Firm) plans to buy a target company (T). Within the framework of the LBO, B may prefer to pay the purchase price by way of a loan obtained by a bank, instead of financing it from its own capital. In such case, B will demand collateral in against of the loan and the buyer B may prefer to provide security from the T's assets (share pledge, plant or any other facility, mortgage, assignment of receivables, etc.), instead of providing security from its own assets.

LBO system or method works differently in the United States of America than it does in other countries. In many other countries, LBOs generally do not undertake a full buyout of the entire company. In the US, LBOs buy whole company (target company) meaning that they are not investing a minority of the shares. They actually take over the whole firm. However, in other countries, it is possible to see that LBOs purchase only some minority shares of the company.

On the other hand, some countries like Italy[10] and South Korea[11] directly prohibit LBO activities.[12] There are some reasons behind this prohibition. The first reason is to protect their own industries. Since LBO is not the kind of industry that actually produces something, those countries want to encourage the growth of local companies that actually product something. The second reason is to default of the money that LBOs use is coming from borrowing banks. The main issue here is if banks give a lot of money and LBO ends up being a disaster, the target company has some kind of financial distress, or they

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10 For the latest improvements in Italy see, **Zambelli,** Simona: "*Recent Challenges of LBOs In Italy And Institutional Insights: The Devil Lies In The Details*", Corporate Ownership & Control / Volume 17, Issue 1, Autumn 2019 (Special Issue).

11 Related with Korean practice we can say that Korean Commercial Law and court precedents prohibit certain forms of LBOs as illegal asset-stripping, and a clear-cut standard on whether a given financing structure is permissible for a given transaction structure has not been provided to date. https://thelawreviews.co.uk/edition/the-mergers-acquisitions-review-edition-13/1197270/korea#:~:text=Korean%20statutory%20law%20and%20court,not%20been%20provided%20to%20date. (Last Access Date: 11.11.2020)

12 For more details regarding different country practices see, **Zerdin,** Marc (Editor): The Mergers & Acquisitions Review, 13th Ed., 2019.

can't turn it around, then the company goes into bankruptcy and the bank has left holding loans haven't collected on. So, for example, in India[13], this kind of transactions undermines their banking industry and they are already a country that is struggling with respect to the amount of capital that banks hold[14].

B. History

Securing the debts taken by the person who will acquire company shares for this purpose with company resources has become widespread in the United States in the 1980s[15]. While it is unclear when the first LBO transaction was carried out, it is generally agreed[16] that the first early LBOs were carried out in the years following World War I. In Great Britain, especially after the World War I, share purchases were made using the resources of the target company with leveraged buyout transactions and many companies collapsed in the great economic crisis of 1920-21. In the face of this development, it was deemed dangerous for companies to provide financing for the purchase of their own shares, and a rule was placed in the British Companies Law, adopted in 1929, that prohibits such financial assistance.

In the years following the end of World War I the Great Depression was still relatively fresh in the minds of America's corporate leaders, who considered it is wise to keep corporate debt ratios low. As a result, for the first three decades following World War I, very few American companies relied on debt as a significant source of funding. At the same time, American business became caught up in a wave of conglomerate building that began in the early 1960s. The number of LBOs increased dramatically in the 1980s in the United States, but they began to occur with some frequency in 1970s as an outgrowth of the 1960s bull markets[17]. Many private corporations took advantage of the high stock prices and chose this time to go public, thereby allowing many entrepreneurs to enjoy windfall gains[18].

In the late 1970s and early 1980s, newly formed firms such as Kohlberg Kravis Roberts and Thomas H. Lee Company saw an opportunity to profit

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13 For detailed information LBO activities in India see **Chokshi,** Narendra: "Challenges Faced In Executing Leveraged Buyouts in India The Evolution of the Growth Buyout", 2007. Available at: https://archive.nyu.edu/bitstream/2451/25939/2/Chokshi.pdf (Last Access Date: 11.11.2020)

14 **Gaughan,** p. 285.

15 For detailed information of the origin of LBO transactions, see **Tasma,** p. 12.

16 **King,** B. W: "*Past Its Prime. Financial Assistance Is an Old Idea Whose Time Has Passed*", International Financial Law Review, 2007, p. 28.

17 Bull market is a financial market of group of securities in which prices are rising or expected to rise. The term "bull market" is most often used to refer to the stock market, but can be applied to anything that is traded, such as bonds, currencies and commodities.

18 **Gaughan**, p. 285; **Maynard,** p. 73.

from inefficient and undervalued corporate assets. Many public companies were trading at a discount to net asset value, and many early LBOs were motivated by profits available from buying entire companies, breaking them up and selling off the pieces[19].

C. The LBO Model

LBO is one of the most preferred methods in company acquisitions, especially by acquiring companies, due to its various financial advantages. According to this method[20]:

- The buyer should acquire company shares in a manner that would enable it to take control over the relevant company,
- A considerable amount of the purchase price should be financed by third party loans,
- Full amount or a considerable amount of the relevant loans should be secured by the target company's assets.

Therefore; the main reason why LBO transactions are frequently used in financing; is the acquisition of the company with a low equity risk, and as a result achieving high total capital profitability.

The term "leveraged buyout" actually reflects the financial aspects of this method. If, according to this method, loan money is put in the company instead of capital, revenues as well as profitability of the company will increase and the less money is spent from the capital in addition to that the lower is the interest rate, the profitability of the company will increase again. This effect is called as the "leverage effect" in finance literature.

It should be noted that there is a direct relationship between LBO activities and interest rates. It means that when interest rates are low, in other words debt is cheap, then LBO volume is high. So when we look at in 2008-2009 period in the US, interest rates were high and the volume of LBOs was low. However, if we look at 2004-2007 period, when the interest rates were low, LBOs volume was very high.

D. Advantages and Risks of LBOs

There are a number of advantages to the use of LBOs in acquisitions[21]. First of all, it is a way of making high profit. That might actually also good for the

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19 This "bust-up" approach was largely responsible for the eventual media backlash against the greed of so-called "corporate raiders", illustrated by books such as *The Rain on Macy's Parade* and films such as *Wall Street* and *Barbarians at the Gate*, based on the book by the same name.

20 **Veziroğlu,** Cem/ **Arıcı**, M. Fatih: Kaldıraçlı Devralma ve Anonim Şirketin Finansal Yardım Yasağı, 2018, p. 5-6.

21 For detailed information and published literature see **Loos,** p. 21.

employees or other people who are working for the company purchased by LBOs. After the acquisition of the company that is under financial distress by LBO, the management will be changed. Therefore, LBO's can help to improve the management performance of the company.

In other words, it can increase management commitment and effort because they have greater equity stake in the company. In a publicly traded company, managers typically own only a small percentage of the common shares, and therefore can participate in only a small fraction of the gains resulting from improved managerial performance. After an LBO, however, executives can realize substantial financial gains from enhanced performance. This improvement in financial incentives for the firms' managers should result in greater effort on the part of management. Similarly, when employees are involved in an LBO, their increased stake in the company's success tends to improve their productivity and loyalty[22]. Besides, there is tax advantage associated with acquiring a company through debt financing rather than an outright purchase because the cost of servicing the debt is deductible. This actually allows the acquirers to pay more for the acquired company than would otherwise be possible, an obvious benefit to the sellers[23].

Large interest and principal payments can force the management to improve performance and operate efficiently. This "discipline of debt" can force management to focus on certain initiatives such as divesting non-core businesses, downsizing, cost cutting or investing in technological upgrades that might otherwise be postponed or rejected outright. In this manner, the use of debt serves not just as a financing technique, but also as a tool to force changes in managerial behavior.

Although venture capital-backed leveraged buyouts provide significant economic benefits in normal functioning of the market, they also contain some risks, as in every economic activity. If the company's cash flow and the sale of assets are insufficient to meet the interest payments arising from its high levels of debt, the LBO is likely to fail and the company may go bankrupt[24]. As a matter of fact, some concerns have arisen about LBO activities, including excessive leverage effect (deterioration of the financial situation/bankruptcy risk), conflict of interest, market abuse and lack of transparency[25].

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22 **Wadadekar,** Anand: "Leveraged buyout: An overview", 2009, p. 4.

23 **Tripathi,** p. 90.

24 **Wadadekar,** p.4.

25 For detailed assessments on risks and concerns see **Ferran,** Eilis: "*Regulation of Private Equity-Backed Leveraged Buyout Activity in Europe*", EGGI Law Working Paper 84/2007, March 2007, p. 7.
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=989748 (Last Access Date: 11.11.2020)

Lastly to say over the last decade, LBOs have been severely criticized, especially after the 2008 crisis. In the aftermath of the global financial crisis, media, regulators, and policymakers around the world increased their criticism for their potential detrimental effects on target companies and their stakeholders. These types of the transaction have been widely accused of involving a lack of full disclosure and a dangerous increase of the debt-equity ratio of target companies, which in turn could increase their default rate.[26]

II. FINANCIAL ASSISTANCE PROHIBITION

A. What is Financial Assistant Prohibition?

Financial assistance rules were developed in the United Kingdom in the eighteenth century, along with the development of common law rules governing capital maintenance in respect of British companies[27]. So we can say that roots of financial assistance prohibition lean on English law. In England, especially after the First World War, share purchases were made using the resources of the target company with leveraged buyouts and many companies collapsed in the great economic crisis of 1920-21. In the face of this development, it was deemed dangerous for companies to provide financing for the purchase of their own shares, and a rule was placed in the British Companies Law, adopted in 1929, that prohibits such financial assistance. After England's entry into the European Union, such law has been included in the Second Directive.

Primarily, financial assistance (aid) prohibition consists of restricting or prohibiting the acquisition of a controlling share of a target company with the target company's assets. The aim of this prohibition is to prevent the buyer, who wants to acquire the shares of the joint stock company, from receiving any financial assistance from the company. As a matter of fact, considering that the registering collaterals from the target company for the people who plans to acquire a small share is very rare in practice, the financial assistance prohibition is also referred to as leveraged buyout prohibition in the doctrine.

As it is mentioned above, an LBO is an acquisition where the purchase price is financed through a combination of equity and debt and in which the cash flows or assets of the target are used to secure and repay the debt[28]. As the debt usually has a lower cost of capital than the equity, the returns on the equity increase with increasing debt. The debt thus effectively serves as a device to increase returns, which explains the origin of the term LBO.

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26 **Zambelli,** p. 360.

27 **King,** p. 28.

28 **Gürel,** Murat: Anonim Şirketin Kendi Paylarını İktisabı Amacıyla Finansal Destek Verme Yasağı, 2014, p. 45.

To the contrary of the general definition in question, the implications of this restriction are more far-reaching than leveraged buyouts. Besides, the financial assistance prohibition is likely to come up in basically any transaction. In this context, financial aid is prohibited all cases unless it falls within one of the two limited exceptions that are stated explicitly in the Turkish Commercial Code No. 6102 **(TCC)**. Before examining the exceptions, it would be better to scrutinize[29] the components of financial aid prohibition which are "the company", "a person" and "the transaction".

The company: The financial aid prohibition in Turkey applies with respect to listed or privately held joint stock companies without distinction. It is important to note at this point that although the TCC[30] contains a provision for capital maintenance applicable to private limited liability companies[31], the financial aid prohibition would not be applicable to private limited liability companies. Besides, there is no express reference in the restriction on financial support granted by subsidiaries of a target company. This means that the company's subsidiaries should not be caught by the restriction.

A person: According to the Article 380 of TCC, the person entering into the transactions with the target company, can be a real person, a company or a partnership and does not need to be the purchaser of the shares.

The transaction "for the purpose of acquiring shares": The TCC gives the examples of *advance, loan or security* with an express note in the annotations that these are intended as superficial examples and that the reference to "transaction" should be interpreted broadly[32]. In terms of the "purpose" of the transaction, it is unclear at this stage what interpretation the Turkish courts will make, although the general expectation is that Turkish courts will undertake a "commercial purpose" review, that is to say, analyse the transactions taking into account the circumstances surrounding it as well as its commercial effects[33].

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29 **Bezen,** Yeşim/ **Cansun,** Nadia/ **Özilhan,** Can/ **Ündar,** Alaz Eker: "*Financial Assistance Prohibition in Turkey: A Familiar Concept in an Unfamiliar Jurisdiction*", p. 2, (1-6) https://www.ebrd.com/downloads/research/law/lit13eb.pdf (Last Access Date: 11.11.2020).

30 Article 580 of TCC: "*Registered capital of private limited liability company shall be at least 10.000 Turkish Lira.*"

31 The term "private limited liability company" is used to refer to a "*limited şirket*" and not reference to companies with limited liability under Turkish Commercial Law.

32 This interpretation is consistent with the *ratio legis* interpretation of law. (for detailed information, look at **Arıcı/ Veziroğlu,** p. 43.

33 **Bezen/Cansun/Özilhan/Ündar,** p. 3.

B. European Union Regulations on Financial Assistance Prohibition

In Europe, the financial assistance prohibition was introduced at the request of the UK in the 1973 negotiations on the Second Council Directive[34], after the UK joined the European Economic Community (EEC) in 1973. Article 23 of the Second Council Directive prohibited a public company with limited liability to advance funds, make loans, or provide security, with a view to the acquisition of its shares by a third party. Articles 18-24a of the Directive regulate in detail the acquisitions of joint stock companies to acquire their own shares. Following its date of introduction, problems relating to financial acquisitions began to surface in European countries subject to the Directive. To overcome these problems, the Directive was revised and an amended Directive published on 6 September 2006 numbered 2006/68/EG[35]. Under this new approach, financial assistance must be facilitated under fair market conditions (the financial assistance to be provided must not depreciate the value of the target company); a report about the transaction must be prepared by the management body and submitted to the company; the company shall approve this financial assistance transaction with the votes cast of two thirds of shareholders; both the target company and the acquiring company must calculatingly approve the financial assistance; and the target company must reserve an amount that is equal to the prospective financial assistance provided.

In this context, we can conclude that if the purpose of a loan consists of acquiring shares of a target company, then EU Directive forbids company to grant credit to anyone. According to national law, the prohibition would lead to the transactions' being held null and void, and liability of the directors.

The financial assistance prohibition is a typical case of a rule addressing company conduct in terms of capital maintenance. There are different reasons for a board not to grant a credit:

- It should determine the beneficiary's creditworthiness,
- It should not extend credit beyond its own financial capacity,
- It should avoid being conflicted, especially if the beneficiary is or is planning to become the controlling shareholder.

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[34] Second Council Directive of the ECC numbered 77/91 and dated 13 December 1976 (the 'Directive'), to a degree that could be considered almost a direct translation. You can reach 77/91/ECC: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31977L0091&from=EN (Last Access Date: 11.11.2020).

[35] Let us point out that the Second Directive was abolished in 2012 and the Directive 2012/30/EU was adopted instead. This Directive was also repealed in 2017 and the Directive 2017/1132/EU was accepted instead. However, in the current Directive No 2017/32/EU, the content and the protection of capital system in the abolished directives are generally protected. So, parallel provisions continue to exist in the context of financial aid prohibition.

All of these reasons are valid reasons, and can cause responsibility of board of directors due to the fact that they violate their fiduciary duty of care and loyalty.

C. Provisions Relevant to Financial Assistance Prohibition in Turkish Commercial Code

LBO may be referred to as "acquisition by way of indebtedness" from a legal point of view. In fact, the company acquires another company, as mentioned above, by using the money it has owned through a loan. This acquisition method was freely applied in Turkey without any legal restriction until 1 July 2012, which is the date of entry into force of the Turkish Commercial Code (TCC). The justification of the Article 380 of the TCC, imposing ban on financial assistance states that the Second Council Directive numbered 77/91 of the European Union with respect to companies has been taken as basis for this article. Thus, the source of the financial assistance prohibition is the European Union corporate law and Turkey has adopted this prohibition within its jurisdiction in line with the harmonization with EU legal framework.

In Turkish Law, joint stock companies are prohibited from acquiring their own shares according to the Articles 379 and 380 of TCC. In this respect, the financial assistance prohibition includes all share acquisitions from a target company regardless of the shares being controlling shares.

With new TCC, especially with the enactment of Article 380, acquisition financing for mergers and acquisitions in Turkey has become a new challenge for investors who would like to enter the Turkish market. Let us elaborate the reasons of this consequence:

While Article 329 of the previous Turkish Commercial Code numbered 6762, only regulated certain exceptions to share buy-backs or acceptance of pledges over company shares, the New TCC, via Article 379, introduced a new perspective on share buy-backs. Article 379 of the TCC stipulates that a company cannot acquire or accept as pledge its own shares in an onerous manner, in an amount exceeding, or which will exceed at the end of a transaction, one tenth of the principal or issued capital of the company. In order to prevent the circumvention of the prohibition for the companies to acquire their own shares, Article 380 of the TCC (entitled "Fraud against the law") stipulates that "*legal transactions involving advance payments, provision of loans or security, which are carried out by a company with another person for the purpose of acquisition of the company's shares, shall be null and void*". The main purpose of this Article is to prevent Article 379 from being ineffective or being circumvented by invalidating the legal transactions in which a joint stock company supports a third party by providing financing, loan or security or by other means for the acquisition of its shares by such third party. In fact,

such support is considered as indirect acquisition by a joint stock company of its own shares under the mentioned articles of TCC.

However, the TCC, adopted the primary regulation of the EU which restricts companies to provide financial assistance without introducing any gateways to cover up the prohibition. Given these developments, the TCC Art. 380 had already been an "outmoded" prohibition even by the time it came into force.

D. Exceptions

Related part with Article 380/1 of TCC is:

"(1) Legal transactions which the company performs with a person for the acquisition of its shares with regard to granting an advance, a loan or security, shall be null and void. This nullity provision shall not be applied to transactions within the scope of activity of credit and finance organizations and to legal transactions in regard to granting an advance, a loan or security to the employees of the company or of its dependent companies for the purpose of acquiring the company's shares. .."

In this context, the exceptions can be enumerated:

1. Financial Services Exception: The ban does not apply to funds provided as part of the normal course of business by credit institutions, which are used to acquire their own shares by a third person. In addition, funds provided as part of the normal course of business by financial institutions, which are used to acquire their own shares by a third person as part of their normal trading in securities business are also immune to the ban[36]. There are some academicians saying that this exception was designed to reassure the Turkish market and prevent it from opposing the new prohibition provisions by entertaining the belief that financial support would still be permitted if a traditional lender was to sit on the receiving end of the transaction that constitutes financial aid[37]. Some even argue that this exception would apply to all banking transactions in general.[38]

The exception has a very narrow scope of application, encompassing only credit lines and advances granted by banks and other financial institutions in the ordinary course of business which subsequently are used to purchase shares in that bank or that other financial institution, not any joint stock company. In other words, in this context, the bank or the other financial institution would become the "*company*" that is providing the financial assistance.

2. Specific Purpose Exception: The second exception is for financial assistance granted to an employee of the target or a subsidiary of the target.

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36 **Arıcı/ Veziroğlu,** p 137.
37 **Poroy,** Reha/ **Tekinalp,** Ünal: Ortaklıklar ve Kooperatifler Hukuku, 2009, p. 446.
38 **Arıcı/ Veziroğlu,** p. 64.

3. Restrictions: We should note here that the exceptions are not absolute but subject to the quantitative test which can be explained shortly;

IF the financial assistance,

(i) reduces the restricted reserves or

(ii) breaches the rules of utilization of restricted reserves,

(iii) the company does not have sufficient distributable reserves in an amount equal to the financial assistance granted, THEN the exception does not apply and the financial assistance is thus declared NULL and VOID.

E. Consequences of the Breach of the Financial Assistance Prohibition in Turkish Commercial Law

Where a financial assistance is concerned, there are two transactions, one being the transfer of shares and the other being the financial assistance for the payment of the share price. Article 380 only foresees that the financing transaction shall be null and void, and does not regulate any consequences to the share transfer. Therefore, we are in the opinion that the share transfer transaction carried out with the financial assistance transaction shall continue to be valid and binding. Furthermore, Article 385 of the New TCC foresees the obligation to dispose of shares purchased in violation of articles 379. 380 and 381 governing company share buybacks, rather than rendering such transactions invalid (void). From this expression, it is understood that the share purchases in violation of article 380 may be realized. Therefore the only transaction that is invalid is the financing transaction.

According to some academicians[39], the legal effect of an unlawful financial assistance is the invalidity of the financial assistance transaction. This involves both the promissory and the disposal transactions. The breach does not per se render invalid the share acquisition. However, as long as it is accepted that these transactions constitute a "combined contract", both transactions deemed invalid.

CONCLUSION

As an acquisition and financing method Leverage buyout (LBO) is a transaction when a company is purchased with a combination of equity and significant amounts of borrowed money, structured in such a way that the target company's cash flows or assets are used as the collateral to secure and repay the borrowed money. That is to say, the buyer can obtain high return on assets by investing lower amount of equity capital.

One of the most controversial issues of LBOs is associated with its economic result, often perceived as example of financial assistance provided

[39] **Arıcı/ Veziroğlu,** p. 56-57.

by the target company for the purchase of its own shares, to the detriment of its assets and stakeholders. As it is known, "protecting the capital" principle is the main principle in joint stock company law. In LBO models, since the ultimate source is the target company's capital or assets, some countries have banned this transaction directly to the extent that it is associated with the financial assistance prohibition and some countries have completely released LBOs due to the high economic return.

This acquisition method was freely applied in Turkey without any legal restriction until 1 July 2012, which is the date of the New Turkish Commercial Code's entry into force. With the article 580 of TCC, such transactions are considered invalid to the extent that they are associated with the financial aid prohibition. Pursuant to this article, the provision of advance funding, loan or securities to third persons by target companies in order for such third persons to acquire shares of the company is prohibited. However, the same article brings forth two limited exceptions to this strict prohibition. The first exception is that the referred prohibition shall not apply to transactions contemplated by banks and financial institutions with regard to their ordinary course of business. According to second exception, transactions effected with a view to the acquisition of shares by the target company's employees or the employees of its subsidiaries are not subject to the prohibition.

The justification of the Article 380 of the TCC imposing ban on financial assistance states that the Second Council Directive numbered 77/91 of the European Union with respect to companies has been taken as basis for this article. Although the EU Directive regulating the financial assistance prohibition was issued in 1976 but the amendments made to that Directive in 2006 adopted a more reasonable approach on the implementation of the financial assistance rules. By enacting prohibition that is not based on the latest amendment to the EU Directive, the TCC will undoubtedly be deemed as a step backwards on the road to EU membership and required legislative harmonization with the EU.

Lastly to say, LBO method is commonly used in merger and acquisition (M&A) environment and according to recent surveys almost 50 percent of M&A transactions are financed by banks. Whereas the rigid approach of the regulation (Art. 580 of TCC) narrows the practice of banks and financial institutions providing financial assistance. As a consequence, investors generally look elsewhere when deploying their capital, towards countries that offer financial flexibility in their legislation. So, an amendment similar to the Second Directive may be considered in the Article 380 of the TCC, and thereby the strict ban is softened.

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