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The Role of Central Agencies in the Field of Public Service Provision

ABSTRACT

The paper reviews the role of central agencies in the field of public service provision in Hungary after 2010. The main hypotheses on public service providing role and independence of agencies are (1) service providing is a relatively new type of task among Hungarian central agencies, (2) agencies with service providing tasks are not independent or only relatively independent: In order to justify these hypotheses the paper examines the concept, historical background, function and powers of independent (regulatory) agencies. Then the paper presents agencies' role in public service providing: institution maintenance, funding and cultural-ideological tasks. The research confirms hypothesis no. 1 partly: the service providing task is relatively new in Hungary, however, funding and political-ideological tasks have some preludes. Hypothesis no. 2 is confirmed partly, too: agencies and service providers are under severe governmental/ministerial control.

KEYWORDS: central agency, government, public service providing, independence

I. INTRODUCTION

The system of Hungarian central agencies has been transformed since the change of government in 2010. The sphere of non-governmental central bodies has been centralised and concentrated: the number of central agencies has decreased, and they have become more subordinate to the Government or the ministries. These tendencies have been connected to the overall centralisation of the Hungarian public administration, for example the centralisation of the central government and the decline of the importance of local governments within the Hungarian public administration.¹ As part of these

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¹ I. Hoffman, J. Fazekas, K. Rozsnyai, Concentrating or Centralising Public Services? The Changing Roles of the Hungarian Inter-Municipal Associations in the last Decades, (2016) 14 (3) *Lex Localis: Journal of Local Self-Government*, 451–471. [https://doi.org/10.4335/14.3.451-471\(2016\)](https://doi.org/10.4335/14.3.451-471(2016))

tendencies a lot of public tasks – including service providing tasks – have been transferred from local governments to central agencies (see detailed in Section III).

The paper reviews the role of (independent or autonomous) central agencies in the field of public service provision in Hungary after the governmental change in 2010. The method of the research is jurisprudential, therefore based on legal texts, statutory and other normative decisions and the relevant scientific literature. The main hypotheses on the public service-providing role and independence of agencies are as follows.

1. Service providing is a relatively new type of task among Hungarian central agencies.
2. Central agencies with service providing tasks are not independent or only relatively independent.

In order to justify these hypotheses, the paper examines the concept, historical background, function and powers of independent (regulatory) agencies. The paper then presents agencies' roles in public service-providing: institution maintenance, funding and cultural-ideological tasks. The research partly confirms hypothesis no. 1: the service-providing task is relatively new in Hungary, but funding tasks are traditional. Hypothesis no. 2 is confirmed: agencies and service providers are under strict governmental/ministerial control.

II. THE (INDEPENDENT) CENTRAL AGENCIES

1. The concept of regulatory authority

Regulatory authorities are usually central bodies in the system of public administration (in Europe at national and European Union level as well), but they can operate on a territorial level, too.² The essence of the regulatory activity is that the regulatory body constitutes general rules of conduct and norms, but it is not necessarily formally provided with legislative powers. Therefore, making and implementing laws are united in one hand. It can be carried out in three ways.

a) The requirements laid down in individual (adjudicative or administrative) decisions issued by the regulatory body, such as permits and sanctions, are followed as norms by market actors who are not directly involved in the given individual case as clients, but they are in a similar position. As a result, the individual decisions become uniform and take on a normative nature.

² A. Sajó, Independent Regulatory Authorities as Constitutional Actors: a Comparative Perspective, *Annales Universitatis Scientiarum Budapestinensis De Rolando Eötvös Nominatae Sectio Iuridica*, (2007) 5–51.; X. A. Yataganas, Delegation of Regulatory Authority in the European Union. The Relevance of the American Model of Independent Agencies, (2001) (3) *Jean Monnet Working Paper*.

b) The regulatory authority adopts several types of soft law instruments, such as policy, recommendations and codes. These are not official legislative acts, but they have nearly the same weight (for example, market actors follow them in the absence of detailed legal provisions).

c) Sometimes normative regulatory powers are vested in regulatory authorities so that they can adopt normative rules, for example decrees (the National Media and Infocommunications Authority and the Hungarian Energy and Public Utility Regulatory Authority).

The homeland of regulatory authorities is the United States of America. They emerged in Europe only after the Second World War and it was a long process because, among European public lawyers, rule-making and law enforcement are theoretically and practically separated spheres of law, while the integration of these two types of activity is the very essence of how regulatory authorities operate.³

Regulatory authorities usually operate in sectors in which technical norms change quickly, such as telecommunications, media and financial services. Because of the continuous sectoral transformation, the legislature is not able to fulfil one of its most important functions: market actors can anticipate the decision of the administrative authority in their individual case (accountability). In these sectors, regulation is often based on abstract concepts, so market actors cannot foresee the content of the administrative decision and its motives or the aspects of consideration. Accountability is usually provided by individual authoritative decisions: the client and market actors in a similar position examine the decision adopted in similar cases and try to draw conclusions (individual decisions have normative or quasi-normative nature). The above-mentioned soft law instruments have a similar function: they can orientate the performance of market actors in order to comply with mandatory legal rules.⁴

However, the performance of regulatory authorities is rather problematic regarding constitutional matters. Namely, regulatory authorities are not directly vested with normative regulatory powers by the Constitution, although, as we could see above, in practice, they carry out regulatory functions. Moreover, the decision-making process of regulatory bodies usually lacks the usual constitutional guarantees of the legislative process, namely transparency and accountability. Furthermore, establishing regulatory bodies is a strong challenge to the separation of powers, because of the merger

³ G. Majone, *The Rise of the Regulatory State In Europe*, in W. C. Müller, *The State in Western Europe: Retreat or Redefinition?* (Psychology Press, 1994) 80–81.; Sajó, *Independent Regulatory Authorities as Constitutional Actors: a Comparative Perspective*, 23–25.

⁴ Kovács A. Gy., *Mitől szabályozó egy hatóság?* in Valentiny P. and Kiss F. L. (szerk.): *Verseny és szabályozás 2008*, (MTA Közgazdaságtudományi Intézet, Budapest, 2009) 13–45.

of rule-making and law enforcement functions and because of their independence.⁵ This independence is another very sensitive characteristic of regulatory agencies.

2. The independence of regulatory authorities

Independence is a very controversial feature of regulatory authorities. In several sectors, such as media and telecommunications, it is prescribed by the law of the European Union to the Member States that they establish an independent regulatory authority (e.g. Audiovisual Media Services Directive: preamble paragraph 94 and Art. 30).

The reason for independence lies in the fact that these sectors have been liberalised in recent decades: a lot of private sector companies have become service providers while some public sector organisations have remained service providers, too. Nevertheless, the state, which is the owner or supervisor of these public sector organisations, is the main regulator of these sectors, too. As a result, the state's two functions (service provider and regulator) must be separated in organisational, personnel and budgetary ways in order to maintain fair competition. On the other hand, regulatory authorities must be separated from the supervised sector as well. The other justification of independence is the protection of certain fundamental rights, such as freedom of expression, and competition and the prohibition of discrimination.⁶

Independence has special legal guarantees in Hungary as follows.⁷

a) Autonomous bodies are created in an act of the National Assembly (or cardinal act), which cannot be modified by the Government.

b) They cannot be instructed, neither by the Government nor by the Minister or another state organ.

c) They submit a – usually annual – report to the National Assembly and shall inform the Government of their activities.

d) The main governance powers on their staff are usually performed by the President of the Republic or the Parliament or the Head of the body. The Head is often appointed by the President of the Republic or elected by the National Assembly. Besides, the PM sometimes has some powers in this field, for example to make a proposal on the appointment of the Head of the National Competition Authority. On the other hand, the senior officials and civil servants must comply with strict rules on conflict of

⁵ P. L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, (1984) 84 (3) *Columbia Law Review*, 573–669. <https://doi.org/10.2307/1122501>

⁶ Kovács, Mitől szabályozó egy hatóság?

⁷ J. Fazekas, Central administration, in A. Patyi, Á. Rixer and Gy. Koi (eds), *Hungarian Public Administration and Administrative Law*, (Schenk Verlag, Passau, 2014) 287–303. <https://doi.org/10.1556/204.2015.37.2.3>

interests. The salaries of the senior officials and civil servants are usually higher than those of the employees of other central bodies.

e) Autonomy in budgetary matters should also be mentioned. Autonomous bodies usually elaborate their own budget and therefore it is adopted as a part of the Central Budget Act of the National Assembly. In some cases, the budget is the subject of a separate act of Parliament (e.g. the budget of the media authority).

f) Because autonomous organs have no supervisory bodies, their decisions cannot be repealed or amended by administrative organs but only by courts, which can only review the legal aspects of their operations.

There are central agencies which are not independent from central administration, or their independence is only relative. The status of these bodies can be described by the concept of centralisation: a change that affects the decision-making, control, and instruction competences, partially or wholly transferring them to an upper level of the administrative hierarchy.⁸ Centralized agencies operate under strict administrative control of the government and they can be instructed and regulated by a ministry or the Government itself.

III. AGENCIES' ROLE IN PROVIDING PUBLIC SERVICES

Providing public services is not a traditional task for central agencies in Hungary, if we take the narrow definition of public services into account. Central agencies have carried out mainly administrative proceedings (adjudication) in the last decades and have directed subordinate territorial (deconcentrated) bodies.⁹ The weight of public service provision in the portfolio of central agencies began to increase after the elections and governmental change in 2010. The three public service-providing activities among agencies are maintaining institutions, funding and cultural-ideological tasks.

1. Institution maintenance

After 2010, the newly elected Hungarian government decided to reorganise the system of human public services. The main goal of the reform was to centralise the maintenance

⁸ M. Rosta, Schizophrenic Public Administration Reform in Hungary. Tension between Anti-NPM Systemic and Pro-NPM Organizational Reforms, (2015) 37 (2) *Society and Economy*, 183–206.; P. D. Hutchcroft, Centralization and Decentralization in Administration and Politics: Assessing Territorial Dimensions of Authority and Power, *Governance*, (2001) 14 (1) 23–53. <https://doi.org/10.1111/0952-1895.00150>; C. Pollitt and G. Bouckaert, *Public Management Reform: A Comparative Analysis. New Public Management, Governance and the Neo-Weberian State*, (Oxford University Press, Oxford, 2011).

⁹ Fazekas, Central administration, 299.; Hoffman I., A közszolgáltatások fogalma, in Fazekas M. (szerk.): *Közigazgatási jog. Általános rész II*, (ELTE Eötvös Kiadó, Budapest, 2017, 17–38) 19–20.

of public institutions in the fields of primary and secondary education, health care and social care. Before 2010, most of the institutions were maintained by local self-governments: for example, specific health care (such as inpatient care) was a compulsory task of the counties while primary care was under the scope of settlements. According to government statements, serious problems occurred before 2010 in these sectors. The local governments had insufficient budgetary resources to maintain their institutions effectively and transparently, therefore only the state administration could provide these public services at a uniform high quality. In the opinion of government decision-makers, only the control of central government could ensure equal opportunities in these sectors.

The Government established agency-type central bodies and their territorial units for the task of maintaining institutions (e.g. primary and secondary schools, hospitals, and nursing homes) in the aforementioned three fields:

a) health care: National Institute for Quality- and Organisational Development in Healthcare and Medicines, then after the reorganisation in 2015: National Health Care Service Centre;

b) primary and secondary education: Klebelsberg Institution Maintenance Centre;

c) social care: General Directorate of Social Affairs and Child Protection.

According to the statutes regulating the legal status and performance of these bodies, the typical maintenance tasks are as follows:

- establishing, reorganising and terminating service provider institutions;
- budgetary tasks, for example approving the annual budget and regulating the budgetary conditions of the institution;
- property management;
- regulating the legal status of the personnel of the institution;
- appointing and dismissing the senior officers of the institution;
- legal, professional and budgetary supervision of the institution.

In addition, these tasks are not entirely carried out by the agencies itself. As a higher level of centralisation, some of these tasks have been conferred on the Minister responsible for the sector (this has been the Minister of Human Capacities in all three sectors), most commonly establishing, reorganising and terminating service provider institutions, budgetary tasks and appointing and dismissing the senior officers of the institution. In these cases, the agency usually makes proposals to the Minister and draws up the decisions.

On the other hand, the General Directorate of Social Affairs and Child Protection and the Klebelsberg Institution Maintenance Centre (primary and secondary education) have territorial units in the counties (19) and the capital (Budapest). The Klebelsberg Institution Maintenance Centre has regional units, too. They contribute to performing the maintenance tasks (preparing decisions and making

proposals) or have competences of their own. For example, the competences of district units of the Klebelsberg Centre extend to primary schools, while secondary schools are under the jurisdiction of county units.

Another and very important side of centralisation is the organisational power¹⁰ of the Government and the Minister over the agencies. In accordance with the Fundamental Law, the Government may establish government agencies pursuant to provisions laid down by law (Art. 15). The origin of this power is the authorisation of the Parliament to the Government to implement its programme in certain sectors and in general. For this purpose, the Government must have an appropriate and well-constructed state administrative system.

The three agencies are categorised into the 'central office' body-type.¹¹ According to Section 72-73/B of Act XLIII of 2010 on Central State Administrative Bodies and the Status of Government Members and Ministers of State,¹² the Government and the Minister had certain organisational and control powers over central offices as follows:

a) The central offices are created by Government decrees.

b) Their main tasks and duties are regulated by Acts adopted by the National Assembly and by the abovementioned Government decrees as well. The organisational power of the Government prevails in how the bodies' tasks and competences are regulated. The Acts of Parliament do not designate state administrative organisations using their official names but only with their common nouns, designating the main tasks of the organisation. The Acts authorise the Government to designate the concrete organization or agency in decrees giving its proper name and detailed tasks. For example, Act CLIV of 1997 on Health Care stated that health care institutes were maintained by the entitled bodies so Government Decree 27/2015. (II. 25.) designated the National Health Care Service Centre as maintenance agency. This way of regulation provides the possibility of Government reorganization without an Act of Parliament.

c) The three central offices are under the direction of the Minister of Human Capacities, who appoints their heads, gives instructions and adopts the organisational and operational procedures of the agency. The appointment of the Head of the agency must be approved by the Permanent Secretary of the Prime Minister's Office (PMO).

d) The budgetary matters of the agencies are governed by the Minister of Human Capacities. The budgets are situated in the Ministry's chapter in the Act on the Central Budget of Hungary. As a result, the Minister performs the rights of the founder over these bodies and exercises financial control over their performance. The

¹⁰ E.-W. Böckenförde, *Die Organisationsgewalt im Bereich der Regierung. Eine Untersuchung zum Staatsrecht der Bundesrepublik Deutschland*, (Duncker & Humblot, Berlin, 1964); Fazekas, Central administration, 290–291.

¹¹ Fazekas, Central administration, 299.

¹² This Act has already been repealed. Now Section 36–38 of Act CXXV of 2018 on Government Administration regulates the legal status of central bodies without any important differences.

transformation of the role of the central administration can be observed in the change of the total expenditure of the budgetary chapter – in practice the sectors – directed by the Ministry of Human (formerly National) Capacities.

In sum, the maintenance agencies in these three sectors are rather tightly subordinated to the Government and directly to the Minister of Human Capacities. This influence expands to the territorial units; for example, the heads of the county and district units of the Klebelsberg Institution Maintenance Centre are appointed by the Head of the Centre but the approval of the Minister is also necessary [Section 6 of Government Decree 202/2012. (VII. 27.) on the Klebelsberg Institution Maintenance Centre]. Furthermore, the heads of the county units of the General Directorate of Social Affairs and Child Protection are appointed by the Minister [Section 2 of Government Decree 316/2012. (XI. 13.) on the General Directorate of Social Affairs and Child Protection]. Nevertheless, the PMO's Permanent Secretary's competence of approval may allow the central government (and the Prime Minister personally) predominant influence over senior personnel matters of the maintenance agencies.

2. Funding bodies

In the last decades since the regime change in 1989/90, several central agencies were established with funding tasks. This entails providing financial resources for several public purposes, such as managing scholarships, competitions and making decisions on tenders. These bodies are usually central offices like the Klebelsberg Centre: they are subordinate to a Ministry or the Government, therefore no serious amount of independence can be detected from the central government. The responsible Ministry or the Government regulates their budget, organisation, and operation, gives them direct instructions and exercises personnel competences e.g. appointment and dismissal of the Heads of these bodies (see maintenance agencies at the previous chapter).

The National Research, Development and Innovation Office (NRDIO) was established by Act LXXVI of 2014 on scientific research, development and innovation. The main aim of its establishment, according to the Act, was to create an institutional framework for the governmental coordination of the national research, development and innovation ecosystem. In order to fulfil this, the NRDIO gives advice on RDI policy for the Government and prepares the RDI strategy for the Government. Moreover, it handles the NRDI Fund and funds research projects based on applications by individual researchers and research groups. The NRDI is the successor of the OTKA (National Scientific Research Fund) Program which was established in 1986.

The Human Capacity Support Provider Body (HCSPB) is a central agency subordinate to the Ministry of Human Resources established in 2012 by Government Decree 178/2012. (VII. 26.). It provides grants to applicants for educational and social

purposes. In addition, it implements EU-funded (EFOP) projects in order to strengthen Hungarian communities, and NGOs in foreign countries, especially neighbouring countries, such as Romania and Slovakia.

The National Institute of Health Insurance Management (NIHIM) is a central agency which is also subordinate to the Ministry of Human Resources established in 2016 by Government Decree 378/2016. (XII. 2.). It manages the National Health Insurance Fund and is the successor of National Health Insurance Fund, which was established in 1993. The main task of the NIHIM is handling the Health Insurance Fund: it allocates its budget to channel state finances to service providers the health care sector. It also carries out procedures regarding social security assistance for pharmaceuticals and medical aids and the adoption of health technologies, and maintains a unified record of health insurance and the pharmaceuticals, medical aids and healthcare services receiving social security reimbursement.

3. Cultural-ideological tasks

The appearance of central agencies entitled with cultural-ideological tasks is a relatively new phenomenon in Hungarian public administration. These work in a field with a politically controversial perception among Hungarian society. The topics covered by the performance of these bodies can be historically contentious, for example the history of the Hungarian Regime Change in 1989/1990, the role of Hungary in the Second World War, Communism and Nazism in Hungary, and the Holocaust. Other topics are also very sensitive and have very strong actual political ties for example, the state of Hungarian minorities in neighbouring countries. Within this framework, they conduct research programmes, allocate grants, hold conferences and publish books and papers. Doing so, they often take a political stand regarding the abovementioned topics.

The first central organ with such tasks was the House of Terror, established in 1999 by the Government Resolution 1020/1999. (II. 24.). More were set up after 2010: the Research Institute and Archives for the History of the Hungarian Regime Change established by Government Decree 83/2013. (III. 21.), and the Research Institute for National Strategy established by Government Decree 346/2012 (XII. 21.). These agencies operate under ministerial control (except for the House of Terror the responsible minister is the Head of the Prime Minister's Office).

IV. CONCLUSIONS

The first question which must be answered is why central agencies carry out the abovementioned tasks in the field of public service provision? If we consider the general

characteristics of agencies, we can see that they are widely used in the non-ministerial sphere of the central administration. The main advantage of their existences is that they concentrate on a few specified tasks while the ministries can implement policies and higher rule-making.¹³ Furthermore, agencies may provide a much more flexible framework of human resource management as buffer organisations during personnel cutback campaigns, which are rather frequent in Hungary.¹⁴ In spite of their (respective) autonomy, agencies often carry out political tasks and frequently operate under tight governmental or ministerial control.¹⁵ Furthermore, an agency structure may favour public participation, and agencies are able to focus public attention on controversial issues thus enriching public debate.¹⁶ The latter function can be very important in politically sensitive sectors regarding the abovementioned cultural-ideological bodies.

To put it in a nutshell, hypothesis no. 1 is partly confirmed: public service provision tasks in the portfolio of central agencies is a mostly new phenomenon in Hungarian public administration. Central agencies usually carry out adjudicative competences (administrative proceedings). On the other hand, there are funding bodies which have historical roots.

Hypothesis no. 2. is partly confirmed as well: agencies entitled with service provider tasks operate under strict governmental or ministerial control (except House of Terror). The responsible minister or the Government exercises such executive competences such as directing and regulating them and budgetary control. Therefore, they can serve as political and ideological tools (symbols) in centralising public administration.

¹³ B. G. Peters, *The Politics of Bureaucracy. An Introduction to Comparative Public Administration*, (Routledge, London and New York, 2010) 129–130., 314–315.

¹⁴ Gy. Hajnal, Agencies and the Politics of Agencification in Hungary, (2011) 7 (4) *Transylvanian Review of Administrative Sciences*, (74–92) 77–78.

¹⁵ On politicization see Hajnal, Agencies and the Politics of Agencification in Hungary.

¹⁶ G. Majone, The regulatory state and its legitimacy problems, (1999) 22 (1) *West European Politics*, (1–24) 9. <https://doi.org/10.1080/01402389908425284>