1. INTRODUCTION

European Parliament resolution P9_TA (2021) 0453 of 11 November 2021 welcomes, inter alia, the revision of the Databases Directive (Directive 96/9 / EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases). It was announced by the EC in the Intellectual Property Action Plan in Support of EU Recovery and Sustainability. The aim is, in parallel with the forthcoming Data Act, to clarify whether Directive 96/9 / EC will not be an obstacle to the use and sharing of data, mainly by clarifying the status of machine-generated data. There are two assumptions here about Directive 96/9 / EC: first, that it is an obstacle to the use and sharing of data, and second, that it is unclear whether and what it relates to machine-generated data.

Makes an impression that in the mentioned policy documents the exceptions to copyright and sui generis the right to databases, and more precisely their incomprehensive and optional nature, is no longer mentioned as an obstacle to harmonization, as in the first and in the second evaluation in 2005 and 2018. This is apparently due to the adoption and entry into force in the meantime of Directive 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (hereinafter Directive 2019/790 or the DSM Directive (unless otherwise stated in the relevant text, the provisions cited are those of the Directive). With it are amended (Article 24), inter alia, the provisions on exceptions in Directive 96/9, Article 6 (2) (b) on copyright and Article 9 (b) on sui generis law, and adds new important exceptions.

The provision of Art. 29 of the DSM Directive required the Member States to transpose it by 6 July 2021, which has so far been notified as implemented by the following Member States: Czech Republic, Denmark, Germany, Estonia, Ireland, Spain, France, Croatia, Italy, Lithuania, Hungary, Malta, the Netherlands, and Austria. How the national transposition will be carried out, i.e. whether it corresponds to the content and scope of the directive, is extremely important for harmo-
nization. This, of course, applies to all EU directives. In this sense, the question has been raised as to whether it is appropriate to carry out copyright reform in Europe with Regulations instead of Directives. This issue is related to the problem that when drafting laws or transposing laws are adopted, member states move in different directions, and this is only partly due to the objective ambiguity of some of the provisions in the directives. “In more significant part, however, this attitude is linked to a misplaced idea of great freedom enjoyed by national legislatures” (Rosati, 2021).

The national legislation of the member states adopted in pursuance of an obligation to transpose may be regarded as a “legislative continuation” of the Directive in the territory of a Member State. In this sense, the article offers a look at the legislative proposal for transposition into Bulgarian legislation of the new exceptions to copyright and sui generis database rights. Namely, those introduced by Directive 2019/790 and relating to the mining of text and data for the purposes of scientific research, digital cross-border learning activities, and use by cultural heritage institutions.

In Bulgaria, the relations related to the creation and distribution of works of literature, art, and science are regulated by the Copyright and Related Rights Act (CARRA), published in the State Gazette No. 56 of 1993, in force since 01.08.1993, with many changes and additions. It is envisaged that the exceptions and restrictions newly introduced by the DSM Directive in order to adapt them to the digital and cross-border environment will be transposed into Bulgarian legislation by amending and supplementing it. For this purpose, a draft law has been prepared to amend and addition the CARRA (hereinafter only the “The Bill”). As of the date of this report, The Bill has not been submitted by the Council of Ministers for discussion in the National Assembly, which objectively excludes as a subject of analysis the reports and transcripts from the discussions in parliamentary committees and possible legislative proposals between first and second reading.

Therefore, the current analysis is based on the text of The Bill, published on 15.09.2021 on the website of the Council of Ministers, Public Consultation Portal. The Bill introduces the new exceptions provided for in the DSM Directive through a new section IIa in the Chapter of the Copyright and Related Rights Act, entitled: “Particular provisions for certain digital uses of works and other objects of protection”, including references to the application of exceptions to of the objects of related rights. This chapter contains a total of five new articles. Namely: Art. 26е “Automated analysis of text and information”; Article 26ж “Automated analysis of text and information for scientific purposes”; Article 26з “Free use within digital and cross-border teaching activities”; Art. 26и “Free use for the protection of cultural heritage”; Art. 26к “Application by analogy; Special rules regarding technical means of protection” and Art. 26л – “Avoidance of collision”. Each new member has several paragraphs (The exact term in Bulgarian legislation is “alinea” and is used here too, as “paragraph” has a different meaning).

For evaluation and to conclude whether the proposed Bill (in volume and content) transposes the matter governing public relations within the scope of Directive 2019/790, we should specify the necessary and mandatory characteristics of new exceptions. As a result of the analysis, we identify seven characteristics that include the minimum required and mandatory content of the exceptions, as follows:

- The exceptions and limitations refer to measures for their adaptation to the digital and cross-border environment, for example for the purposes of illustrating teaching in digital and cross-border teaching activities (Article 5 and Recitals, for example, Recital – 5);
- The exceptions and limitations concern the “Text and data mining” actions, as defined in Article 2 (2): ‘text and data mining’ means any automated analytical technique aimed at
analyzing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations”;

- Exceptions and restrictions are provided in terms of faces. That is, they refer to research organizations and cultural heritage institutions, for the purposes of scientific research and to allow the latter to make copies of works or other objects that are permanently in their collections, in any format, and on any medium, for the purposes of preserving such works or other objects and to the extent necessary for their preservation. They also apply to other persons, apart from the listed organizations and institutions, who, under the condition of Art. 4 (3) have lawfully access to content;

- Lawfully access to content is a condition for research organizations and cultural heritage institutions, including related persons, to fall within the scope of the exception for extracting information from text and data. What is meant by “lawful access” is clarified in Recital 14, which requires an exception “regardless” of how it is obtained – through a policy of free access, through contractual agreements between right holder and users, or otherwise obtained;

- In case of lawful access, no compensation is provided for the right holder by the persons indicated in the exception. It is based on the presumption (recital 17) that, given the nature and scope of the exception, any potential harm would be minimal;

- Any contractual provision contrary to the exceptions provided for in Articles 3, 5 and 6 shall be unenforceable (Article 7, paragraph 1);

- Exceptions and limitations should become mandatory for each Member State. It is worth recalling that the test of Directive 96/9 before the amendment included only three, optional, exceptions: private use of non-electronic databases, illustration of non-commercial training and research, and public security or procedural uses.

The following analysis aims to indicate whether and where the Bulgarian proposal for transposition deviates from the necessary and mandatory content of Directive 2019/790, but without assessing whether this has been done in the best possible way, including through the best possible legislative technique. The analysis of the legislative proposal of the Council of Ministers which transposes Articles 3 to 7 of Directive 2019/790 shows the following.

The title of Art. 26e, alinea 1 “Automated analysis of text and information” is slightly misleading, as it leads to the logical expectation of a subsequent definition, which, however, we find in the Additional Provisions (in the new point 3a of §2, which we will consider separately). Instead of a definition, the provision of Art. 26e, alinea 1 introduces the exception for use of works and other objects of protection by a person who has legal access to them in automated analysis of text and information. Art. 26e, alinea 2, p.3 introduces an exhaustive list (numerus clausus) of admissible actions of use in a digital way or in digital form, relevant to the databases, namely: “reproduction, extraction or re-use within the meaning of Art. 93b of databases or parts thereof”. Given the existing legal definition of “reproduction” in § 2, point 3 of the Additional Provisions of the (CARRA), it can be said that the exceptions in connection with Art. 4 of Directive 2019/790 have been correctly adopted in terms of meaning. Art. 26e, alinea 3 of The Bill almost reproduces alinea 2 of art. 4, and the possibility of the right holder to prohibit the use of protected works by the person under the first paragraph exists only before they are available (art. 26e, alinea 4). It is noteworthy that there is no requirement for persons under Article 4 of the Directive, respectively Art. 26e, alinea 1 of The Bill, to store the results of their actions at an “appropriate level of security”, as this is required and done in respect of the persons under Art. 3 of the Directive (respectively – art. 26ж, alinea 6 of The Bill).
The title of the next provision – Art. 26ж – is “Automated analysis of text and information for scientific purposes” and aims to transpose Article 3 of Directive 2019/790. According to the text, the use for scientific research in automated analysis of text and information of protected works (including databases) by a person with lawful access to them is permissible without the consent of the right holder and without remuneration. The circle of persons for whom the exception is explicitly allowed is exhaustively listed in Art. 26ж, alinea 3, and this is an approach that is supported by the requirement for a “common understanding for research organizations” (Recital 12 of Directive 2019/790). Again in line with the above Recital 12 is the exclusion from the circle of beneficiaries of those “organizations and their associations over which the trader exercises control within the meaning of the Commercial Act or other decisive influence and has the opportunity to enjoy privileged access to results from the scientific research” (art. 26ж, alinea 4). There is also the obligation to protect through appropriate technical means of protection by the beneficiaries (Article 26ж, alinea 6), as well as their right to preserve the results and provide access to third parties for the purposes and for the period of the scientific research, its inspection, and evaluation (Article 26ж, alinea 5). Unlike the previous article, the provision of Art. 26ж, alinea 8 explicitly excludes the computer programs from the scope of the exceptions.

The next provision is Art. 26з, entitled “Free Use in Digital and Cross-Border Teaching Activities” and transposes Art. 5 of Directive 2019/790. It is to allow the digital use of works (including databases) for the purpose of illustration for teaching without the consent of the right holder and without remuneration, by educational institutions, under their control and responsibility and with reference to the source and the name of the right holder. There is no explicit requirement for institutions to have lawful access to protected works. Is it the implied? And if so, why is “lawful access” explicitly written as a condition for applying the exceptions under Art. 26е and Art. 26ж of The Bill (respectively – Art. 4 and Art. 3 of Directive 2019/790)? With regard to databases under this Article, free use provides for the following comprehensive actions:

1. reproduction, public presentation, broadcasting, transmission, retransmission or provision of electronic access;
2. translation into another language, processing or synchronization;
3. reproduction, public presentation, broadcasting, transmission, retransmission or offering of electronic access, as well as dissemination of the results of the actions under item 2;
4. extraction or reuse in the sense of art. 93в.

A comparison with the text of the previous two provisions (namely: Art. 26е and Art. 26ж) shows a significantly higher volume of permissible actions with databases when used for teaching activities. Whether this is justified for the purposes of harmonization and whether it is legally sound and justified is a matter of further analysis. Here we only note that the use of databases through actions such as “public presentation, broadcasting, transmission, retransmission” is not consistent with the specifics of the databases and for the first time we are faced with the anticipation of such uses (i.e. actions) in relation to databases. “Public presentation” is traditionally regulated as a property right of the author to present a (usually stage) work to the public, that is, allowing for the perception of an unlimited number of people. And “broadcasting” as part of the content of property copyright in the context of the law is used when the action is performed wirelessly (for example – satellite – Article 99b of the Copyright and Related Rights Act). It remains unclear, including in the reasons on The Bill, why it is considered necessary to expand the possible actions with databases (reproduction, extraction, or reuse) in the context of digital and cross-border teaching activities. We hope that in the final version and especially in the adopted law this will be clarified.
“Free use for the protection of cultural heritage” is the title of Art. 26i, from which it is clear that the text aims at transposing Art. 3 and Art. 6 of Directive 2019/790. It provides for the use of protected works from public libraries, schools or other educational establishments, museums, archival institutions, and institutions preserving film or sound heritage without the consent of the right holder and without payment of remuneration, in accordance with the National Archives Fund Act. In the context of this use, the permitted actions with databases are “reproduction, extraction or re-use”, which are already established in the Database Directive and in case law.

The following text, Art. 26k, alinea 1, envisages the application by analogy of two current provisions. Namely, the provision of Art. 23 of the Copyright and Related Rights Act (i.e., free use is permissible provided that it does not interfere with the normal use of the work and does not harm the legitimate interests of the right holder), as well as the provision of Art. 25a (i.e., the use may not be carried out in a way that is accompanied by the removal, damage, destruction, or disruption of technical means of protection, and the right of the beneficiary who has free access but is hindered by technical means of protection, to request from the right holder access). The text of Art. 26k, alinea 2 stipulates that the right holder is obliged to provide access within 72 hours of receiving a request from a user who is entitled to free use. This period, given the potentially large number of requests (recital 16), is generally considered sufficient to provide access. It is reproduced (Art. 26k, alinea 3 of The Bill) and the possibility provided by Directive 2019/790 and other directives for right holder to use technical means to protect networks and databases, provided they are proportionate to risks for their integrity and security and do not impede the exercise of the rights under Art. 26ж. And lastly, according to the text of Art. 26л, alinea 2 of the Bill, “any agreement that impedes or restricts the right to free use under Art. 26ж, art. 26з and Art. 26и, is null and void.” It transposes the wording of Article 7 (1) of Directive 2019/790, according to which “Any contractual provision which is contrary to the exceptions provided for in Articles 3, 5 and 6 shall not be enforceable”.

2. DISCUSSION

Before summarizing and drawing the relevant conclusions, we return to the topic of the proposed definition in the new point 3а of §2 of the Additional Provisions of The Bill. According to the text: “automated analysis of text and information” is any automated analytical method used to analyze text and data in digital form, to create models, trends, relationships and other information. This means introducing a legal definition of “automated text and information analysis” and not “text and data mining” (Article 2, (2) of Directive 2019/790 defines ‘text and data mining’ means any automated analytical technique aimed at analyzing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations). Who needs this, what is achieved in this way? The answer is – too little for progress in harmonization. The effect “play on words” is obtained, which is subsequently multiplied in vague interpretations and contradictory case law. Directive 2019/790 accents on the action unknown until the advent of new technologies and its outcome, namely the text and data mining, and not on the technical way in which this action is achieved, as is done with the proposed definition in The Bill. The purpose of the directive, in this case, is to regulate the legal consequences of this new way of using intellectual property rights, and not to define self-serving one technical notion.
3. CONCLUSION

This report provides a brief commentary on The Bill on Amendment and Addition to the Copyright and Related Rights Act, aimed at transposing Directive 2019/790, focusing on how this project envisages transposing the new exceptions. The review shows that, in general, the scope and content of the provisions of the Directive in question are correctly understood at the national level. The legislative technique does not meet the best criteria, especially considering that Bulgaria has a tradition in this regard and legislation for this purpose in the current Law on The Normative Acts of 1973. The two evaluations (2005 and 2018) of Directive 96/9/EC show that a large part of the observed heterogeneity in the laws and case law of the Member States is due to unclear and inaccurate definitions or their absence at all. This, of course, hinders harmonization. And while in some cases the reason may be in the Directive itself, in the present case it is not. Such a legislative approach is not desirable and, as the draft has not yet been discussed in the relevant parliamentary committees, it is not too late to show the necessary will and to avoid legislative misunderstandings.

REFERENCES


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