

CENTRAL EUROPE'S ROOM FOR
MANOEUVRE VIS-À-VIS WASHINGTON

INTRODUCTION

In the history of mankind, we can only list a few dozen inventions that have drastically changed our way of life, our habits and our social structure in a short space of time. These include the steam engine, which launched the industrial revolution, the automobile, which boosted mobility, the internet, which shrunk the world in one fell swoop, and the invention of the smartphone, the embodiment of pocketable privacy. The list should undoubtedly include the emergence of big-tech in the mid-2000s and the social media that embraced it. Their social impact and influence are very difficult to measure accurately, but it should certainly not be underestimated.

They enable the instant sharing of information, the channelling of different opinions, the identification of customer preferences from thousands of kilometres away. Nowadays, especially after the pandemic, we shop online, we are confronted with personalised ads, we take photos of everything, we 'like' everything, we can send a message to anyone from anywhere in a split second, or can even organise protests. Seemingly all the information is available with a quick search, with many of the language barriers rendered obsolete by sophisticated internet translation software. Big-tech has certainly made our lives easier: it entertains us, preserves our memories, connects us, opens a window to the world.

Free, innovative, fast and built around a careful marketing strategy, its irresistible virtual dream world has attracted a mass of individuals and businesses looking for attention, networking and messaging. As a result, the number of people with a Facebook account has reached 2.89 billion

by 2021,¹ and the number of active Google users has even exceeded that.² The sudden change brought about by big-tech against our will convinced even the initially sceptical, social media-defying people in a short time: we accepted that not having a Facebook, Twitter, Instagram and more recently TikTok account was like not being part of society. In our (post)modern world, there is often bewilderment towards such hermits, who often find even offline conversations completely unfamiliar.

In line with the logic of big-tech, our language has been simplified. We shorten almost everything, we use words of foreign origin all the time, and we often respond to each other with emojis. The consequence-free world of the internet has created the illusion that anyone can have a say in anything, and that everyone has an equal say in managing and shaping community affairs. Big-tech has undeniably helped to break down barriers between foreign cultures, spread different ideologies and deepen globalism. We soon saw social media as a modern-day tool for the development of democracy, capable of promoting and disseminating human rights. Thus, social media platforms seemed to have become a vehicle for the complete development of freedom of expression. Moreover, their ability to organise society more effectively than before also made them act like champions of freedom of assembly. Now, with just a few clicks, it is possible to organise events as powerful as the Arab Spring or the Hong Kong protests.

It was also because of this addictive quality of user experience and convenience, efficiency and free service that we had found it so hard to understand that something was not right. You do not have to be a nostalgic, old-fashioned person to feel that this boundless world has its darker sides. The big multinational companies have been happy to adapt to their new role, as digital champions of human rights. In documents called Corporate Social Responsibility (CSR), they have defined their mission to change the world and, through their sudden influence, have claimed an ever larger slice of shaping social discourse and managing community affairs. And the

¹ See Statista 2022.

² For detailed data on Hungarian online audience measurement data see National Media and Infocommunications Authority 2021.

masses, who make up more than a third of the world's population, participate in the daily life of this virtual community according to the business policies and internal rules of these companies.

The following paper will look at how social media, initially seen as a promoter of freedom of conscience and freedom of expression, has devoured its original purpose and become a political playground and a potential tool for opinion hegemony. This book chapter discusses the socially damaging aspects of the operation of tech companies that have by now become monopolies, including their non-transparent operation, market distorting impact, their tax evasion, the dangers of a world dominated by artificial intelligence and algorithms, or the erosion of national sovereignty, in addition to possible restrictions on freedom of speech. This chapter also shows that national governments and international organisations have been relatively slow to realise the perversity of the situation and are still in the process of finding and identifying the way forward. It examines the current thinking on what options are available to regulate and contain big-tech. In this respect, it takes stock of major international, EU and national regulatory initiatives and efforts.

It is worth pointing out at the outset that, as with most of the challenges of our time, Europe is not yet able to effectively assert its claims and respond appropriately to the demands of a digital world dominated by U.S. and Chinese companies. With the departure of the British, the withdrawal of German Chancellor Angela Merkel and the preparations for the French elections, Europe is in a power vacuum,³ which makes the objectives of the geopolitical declaration presented by EU High Representative for Foreign Affairs and Security Policy Federica Mogherini in 2016, called the *European Union Global Strategy*,⁴ seem unlikely to be achieved.

Each great power has its own imperialist aspirations and the means to achieve them: the U.S. is seeking to influence global processes primarily through its military dominance (hard power) and extensive diplomacy (soft power), China through its overwhelming economic potential and the

³ SIGMAR 2021.

⁴ European Union External Action Service 2016.

expansion of its political and cultural influence, and Russia through a hybrid combination of its raw military power and its willingness to blackmail. “China, for example, does not want to dominate the whole world (yet), but it wants to return to the situation that existed for thousands of years, when it dominated the region and the wider region economically, militarily and culturally through concentric circles. So it wants to “sinicize” the world in which it has always been at home.”⁵

By contrast, the European Union’s instruments are mainly limited to economic and bureaucratic processes, and despite the changed world political situation, it continues to “seek to legitimize its policies by claiming that its standards are the right ones and that they provide the most effective way of economic and political integration”.⁶ As former Senior Advisor to the President John Bolton so aptly put it: “Europeans manage problems, Americans like to solve them.”⁷ However, a capable and unified military force, adequate military expenditure and indiscriminate adaptation of foreign technologies⁸ increase the continent’s vulnerability and exposure in the current world order without a world order. In this struggle between worlds, “Europe does not seem to understand how insignificant it is becoming to the rest of the world, and its obsessive reorganization of its internal affairs is akin to reorganizing the benches of the sinking Titanic”.⁹ As exaggerated as this statement may seem, we have to admit that the rules of the digital world are not yet being written by the countries of the old continent that once saw better days.

⁵ MARTONYI 2018: 138.

⁶ ZIELONKA 2008: 475.

⁷ John Bolton was speaking at the Edmund Burke Foundation’s National Conservatism Conference in Washington, D.C. in July 2019.

⁸ See, for example, the adaptation of China’s G5 technology to the EU and the Council conclusions on the *Significance of 5G to the European Economy and the Need to Mitigate Security Risks Linked to 5G*.

⁹ Kishore Mahbubani is University Professor, Diplomat, former Permanent Representative of Singapore to the UN, President of the UN Security Council (2001–2002).

THE OVERDEVELOPMENT OF BIG-TECH

There is no doubt that the emergence of the information society and the spread of digitalisation is a major civilisational achievement, which, as far as we know today, has brought considerably more benefits than it has caused disadvantages. However, it is now clear that the adverse consequences of information society need to be addressed. Over the past decade, the way people get their information has changed significantly, and social media has become the primary source of news for a significant proportion of people. Therefore, some companies have become *de facto* media service providers without having to comply with most of the relevant standards.¹⁰ The incredible rise and overdevelopment of big-tech and its consequent uncontrollability have only become visible in recent years, and the attention of academia, civil society and national governments has only recently turned to the phenomenon.

We had to realise that not only can we organise successful fundraisers on the internet, but hate speech and fake news can spread there at the same speed. The same can be said about child pornography or cyberbullying. Due to the nature of big-tech, the intellectual property and copyright frameworks that were previously thought to be solid have been challenged. We have had to live through several democratic elections to realise that they can be influenced from afar, even by foreign states.¹¹ Previously well-regulated, strict data protection provisions soon proved inadequate due to cross-border data storage and transfer practices. Overdevelopment and the emergence of new, revolutionary technologies have created a series of regulatory loopholes that creative companies have turned to their advantage. The so-called online gatekeepers,¹² or online intermediaries, have become indispensable actors of the digital transformation. The unbroken popularity, the pressure to innovate and the profit motive led to the creation of monopolies that no longer dominated just one sector of the economy, but covered all related

¹⁰ See WEINTRAUB–MOORE 2020: 625–640.

¹¹ See the findings of the Senate report on Russian interference in the 2016 U.S. election in Select Committee on Intelligence United States Senate s. a.

¹² KOLTAY 2020: 267.

areas. Accordingly, these companies have become capable of distorting the market and hindering fair competition within a short period of time.

Although social relationships have not ceased to exist with the rise of the virtual world, they have certainly changed fundamentally. Francis Fukuyama argued already in his 1999 book *The Great Disruption*¹³ that the information society, the post-industrial age has eroded the previously stable and indissoluble units of society: it has weakened social bonds, relativised our shared values and weakened our moral principles. This process has been reinforced by the rise of the internet and big-tech. Some research has shown that the positive or negative feedback received on social media (for example, the number of likes a picture receives) can have a significant impact on the memory of an individual of the experience concerned.¹⁴

The freedom of expression that Western societies cherish so much has been compromised, and moderation, and eventually arbitrary censorship, has taken hold. All this eroded the power of the state, ultimately challenging the very pillars of national sovereignty. The price of this belated realisation is that we no longer dominate technology, but tech companies dominate our societies, that the freedom of the many is determined by the few, that entire industries depend on IT companies based in foreign countries, and that the head of a multinational company can unplug even the President of the United States' speaker without any control.¹⁵

THE DECREASING ROLE OF THE STATE

The above-mentioned circumstances have created a series of situations in which the state is now only able to take limited action. Effective control over companies across continents, time zones, cultures and languages has gradually slipped out of the hands of national governments, and even out of the abstract concept of national sovereignty. For, by its very nature,

¹³ FUKUYAMA 2000.

¹⁴ JACOBSEN-BEER 2021.

¹⁵ BRETON 2021.

big-tech has placed all the conditions¹⁶ defining the state under public international law – territory, population and sovereign power – in a new light: borders and territorial exclusivity, as the most important elements of these cumulative conditions,¹⁷ have become meaningless, population cannot be limited to countries or nations, and sovereignty has ceased to prevail in certain territories.

At the same time, multinational companies have become increasingly state-like. Although they have no physical territory, they rule the virtual space. Their population, i.e. their users, can be anyone, anywhere, and their sovereign power is – through their own global policies and rules – in practice often above the jurisdiction of states. The framework for their operation is primarily set by their own rules and regulations, and only marginally by national law. Some companies are introducing their own currencies, creating their own identities and influencing our daily lives to an extent comparable to churches or political organisations. Facebook, meanwhile, operates the largest censorship system ever, handling more human communications than any government has ever handled.¹⁸

The last decade has seen the emergence of parallel legal systems where the citizen's, or user's right to remedy is enshrined in the so-called terms of use, and where the platform justifies its decisions according to its own whim. Automated systems filter and moderate content based on unknown corporate preferences, and states lack the technical competence to control them. In addition, corporate data centres not only exploit existing data, but also create new data from it. In the case of some tech giants,¹⁹ users can take their alleged rights violations to an oversight board²⁰ that competes with the powers and jurisdiction of an international court and a supreme court, and which, although nominally independent of the company that created it, is contractually bound to the company. This calls into question the independence and ideological neutrality of the decision-makers and

¹⁶ KOVÁCS 2011: 184.

¹⁷ DIXON 2013: 149.

¹⁸ BENESCH 2020: 86.

¹⁹ For more information see DOUEK 2020; KLONICK 2020: 2418–2499.

²⁰ See Oversight Board s. a.

the possibility of professional reasoning that would otherwise be expected of the courts. Big-tech is less constrained by public authority and fundamental rights than traditional (legacy) media providers, and there is also a problem that, while their decisions can affect the lives of millions, they lack legitimacy and empowerment from citizens. With cases diverted from the national courts, it can easily happen that either the algorithms or the company's own staff defines the scope and content of freedom of expression and opinion in a way that differs from the constitutional traditions of the country in question. Because of these self-operating, *pseudo* legal systems, the guarantees provided by the laws of individual states cannot be fully enforced.

Although the formal legal argument is that because of the essentially private law relationship, it is the service provider that determines what content is displayed or hidden, who can contact whom, what products are offered to us, or whether we are informed about certain news. But “the free expression of ideas and views, however unpopular or peculiar, is a prerequisite for the existence of a developing and genuinely living society”.²¹ As Mark Zuckerberg put it: “In a lot of ways Facebook is more like a government than a traditional company.”²²

However, technology giants, by virtue of their size, have the potential to have a significant impact on public opinion and on events that shape the daily life of a community. And service providers with millions of users per country are in practice performing an activity similar to a public service, with no realistic alternative to their service.

In the light of this, the question is no longer really how far the state can encroach on the world of big-tech, but how far big-tech can encroach on the sovereignty of the state. “The sovereignty of an entity ceases the moment other entities acquire the capacity of competing infallibility, whose decisions are unappealable, i.e. they constitute for the previously sovereign entity indefeasible legal norms.”²³

²¹ Constitutional Court decision 30/1992 (V.26.), ABH 1992, 167, 170–171.

²² FOER 2017.

²³ BIB Ó 2021: 248.

THE REGULATORY IMPERATIVE

By now, it has become clear that the legal systems of nation states were inadequate to regulate multinational companies that do not require physical establishment. It is clear from the above that there is only one option for the individual member states: to regulate companies caught up in a regulatory vacuum and to define a general framework for their operation. This is because “responsible and diligent behavior by providers of intermediary services is essential for a safe, predictable and trustworthy online environment and for allowing [...] persons to exercise their fundamental rights [...], in particular the freedom of expression and of information, the freedom to conduct a business, the right to non-discrimination [...]”.²⁴ However, experience shows that to achieve this, it is not enough for market-driven service providers to regulate themselves, but that individual states must actively legislate to promote access to these rights for their citizens. While some argue that lack of regulation can be explicitly beneficial to freedom of expression,²⁵ we believe that states have an explicit obligation to find and restore the right balance for tech companies. No entity other than the state can determine the extent to which freedom of expression can be exercised on its territory, nor can it allow the creation of actors capable of distorting democratic discourse and impeding the balanced flow of information. However, in Western legal systems, public debate on public affairs is considered a highly protected form of expression, so restricting it is a more serious infringement of freedom of expression.²⁶

Against this background, it can be argued that there is an overriding interest for individual states to make tech companies accountable and predictable, and, at the same time, to break the monopoly of the largest firms. Hopefully, these conditions will be in place in Hungary and within the European Union in the near future, thereby reducing their own and their citizens' exposure to third country companies.

²⁴ European Commission 2020b.

²⁵ See HALMAI-TÓTH 2008: 454.

²⁶ KOLTAY 2019: 37.

U.S. AND CHINESE DOMINANCE IN THE DIGITAL WORLD

Despite the fact that the U.S. global lead has clearly been eroding in recent years, it remains a point of reference for both developed and developing countries. The U.S. combines its military, economic and innovative strength with soft tools such as exporting democracy, promoting human rights, supporting multilateralism, diplomacy and humanitarian aid, which together make it a world-leading power. The U.S. is the engine of the global knowledge industry, projecting its own standards, solutions, technical and technological achievements, but also its values and culture, with great efficiency. It also offsets the decline in its influence by maintaining a broad alliance system and prioritising joint action against non-market-based economies. It is seeking to maintain control over the international financial systems, exclude rivals from strategic investments, gain control of raw materials and reduce its economic dependence on China, all by claiming a community of values with the Western world.

China, as the West's counterpart, on the other hand, has no missionary traditions, but rather repressed ambitions. It has every opportunity to do so, as it has been catching up with the West at a rapid pace over the past decades, and in many respects has already gained an advantage. Its infinite resources, restrained foreign policy, centralised state organisation and adaptability have made it the only challenger to the United States. This is confirmed by the fact that China has been able to do what is essential for real strategic autonomy: to divest itself entirely of U.S. technologies. China's previously mentioned effort to build concentric circles of power can be observed in the country's efforts towards "reunification", in acquiring control over African and South American resources, and in indebting countries looked down upon by the West with colonial arrogance through infrastructural investments and significant loans. China is also opening up to European countries emphasising the mutual benefits of trade. It is also steadily increasing its military expenditure, developing its army at a rapid pace and making it clear that, while its aim is to avoid military conflict, it will not shy away from deploying its army if necessary.

The two pivotal pillars of the currently emerging world order could not be more different: Protestantism versus Taoism, liberalism versus communism, democracy versus socialism, individualism versus collectivism and arrogance versus humility. The common ground is mutual vulnerability and the desire to dominate unconquered markets. For the time being, their competition is a commercial one. This rivalry is based on which state can mitigate its dependence on its rival and which state can attract third countries outside its sphere of interest, including the European Union. This is no different in the fields of technology and innovation, where the two great powers are now neck and neck. The United States' digital policy is largely based on broad cooperation, while China conducts extensive monitoring and keeps the entire cyber technology world under control. The European Union, by contrast, is using its normative imperialism to act as a regulatory superpower and a third force on the map of digitalisation.

As a result, while Europe is protecting itself with a "privacy shield", the U.S. and China are eradicating the remaining European influence in most key industries. Europe's influence in the digital economy, which was once based on – mainly German – industrial technological development and achievements, has been significantly reduced in recent times. If this trend continues, Europe will soon have no control over the quality standards to which products are allowed to be sold on its own market. The absence of major European players in the market for new technologies that can have a meaningful influence on the direction of developments or the development of relevant standards is a sign of structural weaknesses and a misguided strategy. On the consumer side, the big U.S. tech companies, because of their market power, set and decide standards themselves, which China tries to counterbalance by involving state-owned companies. Recognising this, the United States is trying to cooperate primarily with European countries and China's regional rivals to contain Chinese technological and market penetration. And in this contest, Europe is becoming increasingly marginalised, which has a direct negative impact on Hungary's room for manoeuvre and its ability to assert its claims and interests. Our country lies not only on a geographical, cultural, religious and ideological dividing line, but also on a technological one. Oddly

enough, here “the combined disadvantages of isolation and central location weigh heavily on our country”.²⁷

COMPETING INTERESTS IN THE INTERNATIONAL ARENA

It can be seen from the set of problems described above that regulating large digital companies is far from easy, especially for nation states with smaller populations and lesser abilities to assert their claims. For all these reasons, we believe that effective action can only be taken through the European Union and, in particular, through its united action, as Hungary alone does not have the infrastructure or the economic potential to make a significant impact on such a major issue.

This is especially true because it makes a huge difference where one starts regulating. Regulation can be based on competition supervision, taxation, content, fundamental rights, or even ideology. A further difficulty is that, in the case of sectoral regulations, there are serious conflicts of interest between the country of establishment, i.e. the beneficiary, and the country that has to tolerate the service, i.e. the “disenfranchised” or “user” country. The latter is losing significant tax revenue due to the cross-border service model of big-tech. Therefore, a truly effective regulatory model cannot be envisaged without a comprehensive international consensus. Recognising the need to address the tax challenges of the digital economy, the European Union, the G20 and the Organization for Economic Co-operation and Development (OECD) have put forward a number of proposals, including the introduction of a digital services tax.²⁸

The most extensive regulatory experiment to date is taking place within the Paris-based OECD. The aim of the global tax reform initiated in this forum is to allow the states concerned to benefit more from the corporate tax paid by large multinational companies through a fairer distribution, so that it is paid directly in the state where they operate and not exported to tax havens.

²⁷ ANDRÁSSY 1911.

²⁸ KIM 2020: 135.

In this respect, the adoption of the guidelines of the two-pillar package of proposals by the 140 participating countries on 1 July 2021 is a milestone.²⁹ According to the original proposal, which harmed primarily American interests, the package would have applied not only to digital companies but also to all multinational companies involved with consumers. However, under the compromise solution, the regulation's scope got significantly narrower. The United States, home to the majority of large tech companies, is nevertheless strongly opposed to the introduction of a digital services tax as a form of profit tax, as it believes it would be detrimental to U.S. tech giants.³⁰

The first pillar of the so-called Inclusive Framework³¹ established to tackle tax evasion of the order of around \$240 billion, according to the OECD, applies to digital giants (MNEs) with global turnover above 20 billion euros and profitability above 10% and having a recognised brand name. Under the package of proposals, the residual profit of the companies concerned will be subject to a revenue redistribution mechanism, which will be an additional resource for the end market jurisdictions.

The second pillar, more critical for Hungary, foresees the introduction of a global minimum corporate tax (Global anti-Base Erosion Rules – GloBe) and penalises companies that are subject to a lower effective tax rate than the global standard. The minimum tax rate agreed by the G20 countries on 9–10 July 2021 was 15%,³² which was actually adopted by the participating countries in October 2021. Hungary, which has a 9% corporate tax rate, would have been adversely affected by the original plans, but thanks to the compromise solution, the Hungarian corporate tax rate will remain unchanged and a ten-year transitional period has been negotiated.

According to the political compromise, the two pillars can only enter into force together and cannot be separated. From an EU perspective, it is worth noting that the European Commission is expected to propose a directive in line with the adopted *Inclusive Framework*, so its provisions

²⁹ OECD 2021.

³⁰ See MASON 2020: 353–402.

³¹ OECD 2021.

³² OECD 2021.

will become part of the Hungarian legal system in time, as the directive is binding for all the Member States to which it is addressed as regards the objectives to be achieved.³³

THE EUROPEAN UNION'S ROOM
FOR MANOEUVRE IN THE FACE OF
INTENSIFYING DIGITAL COMPETITION

In terms of reviewing the operation of big-tech in Hungary, it is hardly possible to avoid mentioning the processes taking place and the legislative ideas proposed in the European Union. Hungary's legal room for manoeuvre and its ability to assert its interests cannot be interpreted without taking into account EU processes and regulatory trends.

Generally speaking, regulatory thinking in the EU typically addresses financial, competition or consumer protection issues, and to a lesser extent fundamental rights. However, despite appearances, these are far from being technical initiatives. They are the means of implementing a well thought-out EU strategy with the hallmarks of normative imperialism.³⁴ Unlike the United States, Russia or China, the EU Member States use their multilateral agreements and their combined trading power to shape the global order. Rather than imposing its conditions by military force, as America did in the case of Iraq, the European Union is persuading other countries that "they want what it wants". In this respect, we share the argument of Jan Zielonka, who has argued for more than a decade that the European Union's ambitions are in fact of a great power nature.³⁵ European norms and standards are gradually being adopted around the world, hence the EU is often accused of

³³ Article 288 of the Treaty on the Functioning of the European Union.

³⁴ See European Commission Communication on Business Taxation for the 21st Century of 18 May 2021 in European Commission 2021.

³⁵ ZIELONKA 2008: 471.

regulatory imperialism.³⁶ This can be seen in areas such as financial markets, data protection, food and health protection, environment protection and the criminal justice system.³⁷

There are, of course, also elements where the will of the community takes the form of a positive, normative force, which, even in the absence of material advantages (and even in a way that is economically very disadvantageous), confronts third states, and even its own member states, when it comes to promoting human rights, for example.³⁸ For example, Europe provides the most development aid in the world.³⁹ In this respect, a forward-looking development is that in October 2020, EU decision-makers agreed to strengthen Europe's digital sovereignty and to allocate at least 20% of the Recovery and Resilience Facility's resources to promoting the digital switchover and developing digital infrastructure.

Nevertheless, there is no doubt that, in the absence of classic (*hard*) instruments of power, the European Union has no powerful card to play at the moment, apart from its above-mentioned coercive bureaucracy and regulatory influence. This indirect way of asserting its claims is capable of shaping the international regulatory framework, exporting its own operating models and conditioning access to a market of around 450 million people, but it is not a viable alternative to the dominance of U.S. and Chinese multinational companies in the absence of consensus and the will of the Member States. Moreover, extending the EU's normative power to certain parts of the world seems unattainable due to the huge cultural, linguistic and religious differences.⁴⁰ Additionally, the competitive advantage derived from the development of multilateralism seems to be diminishing recently

³⁶ The Wall Street Journal 2008. The article cites examples of EU efforts to cow large American firms such as Microsoft, Qualcomm and MasterCard with anti-trust laws. Other frequently cited examples of European 'regulatory imperialism' include the Reach legislation on chemical products and the ban on the import of chlorine-rinsed poultry.

³⁷ See BACH-NEWMAN 2007: 827–846.

³⁸ MANNERS 2002: 252.

³⁹ ZIELONKA 2008: 474.

⁴⁰ SJURSEN 2006: 235–251.

“because of a rapidly growing group of developing countries, informally led by Brazil, India and South Africa, which are now challenging the primacy of the European Union”.⁴¹

As a result, Europe’s most valuable “weapon” is itself – its advanced single market and the economic benefits of access to it. It is no coincidence, then, that the European Union is using all the internal instruments at its disposal to influence global processes outside its control.

On 31 January 2019, *Politico* published a short analysis of the new EU data protection rules on its website, with the headline “Europe wants to conquer the world all over again”.⁴² Although data protection has a tradition going back decades in Europe, the General Data Protection Regulation (GDPR), which came into force in May 2018, has caused a great uproar.⁴³ The choice is not a coincidence: the EU has been very keen to broaden the scope of its data protection rules to protect its citizens who transfer their data abroad and whose data is processed by foreign companies active in the EU.⁴⁴ Indeed, the requirements of the Regulation, which applies quite widely, apply to any company or entity that processes personal data as part of the activities of its branch in an EU country. The scope of the Regulation applies regardless of where the data are processed, and even if the company is based outside the European Union but offers goods or services in the European Union or tracks the behaviour of individuals in the EU.

And that is exactly the essence of the GDPR: its broad scope and the severe penalties attached to its violation force affected third-country companies to either harmonise their policies, operating principles and business practices with EU rules or lose out on the profits offered by the single market. Thus, the GDPR has not only a data protection function, but also a competitive market function. “EU competition policy is one of the drivers

⁴¹ DINAN 2010: 510.

⁴² “Europe wants to conquer the world all over again” (SCOTT–CERULUS 2018).

⁴³ 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, GDPR).

⁴⁴ RYNGAERT 2015: 221.

of the internal market and aims to create fair competition by influencing the structure of the market and the behavior of market participants.”⁴⁵

The European Commission presented its package of proposals on digital services on 15 December 2020 along similar lines. The package consists of two elements, the draft Digital Services Act (DSA) and the draft Digital Markets Act⁴⁶ (DMA). The proposals are a response to a growing demand over the years that the rules for the functioning of digital markets have become outdated over time and as technology has evolved. The drafts have been designed with due consideration of the provisions of the Directive on electronic commerce (Directive 2000/31/EC) adopted in 2000. Not to override it, but to complement its provisions. The aim of the package is to provide a new framework for the rights and responsibilities of users, intermediary platforms and public authorities, thereby strengthening trust, competitiveness, growth and innovation.

The documents set out the basic obligations and responsibilities of online intermediaries, enhance the enforcement of fundamental rights and protect consumers' interests. They strengthen democracy, equality and respect for the rule of law. It applies to recipients of intermediary services who are established or resident in the Union, irrespective of the place of establishment of the service providers concerned.⁴⁷ It therefore has extraterritorial scope, as its requirements apply equally to services provided outside the EU (e.g. TikTok).

There is also a regulatory innovation in the draft regulation, that when a national authority takes a decision to remove illegal content, it will address it directly to the service provider, rather than to the authority where the service provider is based. Another novel aspect of the legislation is that it sets out differentiated due diligence obligations for different service providers depending on their activities, their impact on the market and their size. The draft regulation also defines the concepts of illegal content, online platform and content moderation. The latter is defined as an activity carried out by the intermediary service provider with the aim of detecting

⁴⁵ GOMBOS 2017: 351.

⁴⁶ European Commission 2020a.

⁴⁷ DSA Regulation Article 1(3).

and identifying illegal content or information that is in breach of the general terms and conditions, including taking measures to make the illegal content inaccessible, invisible or unavailable.⁴⁸ The requirement for transparency of algorithms, the design of complaint handling procedures and the ability to challenge decisions are all designed to protect users.

The draft DMA Regulation contains provisions and sets out rules of conduct for the previously mentioned gatekeeper service providers. These companies have a significant influence and control over the entry into digital markets, but are also embedded in these digital markets, which means that many business users are highly dependent on them, which in some cases leads to unfair market practices.⁴⁹ In such a case, the flow of information may be blocked, competitors may lose valuable data, leaving them vulnerable and slowing down innovation.

The condition for being designated as a gatekeeper is that the provider of core platform services exerts significant influence on the internal market, operates a service that serves as an important gateway for business users, and enjoys or is expected to enjoy in the near future an entrenched and durable position in its operations.⁵⁰ The Regulation applies to core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union, irrespective of the place of establishment or residence of the gatekeepers and irrespective of the law otherwise applicable to the provision of service.

NATIONAL ATTEMPTS AT REGULATION

As mentioned earlier, with increasing awareness of irregularities surrounding big-tech, national level regulatory proposals are increasingly coming to light to ensure consumer protection, competition supervision and safeguarding of civil rights. Within the European Union, this means in particular imposing

⁴⁸ DSA Regulation paragraph (p) of Article 2.

⁴⁹ Explanatory memorandum to the DMA Regulation.

⁵⁰ DSA Regulation Article 3(1).

due diligence requirements on intermediary service providers,⁵¹ but it must be seen that the asymmetry inherent in big-tech makes the effectiveness of individual legislative attempts highly questionable, as compared to unified action based on international consensus. In recent years, numerous attempts to crack down on the “too big to tax” phenomenon, to exclude competition distortive practices and to establish jurisdiction have failed.

In addition to Austria, Amazon has also been targeted in Italy, Germany and Luxembourg for unfair market practices arising from its general terms and conditions.⁵² Although it had been postponed several times due to pressure from the U.S. and the imminent threat of a trade war, in 2019 the French Parliament pioneered a law (the so-called GAFA law) that taxed digital companies with revenues of at least €750 million per year globally and €25 million per year in France, at a rate of 3% on their revenues.⁵³ The French Parliament also adopted a law on the protection of freedom of expression and the fight against fake news, which applies to social media services.⁵⁴ It applies to digital service providers that have at least 5 million unique visitors per month or receive at least €100 for the execution of certain of their public interest debate-related advertisements. The related law against hate speech (the so-called *Projet de Loi Avia*) was ultimately annulled by the Constitutional Council on the grounds of excessive interference with freedom of expression.⁵⁵ The law would have also fined companies up to 4% of their global revenues if they did not remove hateful and clearly prohibited content related to race, gender, religion, sexual orientation or disability within one day, and terrorist and child pornography content within one hour.

⁵¹ DSA preamble, paragraph 2; European Commission 2020b.

⁵² See HOFFER 2019: 135.

⁵³ Loi n° 2019-759 du 24 juillet 2019 portant création d'une taxe sur les services numériques et modification de la trajectoire de baisse de l'impôt sur les sociétés.

⁵⁴ Loi relative à la lutte contre la manipulation de l'information.

⁵⁵ The law is available in French at <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042031970>

In Germany, the 2017 law on enforcement on social media platforms⁵⁶ has made it the responsibility of domestically accessible social media platforms to combat hate speech, fake news and other criminal content. Also in 2017, the law on social media providers was adopted, and its amendment was voted by the Bundestag on 14 January 2021.⁵⁷ The amendment aims to curb market distortion by large information technology companies, a first in the European Union. The standard requires service providers to make the detailed rules on complaint handling available on their platforms, with a view to transparency. They should also provide an easy-to-understand, directly accessible and permanently available procedure for complainants who make a complaint. It is worth mentioning that the German Constitutional Court has already passed a decision related to the operation of international digital companies.⁵⁸ In it, the Court stated that the individual fundamental rights must be fully respected in the online space as well.

In Austria, the Communications Platforms Act,⁵⁹ which is based on the German legislation, entered into force on 1 January 2021. The scope of the Act covers domestic and international service providers that provide services through their digital platforms for the purpose of generating revenue. Its innovation is that it obliges service providers to ensure effective remedy for complaints and irregularities arising from their moderation activities. Service providers must, among other things, submit an annual report to the Austrian authorities on the handling of the cases in which they have received a complaint.

In Poland, the Minister of Justice announced on 17 December 2020 to submit a package of proposals to the government to regulate social media.⁶⁰ According to the text of the proposal, the draft aims to safeguard freedom of expression and opinion and the right to information against arbitrary

⁵⁶ *Netzwerkdurchsetzungsgesetz (NetzDG)*.

⁵⁷ *Gesetz gegen Wettbewerbsbeschränkungen (GWB)*.

⁵⁸ *Bundesverfassungsgericht 1 BvQ 42/19*.

⁵⁹ *Kommunikationsplattformen-Gesetz KoPl-G*.

⁶⁰ The document is available at www.gov.pl/web/sprawiedliwosc/zachecamy-do-zapoznania-sie-z-projektem-ustawy-o-ochronie-wolnosci-uzytownikow-serwisow-spolecznosciowych

censorship by social media. The draft would apply to social media services with at least one million registered users and would set out the liability of service providers for illegal content, following the German model. In addition, it provides for a complaints mechanism and allows individuals to bring actions in a wide range of cases. It is envisaged that each submission would be decided by a panel acting in council, against whose decision the parties could appeal to the ordinary courts. The stated aim of the proposal is to ensure that what is not considered illegal content under Polish national rules should not be censored by social media providers under their own internal rules. The draft legislation has not yet been tabled in Parliament due to domestic political events in Poland.

In Hungary, the issue of restricting the domestic activities of technology companies has been raised more seriously in the Digital Freedom Committee (hereinafter: DSZB), established by the Minister of Justice. Based on their competence, the members of the committee include, among others, the National Media and Infocommunications Authority, the Office of the Commissioner for Fundamental Rights, the National Authority for Data Protection and Freedom of Information, the Hungarian Competition Authority and the National Council for Communications and Information Technology. The committee's declared aim is to bring transparency to the operations of transnational technology companies and to examine the challenges posed by the online space in the different areas, building on the experience of public authorities.⁶¹ Citizens can also share their own experiences and raise issues on the Committee's website. Based on the information gathered in this way and international experience, the Ministry of Justice envisaged submitting a draft law on tech companies in early 2021, which has not yet been done due to the efforts ongoing within the European Union.⁶²

Comparing the national regulatory plans listed above with the DSA and DMA Regulations, it can be concluded that there is a high degree of overlap between them, and it would be advisable to link them in the future and channel the experience of the individual Member States into EU fora.

⁶¹ For more details see digitalisszabadsag.kormany.hu.

⁶² See the DSA and DMA Regulations.

To unlock the potential of unified action, the European Union must take the lead in regulating third-country tech companies and protecting EU citizens. Nevertheless, the slowness and bureaucracy of EU decision-making may prompt several Member States to act on their own to counter the harmful consequences of overreach and lack of regulation.

CONCLUSIONS

The rise of digitalisation has fundamentally changed our societies and our habits. The emergence of the information society has been a major civilisational achievement, but it has also created a number of negative consequences. Our channels of communication have become concentrated and simplified, news and information are filtered through private for-profit monopolies, and fake news and different ideologies spread at breakneck speed. These circumstances can upset and greatly affect the social equilibrium that has been slowly but steadily evolving for centuries. In addition, the sudden power of technology giants has the potential to erode the foundations of cherished state sovereignty and override the international written and unwritten rules that have been followed until now. And the regulatory lag has made us realise that we are no longer in full control of the digital world that permeates every aspect of our lives.

The driving force behind this transformation is primarily in the United States and, in recent years, in China. Europe, as in many other areas, is not directing these processes, but simply managing them, *ex post*. Without a clear strategy and effective decision-making mechanisms, and most of all without the will of the Member States, Europe will remain a benign⁶³ player, lagging behind its competitors that are properly speaking the language of political pragmatism and power. Jason C. Sharman, Professor of International Relations in the Department of Politics and International Studies at the University of Cambridge, argued in one of his books⁶⁴ that

⁶³ ZIELONKA 2011: 289.

⁶⁴ SHARMAN 2019.

the commonly held view that Europe once dominated the world because of its military dominance is in fact wrong. Moreover, the dominance of the West was merely a historical anomaly in the past millennium, representing a temporary, anomalous period in world politics, and it now seems that we will soon return to a more normal historical situation in which the great states of Asia will once again be the world's leading powers. Whether we accept Sharman's well-founded argument or reject the predictions of Asia's rise, the first step is to acknowledge that Europe is currently unable to compete with its geopolitical rivals in the digital space. In addition to the growing influence of China, it is equally concerning that we currently lack the proper tools to address the questionable practices of American tech giants that affect our daily lives.

For all these reasons, it is essential that the European Union, or in a less favourable scenario, the Member States individually, create a regulatory environment that prevents monopolies from obstructing fair competition, restricting freedom of expression and democratic discourse, and creating filter bubbles. Rather than adopting the American model of freedom of speech, we should aim to restore European principles of freedom of speech by asserting our autonomy and interpreting our civil rights according to our own constitutional traditions.

REFERENCES

- ANDRÁSSY, Gyula (1911): *A magyar állam főnnmaradásának és alkotmányos szabadságának okai III* [The Reasons for the Survival and Constitutional Freedom of the Hungarian State III]. Budapest: Franklin Társulat.
- BACH, David – NEWMAN, Abraham (2007): The European Regulatory State and Global Public Policy: Micro Institutions, Micro Influence. *Journal of European Public Policy*, 14(6), 827–846. Online: <https://doi.org/10.1080/13501760701497659>
- BENESCH, Susan (2020): But Facebook's Not a Country: How to Interpret Human Rights Law for Social Media Companies. *Yale Journal on Regulation*, 3, 86–111.
- BIBÓ, István (2021): *A jogfilozófiától a politikáig. Bibó István munkái 10* [From Philosophy of Law to Politics. Works of István Bibó 10]. Budapest: Argumentum Kiadó.

- BRETON, Thierry (2021): Capitol Hill – the 9/11 Moment of Social Media. *Politico*, 10 January 2021. Online: <https://www.politico.eu/article/thierry-breton-social-media-capitol-hill-riot/>
- DINAN, Desmond (2010): *Ever Closer Union. An Introduction to European Integration*. Boulder: Lynne Rienner Publishers. Online: <https://doi.org/10.1515/9781685856892>
- DIXON, Martin (2013): *Textbook on International Law*. Oxford: Oxford University Press.
- DOUEK, Evelyn (2020): What Kind of Oversight Board Have You Given Us? *University of Chicago Law Review Online*, 1. Online: <https://lawreviewblog.uchicago.edu/2020/05/11/fb-oversight-board-edouek/>
- European Commission (2020a): *Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector*. Online: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PCo842&from=EN>
- European Commission (2020b): *Regulation of the European Parliament and the Council on a Single Market for Digital Services*. Online: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PCo825&from=EN>
- European Commission (2021): *Communication from the Commission to the European Parliament and the Council*. Online: https://ec.europa.eu/taxation_customs/system/files/2021-05/communication_on_business_taxation_for_the_21st_century.pdf
- European Union External Action Service (2016): *A Global Strategy for the European Union's Foreign and Security Policy. Shared Vision, Common Action: A Stronger Europe*. Online: https://www.eeas.europa.eu/eeas/global-strategy-european-unions-foreign-and-security-policy_en
- FOER, Franklin (2017): Facebook's War on Free Will. *The Guardian*, 19 September 2017. Online: <https://www.theguardian.com/technology/2017/sep/19/facebooks-war-on-free-will>
- FUKUYAMA, Francis (2000): *The Great Disruption. Human Nature and the Reconstitution of Social Order*. New York: Simon & Schuster.
- GOMBOS, Katalin (2017): *Az Európai Unió joga* [European Union Law]. Budapest: Patrocinium Kiadó.
- HALMAI, Gábor – TÓTH, Gábor Attila eds. (2008): *Emberi jogok* [Human Rights]. Budapest: Osiris Kiadó.
- HOFFER, Raoul (2019): Austrian Competition Law: Tough on Big Tech. *Competition Law International*, 15(1), 131–138.
- JACOBSEN, Benjamin – BEER, David (2021): Quantified Nostalgia: Social Media, Metrics, and Memory. *Social Media + Society*, 7(2). Online: <https://doi.org/10.1177/20563051211008822>
- KIM, Young Ran (2020): Digital Services Tax: A Cross-Border Variation of the Consumption Tax Debate. *Alabama Law Review*, 72(1), 131–185.
- KLONICK, Kate (2020): The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression. *Yale Law Journal*, 129(8), 2418–2499.

- KOLTAY, András (2019): *Az új média és a szólásszabadság. A nyilvánosság alkotmányos alapjainak újragondolása* [New Media and Freedom of Expression. Rethinking the Constitutional Foundations of the Public Sphere]. Budapest: Wolters Kluwer.
- KOLTAY, András (2020): The Private Censorship of Internet Gatekeepers. *University of Louisville Law Review*, 59(2), 255–304.
- KOVÁCS, Péter (2011): *Nemzetközi közjog* [International Public Law]. Budapest: Osiris Kiadó.
- MANNERS, Ian (2002): Normative Power Europe: A Contradiction in Terms? *Journal of Common Market Studies*, 40(2), 235–258. Online: <https://doi.org/10.1111/1468-5965.00353>
- MARTONYI, János (2018): *Nyitás és identitás. Geopolitika, világkereskedelem, Európa* [Opening and Identity. Geopolitics, World Trade, Europe]. Szeged: Iurisperitus Kiadó.
- MASON, Ruth (2020): The Transformation of International Tax. *American Journal of International Law*, 114(3), 353–402. Online: <https://doi.org/10.1017/ajil.2020.33>
- National Media and Infocommunications Authority (2021): *Internetes közönségmérés adatok (2020. IV. negyedév)* [Internet Audience Measurement Data (Q4 2020)]. NMHH, 25 February 2021. Online: https://nmhh.hu/cikk/218350/Internetes_kozonsegmeresi_adatok_2020_IV_negyedev
- OECD (2021): *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy*. Online: <https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2020-september-2021.htm>
- Oversight Board (s. a.): *Ensuring Respect for Free Expression through Independent Judgement*. Online: <https://oversightboard.com/>
- RYNGAERT, Cedric (2015): Symposium Issue on Extraterritoriality and EU Data Protection. *International Data Privacy Law*, 5(4), 221–225. Online: <https://doi.org/10.1093/idpl/ipv025>
- SCOTT, Mark – CERULUS, Laurens (2018): Europe's New Data Protection Rules Export Privacy Standards Worldwide. *Politico*, 31 January 2018. Online: <https://www.politico.eu/article/europe-data-protection-privacy-standards-gdpr-general-protection-data-regulation/>
- Select Committee on Intelligence United States Senate (s. a.): *Russian Active Measures Campaign and Interference in the 2016 U.S. Election*. Online: https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume1.pdf
- SHARMAN, Jason C. (2019): *Empires of the Weak*. Princeton: Princeton University Press.
- SIGMAR, Gabriel (2021): *Wie Macron Frankreich zum Anführer machen will* [How Macron Wants to Make France the Leader]. *Der Tagesspiegel*, 7 January 2021. Online: <https://www.tagesspiegel.de/politik/das-machtvakuum-in-der-eu-wie-macron-frankreich-zum-anfuhrer-machen-will/26770220.html>
- SJURSEN, Helene (2006): The EU as a 'Normative Power': How Can This Be? *Journal of European Public Policy*, 13(2), 235–251. Online: <https://doi.org/10.1080/13501760500451667>

- Statista (2022): Number of Monthly Active Facebook Users Worldwide as of 4th Quarter of 2021 (in millions). *Statista*, 4 February 2022. Online: <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/>
- The Wall Street Journal (2008): Europe v. U.S. Business. *The Wall Street Journal*, 17 January 2008. Online: <https://www.wsj.com/articles/SB120053154686996085>
- WEINTRAUB, Ellen L. – MOORE, Thomas H. (2020): Section 230. *Georgetown Law Technology Review*, 4(2), 625–640.
- ZIELONKA, Jan (2008): Europe as a Global Actor: Empire by Example? *International Affairs*, 84(3), 471–487. Online: <https://doi.org/10.1111/j.1468-2346.2008.00718.x>
- ZIELONKA, Jan (2011): The EU as an International Actor: Unique or Ordinary? *European Foreign Affairs Review*, 16(3), 335–352. Online: <https://doi.org/10.54648/EERR2011021>